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The Treaty of Waitangi and the Relationship Between the Crown and Maori in New Zealand

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THE TREATY OF WAITANGI AND THE RELATIONSHIP BETWEEN THE CROWN AND MAORI IN NEW ZEALAND

Noel Cox[*]

I. INTRODUCTION

THE orthodox legitimacy of the Crown,[1] in those countries that derive their constitutional principles from Great Britain, is the legitimacy of the inherited legal form. So long as government is conducted in accordance with the rule of law, and meets the aspirations of the majority of the population, the legitimacy of the government based on such a ground has been little questioned.

This legitimacy alone, however, is not necessarily sufficient. Nor does it alone explain the general acceptance of the current regime in New Zealand. There exists a second, potentially potent, source of legitimacy in New Zealand — the Treaty of Waitangi ("Treaty"). As the moral, if not legal, authority for European settlement of New Zealand, this 1840 compact between the Crown and Maori chiefs has become increasingly important as a constitutional founding document for New Zealand.[2] As a party to the Treaty, the Crown may have acquired a new and significant source of legitimacy as the body with which the Maori have a partnership. It is also a source of legitimacy that

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1. "The Crown" refers to the "[l]oose voluntary association of political entities, nearly all of which give symbolic or actual allegiance to the British crown, or did so at one time or another." FUNK & WAGNALLS NEW ENCYCLOPEDIA (2000), LEXIS, Nexis Library, Legal Reference. *See also* Noel Cox, *Republican Sentiment in the realms of the Queen: The New Zealand Perspective*, 29 MANITOBA L.J. 121, 141 n.160 (2002) ("Crown is defined as 'Her majesty the Queen in right of New Zealand.'" (quoting the State-Owned Enterprises Act, § 2 (1986) (N.Z.))).

2. Richard Mulgan, *Can the Treaty of Waitangi Provide a Constitutional Basis for New Zealand's Political Future?,* 41 POL. SCI. 51, 57 (1989). *But see* Susan Pepperell, *Right Time to Leave, Says Upton*, WAIKATO TIMES, Dec. 13, 2000, at 1, *available at* 2000 WL 30349943 (quoting Simon Upton, Member of Parliament, Address before the Parliament of New Zealand, Dec. 12, 2000).

belongs specifically to the Crown as a symbol of government. The purpose of this article is to examine and assess this source of legitimacy.

The first section of this article looks at the place of indigenous peoples vis-à-vis the Crown. It will evaluate the nature of the relationship established with the Crown during the course of colonial expansion and its relevance for the native peoples today. In particular it will examine the development of the concept of fiduciary duty. The second section looks at the New Zealand situation, and specifically at the Treaty. This Treaty is evaluated both as a source of legitimacy — as a direct agreement between the Crown and Maori tribes — and as a possible cause for questioning the legitimacy of the Government of New Zealand, due to the Treaty's partial fulfillment and lingering uncertainties as to its meaning and application. The third section looks at the Maori attitude toward the monarchy, and in particular, the legitimacy derived from the Treaty. This section seeks to bring together the concepts identified in the previous sections and to identify some of the factors that Maori have considered important aspects of the Crown-Maori relationship. Each section is important because it explains a possible source of legitimacy. But contained within each are also dangers inherent in analyzing political structures that are founded in disparate cultural histories, in this case the difference between the culture of the indigenous Maori people and that of the European settlers (known to the Maori as "*Pakeha*").

II. INDIGENOUS PEOPLES AND THE CROWN

The Crown has a special role as trustee for the indigenous peoples of Canada, New Zealand, and to a lesser degree, Australia. In each country the Crown assumed, and still discharges, certain responsibilities for what in New Zealand are called the *tangata whenua* — the "people of the land."[3] As such the Crown occupies a symbolic place distinct from, yet linked with, the

3. Benedict Kingsbury, *Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law*, 52 U. TORONTO L.J. 101, 125–26 (2002). A phrase that has strong parallels with *autochthony*. Autochthony is the status of being based solely on local sources and not dependent upon the continuing legal or other authority of an outside source. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 44–49 (1992).

government of the day.[4] Though the Maori and European populations have become increasingly intermingled, the role of the Crown has remained important as guarantor of Maori property.

In New Zealand the Crown has become national — historically and politically similar to what happened in Canada, but distinct from what developed in Australia. In both New Zealand and Canada, the Crown made treaties regulating its relations with the aboriginal inhabitants of the new colonies. These treaties, combined with the circumstances of settlement, created an ongoing duty on the part of the Crown towards the native peoples of these countries.

The Treaty of Waitangi, signed in 1840 by emissaries of the Queen of Great Britain and many indigenous Maori chiefs, has long been regarded as New Zealand's founding document.[5] Since its signing, the Treaty has been viewed as an unqualified cession of sovereignty to the British Imperial Government, or as a permit for the settler population to administer its own affairs in consultation with the Maori.[6] Its exact legal significance was uncertain. However, it seems that the Crown gave implicit recognition to the Maori as the indigenous inhabitants of the country,[7] both in the Treaty and in its prior and subsequent conduct towards Maori. The acquisition of sovereignty, implicit in the Treaty, was not acquired in a legal or political vacuum. Nevertheless, the legal effect of the treaty was not as important as its political function. Both the British Imperial Government and

4. *See* Janine Hayward, *Commentary*, *in* CONSTITUTIONAL IMPLICATIONS OF MMP 233–234 (Alan Simpson ed., 1998) (stating that the Crown is increasingly seen by Maori in this light).

5. *See* Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View from Common Law*, 31 U. TOL. L. REV. 1, 3 (1999).

6. *See* Betty Carter, *The Incorporation of the Treaty of Waitangi into Municipal Law*, 4 AUKLAND U. L. REV. 1 (1980–83). *See also* J.G.A. Pocock, *Law Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi*, 43 MCGILL L.J. 481, 489–91 (1998).

7. At least, such has been the widespread view, now given the backing of both politicians and courts. *See, e.g.*, New Zealand Maori Council v. Attorney-General [1987] 1 N.Z.L.R. 641; *but see,* New Zealand Maori Council v. Attorney-General [1992] 2 N.Z.L.R. 576 (the 1992 case could be seen as a partial reversal of the 1987 case).

the Maori chiefs knew that it was the culmination of a process that had begun some decades earlier.[8]

Taking the lead from a number of court decisions,[9] governments of the former colonies have increasingly sought to apply the concept of partnership among the settlers and the indigenous population. In both Canada and New Zealand this relationship has not always been smooth, but the courts have recognised its importance. The New Zealand government has followed the direction set by the courts,[10] just as it has happened in Canada[11] and in the United States of America.[12]

A. Canada

The Supreme Court of Canada in *Guerin v. The Queen*[13] acknowledged the existence of a fiduciary obligation of the Crown towards the Canadian Indians.[14] The court clearly stated that the exercise of discretion or power over property, above and beyond what people are normally subject to, leads to accountability in law.[15] Since successive governments in Canada have long assumed the right to control, manage, and dispose of Indian lands, a fiduciary obligation has rested with the Crown.[16] This

8. Noel Cox, The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity 78 (2001) (unpublished Ph.D. thesis, University of Auckland) (on file with author).

9. *See, e.g.,* New Zealand Maori Council v Attorney-General [1987] 1 N.Z.L.R. 641 (C.A.).

10. Interview with Douglas Graham, former Minister in Charge of Treaty of Waitangi Negotiations, in Auckland, N. Z. (Nov. 24, 1999).

11. Joseph Borrows, A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government (1991) (unpublished LL.M. thesis, University of Toronto) (on file with author); Richard H. Bartlett, *The Fiduciary Obligation of the Crown to the Indians*, 53 SASK. L. REV. 301, 302–03 (1989); BRUCE CLARK, NATIVE LIBERTY, CROWN SOVEREIGNTY — THE EXISTING ABORIGINAL RIGHT OF SELF-GOVERNMENT IN CANADA 11–57 (1990).

12. *See* Janis Searles, Note, *Another Supreme Court Move Away from Recognition of Tribal Sovereignty*, 25 ENVTL. L. 209, 235–36 (1995).

13. Guerin v. The Queen [1985] 13 D.L.R. (4th) 321.

14. *See* Richard H. Bartlett, *You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen*, 49 SASK. L. REV. 367, 372–73 (1984–85).

15. *Guerin*, 13 D.L.R. at 340. For discussion of principles of law in fiduciary relationships see *Hospital Products Ltd. v. United States Surgical Corp.,* (1984) 55 A.L.R. 417 (Austl.) and *Frame v. Smith,* [1987] 2 S.C.R. 790 (Can.).

16. Bartlett, *supra* note 11, at 302–03.

obligation was founded both on imperial practice and the Royal Proclamation of 1763.[17]

The Royal Proclamation, which had the status of an Imperial Act of Parliament[18] and thus could not be repealed by the Canadian Parliament (until the passage of the Statute of Westminster of 1931[19]), had guaranteed the native North American Indians possession of hunting grounds and the protection of the Crown.[20] "In restricting the alienation of Indian lands, the Crown assumed responsibility for the protection and management of Indian proprietary interests."[21] In this respect there are strong parallels with the situation in New Zealand. But the Canadian federal constitutional arrangements saw a more marked division of powers than what was seen in a unitary state like New Zealand.

Today the Crown-in-Parliament has sovereignty in Canada, but aboriginal peoples have legislative jurisdiction, from which non-natives are excluded.[22] In a similar way, the federal and provincial governments of Canada today are subordinate to the Constitution and can exercise only the powers delegated to them by the Constitution.[23]

The only government with true sovereignty during the colonial era was the British Imperial Government.[24] But the impe-

17. The Royal Proclamation of October 7, 1763, R.S.C., c. I-5, app. 1 (1985) (Can.) [hereinafter Royal Proclamation].

18. *See* The King v. McMaster, [1926] Ex. C.R. 68, 72 (Can.). However, this is only because the Crown can legislate by proclamation or order in council for colonies. *Id*. The general power to legislate by proclamation was rejected in the *Case of Proclamations,* 77 Eng. Rep. 1352, 1354 (K.B. 1611).

19. The Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.).

20. Royal Proclamation, *supra* note 17. But it included the right of preemption.

21. Darlene M. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples*, 18 OTTAWA L. REV. 307, 329 (1986).

22. CLARK, *supra* note 11, at 3.

23. *See* CAN. CONST. (Constitution Act, 1982) pt. VII (General), § 52. *See also* JACQUELINE R. CASTEL & OMEELA K. LATCHMAN, THE PRACTICAL GUIDE TO CANADIAN LEGAL RESEARCH 4 (2d ed. 1996); BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA'S CONSTITUTIONAL LAW IN A NUTSHELL 105 (1994).

24. However, there were claims to the contrary by American colonials in the seventeenth and eighteenth centuries. In the chartered colonies the local assembly elected the governor, enacted laws repugnant to English law, declined to recognize Admiralty jurisdiction or appeal rights, neglected to provide their quotas for imperial defence, and encouraged trades forbidden by imperial legislation. In short, they were politically independent, and claimed

rial government in its dealings in North America also sought to maintain an "even hand" between the Indians and the colonial governments.[25] Partly for this reason, they circumscribed the power of the colonial government, and therefore their federal and provincial successors.[26]

Throughout Canadian history, the colonial governments were constitutionally bound to respect aboriginal rights, because they were never invested with sufficient legal power to abrogate such rights.[27] These rights were later formally announced in the Royal Proclamation of 1763 and in the instructions to the governors. However, in accordance with the Colonial Laws Validity Act of 1865,[28] the colonial legislature had the power to enact laws that were prejudicial to the aboriginals.

The native peoples of Canada enjoyed constitutional immunity, not merely federal immunity.[29] Thus they had certain rights, such as of land ownership, which depended upon the constitution, rather than upon federal laws.[30]

Developments in the courts during the 1970s has led to a resurgence of native authority.[31] In *Calder v. Attorney-General for British Columbia,*[32] the Supreme Court of Canada assumed that the pre-confederation colonial government in British Columbia was granted by the British Imperial Government, as

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legal independence as well. *See* SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 352 (7th ed. 1964).

25. The Queen v. Taylor, [1981] 34 O.R.2d 360, 367 (Can.). More recently, the courts have observed that, in dealing with the native Americans, "the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned." *Id.*

26. CLARK, *supra* note 11, at 58–63.

27. *See* Mark D. Walters, *Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada*, 23 QUEEN'S L.J. 301, 364–65 (1998).

28. Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (U.K.). Sections 3 and 4 abolished the former theory and practice that colonial legislatures must respect the fundamental principles of English law. *Id.* §§ 3–4.

29. *See* Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 682–83 (1991).

30. *See, e.g.*, Royal Proclamation, *supra* note 17. Since 1982 there has been constitutional entrenchment for these rights under section 35 of the Constitution Act of 1982. CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), § 35(1).

31. Graham Interview, *supra* note 10. *See, e.g.,* Calder v. Attorney-General for British Columbia, [1973] S.C.R. 313, 395.

32. *Calder,* [1973] S.C.R. at 395.

opposed to regal sovereign power, sufficient to extinguish the aboriginal rights to the territory the Crown had not purchased. But even the federal government's powers at the time of confederation were not sovereign.[33]

Canadian courts have led the way to the recognition of a special relationship between the Crown and native peoples.[34] Following its tentative recognition in *Calder*,[35] the court in *Guerin v. The Queen* authoritatively established that the Crown may be held accountable for its role in the management and disposition of aboriginal land and resources.[36] Four judges held that a fiduciary obligation only arose if the land was surrendered,[37] while three held that a more general obligation to protect the land interests of aborigines existed.[38] The minority was followed in *The Queen v. Sparrow*.[39]

While imbued with an ongoing responsibility for the native peoples, the Crown enjoys a special position in the Canadian political system; this position was initially developed by the courts and has been followed by successive governments and the Canadian Parliament.

The adoption of a republic in Canada would require a re-evaluation of the relationship between the different peoples of the country. To some degree, the establishment of Canada was founded on a series of treaties between the Crown and the Native American peoples. The obligations under these treaties have been assumed by the Canadian authorities, but in such a way that the Crown remains symbolically central to the relationship.[40] The Europeans and the natives did not have such a relationship, as the Crown did not purport to represent a population as such — though the relationship could be perceived as

33. *See* Brian Slattery, *The Independence of Canada*, 5 SUP. CT. L. REV. 369, 373, 382 (1983) (Can.).

34. Graham Interview, *supra* note 10; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; The Queen v. Van der Peet, [1996] 2 S.C.R. 507; The Queen v. Sparrow, [1990] 70 D.L.R. (4th) 385; Guerin v. The Queen, [1985] 13 D.L.R. (4th) 321, *Calder,* [1973] S.C.R. at 395.

35. *Calder,* [1973] S.C.R. at 395.

36. *Guerin*, 13 D.L.R. (4th) at 334.

37. *Id*. at 334 (Dickson, J.).

38. *Id*. at 357–58, 361 (Wilson, J., concurring).

39. *Sparrow*, 70 D.L.R. (4th) 385.

40. One rather unusual aspect of this is the existence, since 1711, of Her Majesty's Chapel of the Mohawk, Brantford, Ontario. *See* DAVID BALDWIN, THE CHAPEL ROYAL: ANCIENT AND MODERN 56–62 (1990).

being between the State and the natives — provided that there was an agreement as to the nature of the State (i.e., the meaning of the Crown).

The general rules of fiduciary obligations have also been developed in the United States of America,[41] though the practical implications of these rules for the native peoples may be limited.[42] The relationship between the United States of America and the North American tribes within its boundaries followed a similar path to that seen in Canada.[43] Yet Canada alone secured, at least in theory, Indian rights generally, not only those of title to land.[44] They did so with the Royal Proclamation, which, like the Treaty of Waitangi, has been analogized to the Magna Carta.[45]

B. Australia

In contrast to Canada, the principles of Crown guardianship of native peoples had received little judicial attention in Australia until *Mabo v. Queensland (No 2)*.[46] Though it had been said in an earlier case that the Crown in right of the Commonwealth of Australia may come under a fiduciary duty,[47] the judgements in *Mabo* showed a more marked inclination to recognize a fiduciary obligation in cases where there was actual or threatened interference with native title rights.[48]

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41. *See* Camilla Hughes, *The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada*, 16 U. NEW SOUTH WALES L. J. 70, 87 (1993). These duties can be traced back to 1831, *id*. at 70–71, though the treatment of American Indians by the government until the early years of the twentieth century was frequently brutal, and sometimes at odd with judicial decisions.

42. *See* Searles, *supra* note 12, at 210–11.

43. *See* Hughes, *supra* note 41, at 87–94.

44. *See* Calder v. Attorney-General, [1973] S.C.R. 313, 395.

45. Richard Boivin, *The Coté Decision: Laying to Rest the Royal Proclamation*, 1 CAN. NATIVE L. REP. 1, 1 (1995). *Cf.* PAUL MCHUGH, THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991).

46. Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 42–43, 205 (Austl.).

47. N. Land Council v. Commonwealth [No. 2] 61 A.L.J.R. 616, 620 (1987) (Austl.).

48. *Mabo*, 175 C.L.R. at 42–43, 205. Acquisition of legal title over Australia was based on settlement, not conquest, with the continent being regarded legally a *terra nullius*, or subject to no legal sovereign. This was legally true of New Zealand also, but for political and moral reasons this country was treated differently.

Aboriginal relations, however, have played a lesser part in the Australian republican debate than they have in the political debate in Canada or New Zealand, largely because the Australian aboriginal population generally lacked treaties with the Crown.[49] Suggestions in recent years for such a treaty raised an interesting question about the extent to which Australia could (or would wish to) replicate the situations that have existed in Canada for 200 years and in New Zealand for over 150 years.[50] Ironically, some commentators have suggested that "aboriginality" should replace the Crown in the Australian national identity,[51] thereby in some respects reversing the relationship of the settlers and the aboriginal people. Precisely what is meant by "aboriginality" is not clear, however. Although the Crown assumed in Australia, as it did in all colonies, the role of protector of the native peoples, the protection was limited because of the absence of written undertakings.

III. THE TREATY OF WAITANGI

The situation in New Zealand is much closer to that in Canada than in Australia. In both New Zealand and Canada, the Crown assumed a fiduciary role through treaty and its conduct with respect to the native peoples. The Crown has perpetual responsibilities to native peoples in both countries. In New Zealand, however, one treaty has paramount significance, in part simply because it was the only treaty made with the indigenous inhabitants of the islands. [52]

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49. *See* Wendy Brady, *Republicanism: An Aboriginal View*, *in* THE REPUBLICANISM DEBATE 145, 146–47 (Wayne Hudson & David Carter eds., 1993); *see also, generally,* Paul Behrendt, *Aboriginal Sovereignty*, *in* VOICES OF ABORIGINAL AUSTRALIA: PAST, PRESENT, FUTURE 398 (Irene Moores ed., 1995).

50. Cox, *supra* note 8, at 86. *See also* Mark Brabazon, *Mabo*, *The Constitution and The Republic*, 11 AUSTL. BAR REV. 31, 36–38 (1994); James Cockayne, *More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation*, 23 SYDNEY L. REV. 577, 590 (2001); Andrew Lokan, *From Recognition to Reconciliation: The Functions of Aboriginal Rights Law*, 23 MELB. U. L. REV. 65, 112 (1999).

51. John Morton, *Aboriginality, Mabo and the Republic: Indigenising Australia*, *in* IN THE AGE OF MABO: HISTORY, ABORIGINES AND AUSTRALIA 117, 119–123 (Bain Attwood ed., 1996).

52. William Renwick, A *Variation of a Theme, in* SOVEREIGNTY AND INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS 199, 208 (William Renwick ed., 1991).

Orthodox theory holds that the Treaty of Waitangi ("Treaty") has a socio-political, not legal, force, as it was not a treaty recognized under international law.[53] It therefore has an effect only so far as a legal recognition has been specifically accorded to it.[54] However, at some point either the courts or New Zealand Parliament may have to give the Treaty legal recognition as part of the constitution of New Zealand.[55] In any event the Treaty, as a constitutional principle, has become entrenched, if only because it is generally regarded by the Maori as a sort of "holy writ."[56] Government agencies therefore apply the Treaty, wherever possible, as if it were legally binding upon them.[57] In this respect, the growth in what has been called the "myth" of Crown–Maori partnership has been particularly important.[58]

This section looks at the events that led to the assumption of British authority in New Zealand, the process by which this assumption was achieved, the legal basis for this assumption, and the legitimacy derived from the Treaty.

A. Assumption of Sovereignty

Scholars disagree as to the specific date of assumption of British sovereignty over New Zealand.[59] The actual means of ob-

53. *See* Anthony P. Molloy, *The Non-Treaty of Waitangi*, N.Z. L.J. 193, 193 (1971). For a contrary view, based on the changing precepts of modern international law, see K. Bosselmann, *Two Cultures Will Become One Only on Equal Terms*, N. Z. HERALD, Mar. 1, 1999, at A13. However, if the Treaty was not a treaty in 1840, it is difficult to see how it could be one now. It would be preferable to see its importance in domestic constitutional terms. *See* E.T.J. Durie, *The Treaty in Maori History, in* SOVEREIGNTY AND INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS 156, 162–64 (William Renwick ed., 1991).

54. *See generally* W. Attrill, Aspects of the Treaty of Waitangi in the Law and Constitution of New Zealand (1989) (unpublished LL.M. thesis, Harvard University) (on file with author).

55. John Fogarty, Book Review, N.Z. L.J. 212 (1993) (reviewing PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND (1993)).

56. Graham Interview, *supra* note 10.

57. *Id.*

58. *See* Guy Chapman, *The Treaty of Waitangi — Fertile Ground for Judicial (and Academic) Myth-making*, N.Z. L.J. 228 (1991). *Cf.* Paul McHugh, *Constitutional Myths and the Treaty of Waitangi*, N.Z. L.J. 316, 317–18 (1991); Joe Williams, *Chapman is Wrong*, N.Z. L.J. 373 (1991).

59. David V. Williams, The Use of Law in the Process of Colonialization 67ff (1985) (unpublished Ph.D. thesis, University of Dar es Salaam) (on file with author). There have been many works covering the events both prior to

taining sovereignty is also disputed. William Swainson, the first New Zealand Attorney-General, thought that sovereignty was partly established by cession, and that neither conquest nor usurpation had occurred.[60] The Colonial Office, in rejecting Swainson's view, held that the New South Wales Charter of November 16, 1840, was the legal basis of sovereignty.[61] Though the assumption of sovereignty is disputed, the legal foundation of New Zealand as a separate colony can be ascertained with some certainty.[62]

Captain James Cook, of the British Royal Navy, took possession of the North Island on November 15, 1769, and the South Island on January 16, 1770.[63] New Zealand constituted a part of the Colony of New South Wales by an Order in Council in 1786 and the first Governor's Commission for that colony.[64]

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and immediately after the signing of the Treaty of Waitangi. For an overview of the subsequent constitutional implications, see S.L. Cheyne, Search for a Constitution (1975) (unpublished Ph.D. thesis, University of Otago) (on file with author); David V. Williams, *The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?*, 2 AUSTL. J. L. & SOC. 41 (1985); David V. Williams, *The Foundation of Colonial Rule in New Zealand*, 13 N.Z.U. L. REV. 54 (1988).

60. Whether the sovereignty of the United Kingdom Parliament was legally and/or politically grounded in the Treaty of Waitangi has been answered in the affirmative by Paul McHugh. *See* Paul McHugh, *Constitutional Theory and Maori Claims*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 25, 42, 47 (Sir Hugh Kawharu ed., 1989). *See also* Sian Elias, *The Treaty of Waitangi and Separation of Powers in New Zealand*, *in* COURTS AND POLICY: CHECKING THE BALANCE 206, 222–224 (B.D. Gray & R.B. McClintock eds., 1995).

61. Charter for erecting the Colony of New Zealand, and for Creating and Establishing a Legislative Council and an Executive Council (Nov. 16, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 153–155 (Irish University Press Series 1970) [hereinafter Charter of Dec. 9, 1840].

62. In modern popular mythology, the Treaty of Waitangi is taken to be the foundation of New Zealand. The legal significance of February 6, 1840 is, however, rather less according to the general and settled imperial law of the mid-nineteenth century. Wi Parata v. The Bishop of Wellington [1877] 3 N.Z. Jurist Reports (New Series) 72. *Cf.* The Queen v. Symonds [1847] N.Z.P.C.C. 387.

63. British courts have held that an unequivocal assertion of sovereignty by the Crown must be accepted by a domestic court, even where the claim would not be recognised under international law. *See* Sobhuza II v. Miller [1926] A.C. 518, 524–25.

64. J. L. ROBSON, NEW ZEALAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 2 (1954). The Commission issued instructions April 25, 1787 to

However, this is a rather strained interpretation of the actual authority enjoyed by the government in Sydney.[65]

The Government and General Order Proclamation issued in 1813 by Lachlan Macquarie, Governor of New South Wales, declared that the aboriginal natives of New Zealand were "under the protection of His Majesty and entitled to all good offices of his subjects."[66] However, the jurisdiction of New South Wales over the islands of New Zealand was expressly denied by an imperial statute, the Murder Abroad Act of 1817.[67] Subsequent enactments repeated that New Zealand was "not subject to his Majesty."[68] Since 1823, however, the courts of New South Wales were permitted to try cases for offences committed in New Zealand by British subjects.[69] Extra-territorial judicial processes were at this time common, particularly where British trade was conducted in countries with "non-Christian or barbaric laws," or with no laws at all.[70] Thus, it is likely that extraterritorial jurisdiction was intended, rather than any claim to sovereignty.

Circumstances eventually required greater official British involvement in New Zealand. In 1831, thirteen chiefs from Kerikeri petitioned King William IV for protection against the

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Captain Arthur Phillip, Royal Navy, appointing him "Captain General and Governor in Chief of Our Territory called New South Wales . . . ." Governor Phillip's Instructions, Apr. 25, 1787, H.R.A., Ser. I, vol. 1, at p. 1, *available at* http://www.foundingdocs.gov.au/places/transcripts/nsw/nsw_pdf/nsw2_doc_1787.pdf. The commission, which was amplified on April 2, 1787, was publicly read at Sydney Cove on January 26, 1788. *See* ALEX C. CASTLES, AN AUSTRALIAN LEGAL HISTORY 24 (1982).

65. ROBSON, *supra* note 64. *See also* A.H. MCLINTOCK, CROWN COLONY GOVERNMENT IN NEW ZEALAND 9 (1958). New Zealand was generally regarded as being included in the territory of the Colony of New South Wales in early years of the development of that colony. *Id*.

66. ROBERT MCNAB, 1 HISTORICAL RECORDS OF NEW ZEALAND 317 (1908).

67. An Act for the More Effectual Punishment of Murders and Manslaughters Committed in Places not within His Majesty's Dominions, 57 Geo. III, c. 53 (1817) (U.K.).

68. Australian Courts Act, 1828, 9 Geo. IV, c. 83 (U.K.).

69. An Act for the Better Administration of Justice in New South Wales and Van Diemen's Land, 1823, 4 Geo. IV, c. 96 (U.K.).

70. Such a jurisdiction survived in the Trucial States, now the United Arab Emirates, until 1971. *See* Exchange of Notes Concerning the Termination of Special Treaty Relations between the United Kingdom and the Trucial States, 1971 U.K.T.S. No. 34, at 3 (Cmnd. 4941).

French.[71] As a result of this petition, and to curb the conduct of visiting ships' crews and round up runaway convicts, James Busby was appointed British Resident in Waitangi in 1833, with the local rank of vice-consul.[72] No magisterial powers were ever conferred upon him; imperial legislation seeking to increase his powers was contemplated but never passed.[73]

Busby encouraged the Declaration of Independence by thirty-five northern chiefs in 1835, in an attempt to thwart the move by Charles de Thierry, the self-styled "Sovereign Chief of New Zealand and King of Nuku Hiva," to set up his own government.[74] The Declaration of Independence of the United Tribes of Aotearoa in 1835 may have been "politically unsustainable, practically unworkable, and culturally inconceivable."[75] Nonetheless, for those tribes who signed, the Declaration meant that henceforth the British king was "honour-bound to recognise and protect their independence."[76] This step was followed by the Treaty of Waitangi, inspired as much by internal Colonial Office politics as by a genuine regard for native rights.[77]

In 1838, a House of Lords committee favored the extension of British possession over New Zealand, though it did not expressly advocate it.[78] The Colonial Office, however, decided to annex New Zealand to New South Wales.[79] On June 15, 1839, letters patent were signed, which enlarged the jurisdiction of the Governor of New South Wales by amending his commission

71. MCLINTOCK, *supra* note 65, at 18.

72. *Id.* at 22.

73. *See id.* at 21 n.4, 25.

74. *See id.* at 24; *see also* J.D. RAESIDE, SOVEREIGN CHIEF, A BIOGRAPHY OF BARON DE THIERRY 113, 118–19 (1977).

75. Jane Kelsey, *Restructuring the Nation: The Decline of the Colonial Nation-State and Competing Nationalisms in Aotearoa/New Zealand*, *in* NATIONALISM, RACISM AND THE RULE OF LAW 177, 178–179 (Peter Fitzpatrick ed., 1995). The Declaration was "laughed at" in many circles. *See* Copy of a Despatch from Governor Sir R. Bourke . . . to Lord Glenelg (Sept. 9, 1837), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 24 (Irish University Press Series 1970).

76. Kelsey, *supra* note 75, at 179; Graham Interview, *supra* note 10.

77. Graham Interview, *supra* note 10.

78. *See* Letter from Standish Motte, Esq., to the Marquis of Normanby (Mar. 4, 1839), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 68–69 (Irish University Press Series 1970). *See also* PETER ADAMS, FATAL NECESSITY 134–171 (1977).

79. *See* ADAMS, *supra* note 78, at 134–171.

to include the New Zealand islands.[80] On January 14, 1840, Sir George Gipps, Governor of New South Wales, swore in Captain William Hobson of the British Royal Navy, as his lieutenant-governor and consul, and signed proclamations relating to title to the land in New Zealand.[81] These were published in Sydney on January 19, 1840, and in New Zealand January 30, 1840.[82]

Hobson was instructed to take possession of the country only with the consent of the Maori chiefs.[83] The Treaty of Waitangi was the immediate instrument by which this was to be achieved.[84] The Treaty was initially signed on February 6, 1840, although the process of signing copies was not completed until September 3, 1840.[85] After the chiefs signed, local proclamations of British sovereignty were issued. However, no formal proclamation of sovereignty by the Imperial Government over the northern districts was ever issued. In the central North Island there was substantial non-adherence to the Treaty by Maori leaders who were well aware of the implications of signing away their independence.[86]

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80. Proclamation By His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-Chief (Feb. 9, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 123 (Irish University Press Series 1970).

81. *Id.* at 123–25.

82. *Id.*

83. From the Marquis of Normanby to Captain Hobson, Royal Navy (Aug. 14, 1839), *reprinted in* BRITISH PUBLIC PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 85–90 (Irish University Press Series 1970) [hereinafter Marquis of Normanby to Hobson, Aug. 14, 1839].

84. *See id.* at 86–87; MCLINTOCK, *supra* note 65, at 61–62, 146.

85. T. LINDSAY BUICK, THE TREATY OF WAITANGI OR HOW NEW ZEALAND BECAME A BRITISH COLONY 203–13 (1914). *See also* CLAUDIA ORANGE, THE TREATY OF WAITANGI 84–6 (1987); J. RUTHERFORD, THE TREATY OF WAITANGI AND THE ACQUISITION OF BRITISH SOVEREIGNTY IN NEW ZEALAND 20, 63 (1949).

86. NZHistory.net.nz, Manukau-Kawhia Treaty Copy, *at* http://www.nzhistory.net.nz/gallery/treaty-sigs/manukau.htm (last visited Oct. 11, 2002). There were "very serious doubts whether the Treaty of Waitangi, made with naked savages by a Consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment." *The Effect of the Treaty of Waitangi on Subsequent Legislation*, 10 N.Z. L.J. 13, 15 (1934) (quoting Letter from Joseph Soames to Lord Stanley, Minister for the Colonies (Jan. 24, 1843) (promoting the Company's claim to twenty million acres of New Zealand)).

The New Zealand Company was not disinterested in this matter, and it was incorrect that Hobson was merely a consul without plenipotentiary power —

As a result of reports that the New Zealand Company settlers in Wellington (then Port Nicholson) had issued their own constitution and set up a government,[87] on May 21, 1840, Hobson issued two proclamations of full sovereignty over all of New Zealand, which were published in *The London Gazette* on October 2, 1840.[88] The first proclamation was in respect to the North Island, and was based on cession by virtue of the Treaty of Waitangi.[89] The second related to the South Island (then Middle Island) and Stewart Island.[90]

On October 15, 1840, Hobson sent a despatch to London which collated all the copies of the Treaty,[91] and this despatch was approved March 30, 1841.[92] In it, Hobson indicated that the second proclamation of May 21, 1840 relied on the right of discovery, rather than on the Treaty.[93] Hobson was thus acting

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he had been appointed Lieutenant-Governor and instructed to make a treaty with the natives. *See* Marquis of Normanby to Hobson, Aug. 14, 1839, *supra* note 83. Nor was ratification by the Crown necessary. But the essence of the argument remained as to the Treaty of Waitangi's status in international law.

87. Lieut.-Governor Hobson to the Secretary of State for the Colonies (May 25, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 138–39 (Irish University Press Series 1970) [hereinafter Hobson Letter of May 25, 1840].

88. Proclamation In the Name of Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland, by William Hobson, Esq. (May 21, 1840) ["The Northern Island"], *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 140 (Irish University Press Series 1970) [hereinafter Northern Island Proclamation of 1840]; Proclamation In the Name of Her Majesty Victoria, Queen of the United Kingdom of Great Britain and Ireland, by William Hobson, Esquire (May 21, 1840) ["The Southern Islands of New Zealand"], *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 141 (Irish University Press Series 1970) [hereinafter Southern Islands Proclamation of 1840].

89. *See* Hobson Letter of May 25, 1840, *supra* note 86; Northern Island Proclamation of 1840, *supra* note 87. *But see* Carter, *supra* note 6 (arguing that the Treaty was a legally valid treaty of cession); Sir Kenneth Keith, *International Law and New Zealand Municipal Law*, *in* AG DAVIS ESSAYS IN LAW 130–48 (J.F. Northey ed., 1965) (same).

90. Southern Islands Proclamation of 1840, *supra* note 88.

91. Copy of a Despatch from Governor Hobson to the Secretary of State for the Colonies, (Oct. 15, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 220 (Irish University Press Series 1970).

92. Copy of a Despatch from Lord John Russell to Governor Hobson (March 30, 1831), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 234 (Irish University Press Series 1970).

93. Hobson Letter of May 25, 1840, *supra* note 87.

in conformity with his instructions to extend British sovereignty over the South Island "by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the island."[94]

In the meantime, Major Bunbury proclaimed sovereignty by cession over the South Island on June 17, 1840. The proclamations of May 21 were effective in showing that New Zealand was a colony by act of State.[95] An act of State must be accepted as legally effective,[96] and no special formality is required for annexation.[97]

Meanwhile, the government of New South Wales purported to annex New Zealand through an act that came into force as of June 16, 1840;[98] yet this was done in ignorance of the British imperial plans.[99] New Zealand remained a dependency of New South Wales until letters patent in the form of a Royal Charter were signed on November 16, 1840.[100] The letters patent and a Governor's commission[101] were published in the London Gazette on November 24, 1840, and proclaimed in New Zealand on May

94. Captain William Hobson to the Under Secretary of the Colonial Department (August 15, 1839), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 90–92 (Irish University Press Series 1970); Marquis of Normanby to Captain Hobson (August 15, 1839); *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND 1835–42, at 92–93 (Irish University Press 1970).

95. Robson argues that it was a colony by occupation, but Foden (in the minority viewpoint), argues that it was through settlement. *Compare* ROBSON, *supra* note 64, at 4–5, *with* N.A. FODEN, THE CONSTITUTIONAL DEVELOPMENT OF NEW ZEALAND IN THE FIRST DECADE 38 (1938). In Foden's view, the letters patent of June 15, 1839 are the *fons et origo* of British sovereignty. He eliminates the humanitarianism and idealism prevalent in earlier interpretations of the events of 1839–40. *Cf.* RUTHERFORD, *supra* note 85.

96. Salaman v. Secretary of State in Council of India, 1906 K.B. 613 (Eng. C.A.).

97. In re Southern Rhodesia, [1919] A.C. 211, 239–41 (P.C. 1918).

98. An Act to Annex to Her Majesty's Dominions, in the Islands of New Zealand, to the Government of New South Wales, 3 Vict. 28 (Austl.); David V. Williams, *The Foundation of Colonial Rule in New Zealand*, 13 N.Z.U. L. REV. 54, 56 (1988).

99. Charter of Dec. 9, 1840, *supra* note 61.

100. Copy of Letters Patent Appointing William Hobson, Esq. Captain in the Royal Navy Governor and Commander-in-Chief in and Over the Colony of New Zealand (Nov. 24, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 153–155 (Irish University Press Series 1970).

101. *Id.*

3, 1841.[102] The Royal Instructions to the Governor were issued December 5, 1840.[103] The Charter was based solely on the authority of the New South Wales and Van Diemen's Land Act of 1840, passed August 7, 1840, by which separate colonies were to be established in the territories of the Colony New South Wales and Van Diemen's Land.[104]

The assumption of British rule over New Zealand was in some way inevitable, but it came at a time when modern notions of international law were evolving. It was clear that the Crown was acting, at least partly, for the good of the Maori. In this regard, the Crown assumed an obligation towards the native peoples that was to outlast its imperial authority and become a legacy for post-colonial governments.

B. The Legal Basis for the Assumption of Sovereignty

According to the constitutional theory, which had evolved since the establishment in the seventeenth century of the first British Empire,[105] colonies in the mid-nineteenth century were either settled colonies, conquered colonies, or ceded colonies.[106] The basis of the distinction was the stage of civilization considered to have existed in the territory at the time of acquisition. If there was no population or no form of government considered civilized and recognized in international law, possession was obtained by settlement.[107] If there was an organized society to

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102. PETER ADAMS, FATAL NECESSITY 162 (1977).

103. Instructions to . . . William Hobson, Esq. our Governor and Commander-in-Chief in and Over Our Colony of New Zealand (Dec. 5, 1840), *reprinted in* BRITISH PARLIAMENTARY PAPERS, 3 COLONIES, NEW ZEALAND, 1835–42, at 156–64 (Irish University Press Series 1970).

104. New South Wales and Van Diemen's Land Act, 1840, 3 & 4 Vict., c. 62 (Eng.). This statute of course presupposed that New Zealand was by 1840 a part of the Colony of New South Wales, a fact which was sufficiently clear after June 15, 1839. Van Diemen's Land (renamed Tasmania in 1856) likewise became a colony independent of New South Wales, by letters patent June 14, 1825.

105. *See* A. BERRIEDALE KEITH, CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE, at B2 (1930).

106. Phillips v. Eyre, 6 L.R.-Q.B. 1, 10–11 (1870) (Eng.); Lyons (Mayor of) v. East India Co., 12 Eng. Rep. 782 (P.C. 1836); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 104 (1978).

107. R. Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 20–23 (1963).

which international personality was attributable, acquisition was accomplished by cession or conquest.[108]

The original, relatively clear distinction, between the deserted and uninhabited territories, which could be settled, and those that were inhabited, which could not be settled, was eroded after the American Revolution. It became accepted that colonies occupied by a tribal society could be "settled." New Zealand has been cited as the example *par excellence* of this trend towards a legal fiction of a *terra nullius*.[109] If this were so, then the Treaty of Waitangi could not have been a treaty of cession, as the later nineteenth century orthodox theory maintained.[110] The Treaty of Waitangi had a socio-political, not legal force, as it was not a treaty recognized by international law.[111]

The authority actually exercised by the Crown in New Zealand always exceeded that of a protectorate,[112] and, from the beginning, New Zealand was administered as a Crown colony.[113] New Zealand was held to be a settled colony — though not without difficulty.[114] From the contemporary British perspec-

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108. Lyons (Mayor of) v. East India Co., 12 Eng. Rep. 782 (P.C. 1836); Freeman v. Fairlie, 18 Eng. Rep. 117 (P.C. 1828); BLACKSTONE, *supra* note 105, at 104.

109. A land without a settled population, which therefore could have no laws nor legal rights (as of ownership) except that imposed upon the acquisition of sovereignty; Paul McHugh, Aboriginal Rights of the New Zealand Maori at Common Law 137–142 (1987) (unpublished Ph.D. thesis, University of Cambridge) (on file with author).

110. Wi Parata v. The Bishop of Wellington [1877] 3 N.Z. Jurist Reports (New Series) 72.

111. Molloy, *supra* note 53, at 195; Wi Parata v. The Bishop of Wellington [1877] 3 N.Z. Jurist Reports (New Series) 72. *Cf.* The Queen v. Symonds [1847] N.Z.P.C.C. 387.

112. Where, for example, the relations of imperial power and local population were regulated by specific treaty arrangements. In practice, the extent to which such countries were treated differently from colonies depended upon the degree of sophistication of the indigenous inhabitants' civilization. RUPERT EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES (1960).

113. Cheyne, *supra* note 59. *See also* English Laws Act, 1858, 21 & 22 Vict. No. 2 (N.Z.); Imperial Laws Application Act, 1988, § 5, sched. 2 (N.Z.).

114. *See* David V. Williams, *The Foundation of Colonial Rule in New Zealand*, 13 N.Z.U. L. REV. 54 (1998); REPORT OF THE PRIVY COUNCIL ON THE PROJECT OF A BILL FOR THE BETTER GOVERNMENT OF THE AUSTRALIAN COLONIES, 1849; The Queen v. Symonds [1847] N.Z.P.C.C. 387. *See also* English Laws Act, 1858, 21 & 22 Vict. No. 2 (N.Z.); Imperial Laws Application Act 1988, § 5, sched. 2 (N.Z.).

tive, the Treaty of Waitangi was a treaty of cession, which allowed for the settlement and purchase of land.[115] However, because the chiefs had little formal law, and because of the direct proclamation of sovereignty over the South Islands, New Zealand was treated thereafter as a settled colony.[116] That said, even if the Maori were not able to make binding international treaties, the Treaty of Waitangi was not a mere nullity. The capacity to make international treaties was distinct from the existence of an established system of laws or legal personality. Almost invariably in British imperial practice, the acquisition of territories was by cession, accompanied by treaties, in which the inhabitants' entitlement to the continued occupation of the territory was declared.[117] This practice implied, by definition, that the territorial sovereignty and property rights of the inhabitants were recognized.[118]

There can also be little doubt that the negotiation of the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make some form of internationally valid agreement.[119] Moreover, there is evidence that in the decade prior to the conclusion of the Treaty of Waitangi the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law,[120] and therefore bound, at least morally, by the

115. IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES 9 (F.M. Brookfield ed., 1992).

116. KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 196 (1989).

117. Frederika Hackhsaw, *Nineteenth Century Notions of Aboriginal Title*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 92, 97 (I.H. Kawharu ed., 1989). *See* SIR MARK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1969); Elizabeth Evatt, *The Acquisition of Territory in Australia and New Zealand*, *in* STUDIES IN THE HISTORY OF THE LAW OF NATIONS 16, 16–45 (C.H. Alexandrowicz ed., 1970).

118. *See* McHugh, *supra* note 58, at 317–19 (discussing the nineteenth century theory and practice).

119. Examples of where treaties with native peoples were regarded as binding in international law include those made with the Cherokee on September 20, 1730. *See* 2 J. ALMON, A COLLECTION OF ALL THE TREATIES OF PEACE, ETC. 13 (1772).

120. *See* 1 GREAT BRITAIN AND THE LAW OF NATIONS: A SELECTION OF DOCUMENTS ILLUSTRATING THE VIEW OF THE GOVERNMENT OF THE UNITED KINGDOM UPON MATTERS OF INTERNATIONAL LAW 131 (Herbert Arthur Smith

terms of a treaty of cession. The fact that doctrinal developments in international law subsequently denied the treaty-making capacity to what were described as "Native chiefs and Peoples"[121] is immaterial.

If the Treaty of Waitangi was a valid international treaty, its very execution served to extinguish the separate legal identity of the sovereign chiefs and brought questions of its implementation to the plane of domestic law.[122] New Zealand would then be regarded as a ceded territory, and its pre-existing laws subject to abolition or amendment by the Crown.[123] If it was not a valid international treaty, its application remained a matter of domestic law.[124] In both cases it depended upon the good faith of the Crown that the provisions of the Treaty were upheld. This meant that the principal focus was on domestic law, which was perhaps preferable to attempting to resolve essentially internal problems on the international plane. In the decade prior to the conclusion of the Treaty of Waitangi, the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law, at least with respect to the North Island,[125] and therefore bound, at least morally, by the terms of a treaty of cession.

C. Legitimacy Derived from the Treaty of Waitangi

The Crown acquired legal authority over New Zealand by discovery and settlement, as well as by cession.[126] But this acquisition of authority was intended by the imperial government to be with the consent of the Maori chiefs, and the chiefs generally accepted it on that basis.[127] This acquisition was in conformity

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ed., 1932) [hereinafter THE LAW OF NATIONS]; IAN BROWNLIE, Q.C., TREATIES AND INDIGENOUS PEOPLES 8 (F.M. Brookfield ed., 1992).

121. 1 LORD MCNAIR, THE LAW OF TREATIES, 52–54 (1961).

122. *See* Te Heuheu Tukino v. Aotea District Maori Land Board [1941] N.Z.L.R. 590, 596–597, A.C. 308, 324 (P.C. 1941) (holding that the Treaty was not enforceable in domestic law).

123. Whether pre-existing indigenous legal rights automatically survived settlement or cession, or were dependent upon Crown recognition was only settled comparatively recently in favour of the continuing legality of native rights. KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 196 (1989).

124. *See Te Heuheu Tukino*, [1941] N.Z.L.R. at 596–597, A.C. at 324.

125. *See* sources cited *supra* note 120.

126. Evatt, *supra* note 117, at 36–39.

127. McHugh, *supra* note 60, at 47.

with prior colonial practice[128] and consistent with the practice of the previous several decades.[129] Unfortunately for the Maori, after 1840 the practice of the colonial government, to whom the imperial authorities increasingly sought to transfer responsibility, was one of widespread disregard for the spirit, if not the terms, of the Treaty.[130]

The British side thought that the chiefs were making a meaningful recognition of the Queen and the concept of national sovereignty in return for the recognition of their rights of property.[131] In contrast, David Williams has argued that the Maori text connoted a covenant partnership between the Crown and Maori, rather than an absolute cession of sovereignty;[132] but this interpretation may be strained.[133] It is likely that the chiefs did not anticipate that the Treaty would have such far-reaching consequences for them. Claims of legitimacy founded in a completely different value system can be so unclear as to be nearly impossible to distinguish.[134] After the treaty the extent of the chiefs' loss became apparent, but it was too late.

In the absence of a voluntary cession of full sovereignty, the legitimacy of colonial rule could only be validated over time through the habit of obedience[135] or legal sovereignty.[136] This

128. MARK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1969).

129. Interview with Georgina Te Heuheu, former Associate Minister in Charge of Treaty of Waitangi Negotiations, in Auckland, N.Z. (Dec. 7, 1999) (on file with author).

130. F.M. BROOKFIELD, WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND LEGITIMATION (1999) (amounting to what Brookfield calls a revolutionary seizure of power).

131. Catherine Tizard, Address at The Wellington Historical and Early Settlers' Association 1995 Lecture on Colonial Chiefs 1840–1889 (March 30, 1995), *at* http://www.gov_gen.govt.nz/speeches/tizard/1995-03-30.html (last visited Sept. 25, 2002) [hereinafter Tizard Address].

132. David V. Williams, *The Constitutional Status of the Treaty of Waitangi: An Historical Perspective*, 14 N.Z.U. L. REV. 9, 16–18 (1990).

133. The *contra proferetem* principle leads to the conclusion that the Maori version is definitive. *See id.*

134. Tizard Address, *supra* note 131.

135. F.M. Brookfield, *The New Zealand Constitution the Search for Legitimacy*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 1, 1 (Hugh Kawharu ed., 1989).

approach is based upon European legal concepts, something that has been criticized by some Maori academics.[137] However, "legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law,"[138] even amongst the early Maori.[139] Whether or not it had been intended by the signatories, it is now widely assumed that Maori have, under the first article, accepted the sovereignty of the Crown,[140] and have therefore accepted the legitimacy of the present government and legal system.[141] Indeed, most Maori leaders accept this legitimacy and concentrate on the Crown's failure to keep its obligations to protect property rights under the Treaty.[142] It might be said that the government has always viewed the Treaty as mainly a source of its own authority,[143] whereas in the common Maori view, the Crown's protection of Maori property[144] was more important than the placement of

136. Paul McHugh, *Constitutional Theory and Maori Claims*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI (Hugh Kawharu ed., 1989).

137. *See* Annie L. Mikaere, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, 14 N.Z.U. L. REV. 97, 98 (1990) (book review).

138. R.W.M. Dias, *Legal Politics: Norms behind the Grundnorm*, 26 Cambridge L.J. 233, 237–38 (1968).

139. *See* MOANA JACKSON, THE MAORI AND THE CRIMINAL JUSTICE SYSTEM: A NEW PERSPECTIVE: TE WHAIPAANGA HOU (Part 2) 35–44 (1988) [hereinafter CRIMINAL JUSTICE SYSTEM]; Moana Jackson, *Maori Law, Pakeha Law and the Treaty of Waitangi*, *in* MANA TIRITI: THE ART OF PROTEST AND PARTNERSHIP 15–16 (Ramari Young ed., 1991) [hereinafter PROTEST AND PARTNERSHIP].

140. *See* WAITANGI TRIBUNAL, WAI 350, MAORI DEVELOPMENT CORPORATION REPORT app. 6.1 (1993), *available at* http://www.wai8155s1.verdi.2day.com/reports/generic/wai350/app06/app0601.asp; Te Heuheu, Interview, *supra* note 129. For general discussions of perceptions of Maori sovereignty, see generally HINEANI MELBOURNE, MAORI SOVEREIGNTY: THE MAORI PERSPECTIVE (1995); CAROL ARCHIE, MAORI SOVEREIGNTY: THE PAKEHA PERSPECTIVE (1995).

141. Indeed, it has been said that it is unrealistic to maintain any contrary argument. Graham Interview, *supra* note 10.

142. Mulgan, *supra* note 2, at 56, 57–59. There are some who, whilst decrying alleged Crown breaches of the Treaty, deny that the Treaty conveyed anything more than permission for European settlement — a case of "having their cake and eating it too." Graham Interview, *supra* note 10.

143. Treaty of Waitangi, Feb. 6, 1840, Eng.-Maori, art. I, 89 Consol. T.S. 473, 475, *available at* http://www.govt.nz/aboutnz/treaty.php3.

144. *Id.* art. III.

authority.[145] This pragmatic position has proved most effective and has led to the successful conclusion of numerous claims for compensation for past wrongs.

The Treaty at least partially justifies or legitimates the Crown and Parliament's claims to power, though, in Jackson's view, only with respect to *Pakeha*.[146] However, such a resolution presupposes that the original assumption of sovereignty was in some way illegal, a proposition itself open to argument.[147]

It becomes clear that traditional views of the Treaty must be reassessed, and that the concept (or "myth" as Guy Chapman called it[148]) of the Treaty as a living document is symbolically important. A republican constitution would allow a fresh start, though at a greater potential risk, due to the need to re-evaluate the nature of the relationship between the Maori and the government. But not all have accepted that the Treaty of Waitangi is a substantial enough basis upon which to build a constitution.[149]

The Treaty occupies an uncertain place in the New Zealand constitution.[150] No Maori law was recognized by the colonial legal system[151] — indeed there was no Maori law as the term is now generally understood.[152] The New Zealand Parliament has never doubted that they have full authority irrespective of the Treaty.[153] There have been some signs that this orthodoxy may be challenged,[154] but it is difficult to see how this could be

145. *See* Haare Williams, *Te Tiriti o Waitangi*, *in* HE KORERO MO WAITANGI 1984 (Arapera Bank et al. eds., 1985).

146. PROTEST AND PARTNERSHIP, *supra* note 139, at 19.

147. F.M. Brookfield, *Parliament, the Treaty, and Freedom*, *in* ESSAYS ON THE CONSTITUTION 43–46 (Philip Joseph ed., 1995).

148. Chapman, *supra* note 57.

149. *See, e.g.,* Peperell, *supra* note 2 (quoting Simon Upton, Member of Parliament, Address before the Parliament of New Zealand, Dec. 12, 2000).

150. For the general background to the Treaty, see BUICK, *supra* note 85; P. MOON, ORIGINS OF THE TREATY OF WAITANGI (1914); RUTHERFORD, *supra* note 85.

151. Wi Parata v. The Bishop of Wellington [1877] 3 N.Z. Jurist Reports (New Series) 72.

152. *Tapu*, customs, and lore fulfilled the functions of laws found in more complex societies.

153. F. M. Brookfield, *Kelsen, The Constitution and the Treaty*, 15 N.Z.U. L. REV. 163, 175 (1992).

154. *Id.*

achieved in the absence of an entrenched Constitution and a strong Supreme Court of the American model.[155]

Lord Woolf, in his 1994 Mann lecture, subscribed to the opinion, which is gradually gaining ground, that there are some fundamentals that even the Westminster Parliament cannot abolish.[156] The traditional doctrine of supremacy of Parliament, however, holds that there is nothing that Parliament cannot do.[157]

The time may have come for the courts to give judicial recognition to the Treaty of Waitangi, as Professor Whatarangi Winiata, among others, has called upon them to do.[158] There have been clear signs that Lord Cooke of Thorndon, while President of the Court of Appeal, was inclined to reconsider the position of the Treaty.[159] Such a significant step remains, however, unlikely.[160] In the meantime, the Crown and the Maori remain in a form of political or legal symbiosis through their Treaty relationship.

In light of the strong *Pakeha* opposition to the Maori claims under the existing Treaty,[161] it is uncertain whether there would be sufficient support for a simple transfer of Treaty obligations to a new regime. More importantly, many Maori still view the Treaty as an obligation assumed by the Crown, and not solely by the government of New Zealand.[162]

155. F.M. Brookfield, *A New Zealand Republic?*, 8 LEGISLATIVE STUDIES 5 (1994).

156. *See* Robert Lindsay, *The Australian Janus: The Face of the Refugee Convention or the Unacceptable Face of the* Migration Act*?*, *at* http://www.ntu.edu.au/faculties/lba/schools/Law/apl/Retreating/lindsay.htm (amended Feb. 21, 1997) (quoting Lord Woolf).

157. *See, e.g.,* T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, _ (1985).

158. Whatarangi Winiata, *Revolution by Lawful Means*, *in* 2 THE LAW AND POLITICS: LAW CONFERENCE PAPERS 13, 16–18 (New Zealand Law Conference 1993).

159. *See* Te Runanga o Wharekauri Rekohu Inc v. Attorney-General [1993] 2 N.Z.L.R. 301, 305.

160. Te Heuheu Interview, *supra* note 129.

161. *See generally* Paul Perry & Alan Webster, New Zealand Politics at the Turn of the Millennium: Attitudes and Values about Politics and Government 75 (1999).

162. Hayward, *supra* note 4, at 233–34.

IV. MAORI ATTITUDES TOWARD THE CROWN

The Treaty of Waitangi may legally have ceded sovereignty, but it should be seen as part of the British government's stated intention to take possession of the country only with the consent of the Maori chiefs.[163] Since the 1770s, Maori contact with British officers had given them an understanding of the advantages and disadvantages of coming under the Queen's protection.[164] It is clear that in signing the Treaty of Waitangi, they saw themselves as reinforcing this link with the Queen and her royal predecessors (as well as successors).[165]

Maori deputations to the Sovereign, in 1882 and 1884 to Queen Victoria,[166] and in 1914 and 1924 to King George V to seek redress of grievances under the Treaty, must be seen in this context.[167] The Maori did not consider that the Queen had signed in any other capacity than the chiefs themselves had signed.[168] Thus they may not have fully appreciated that although the Treaty was signed on behalf of Queen Victoria, the political capacity of the Sovereign was exercised by her Ministers on her behalf.[169]

Each of the deputations was referred by the Ministers in the United Kingdom to the colonial Ministers in Wellington, on whose advice the Sovereign was now acting in matters affecting his or her Maori subjects.[170] Whether this was a correct position

163. Marquis of Normanby to Hobson, Aug. 14, 1839, *supra* note 83, at 38–39.

164. *See* RANGINUI WALKER, KA WHAWHAI TONU MATOU: STRUGGLE WITHOUT END 94–95 (1990) [hereinafter STRUGGLE].

165. *See* Cox, *supra* note 8, at 109.

166. *See* STRUGGLE, *supra* note 164, at 160, 163 (1990).

167. *See id*. at 165.

168. *See* Cox, *supra* note 8, at 109.

169. *See id.* Indeed, they were encouraged to see the Treaty as an agreement with the Queen. Graham Interview, *supra* note 10.

170. In a similar way, efforts were made to seek the involvement of the United Kingdom Parliament on behalf of the Canadian Indians during the 1981–82 patriation process. The courts had to rule that the treaty obligations to natives were now the responsibility of the government and Parliament of Canada. *See* The Queen v. Secretary of State for Foreign and Commonwealth Affairs, 1982 Q.B. 892, 926 (Eng. C.A.); Douglas E. Sanders, *The Indian Lobby*, *in* AND NO ONE CHEERED: FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT 301, 322–323 (Keith Banting & Richard Simeon eds., 1983).

to take in the late nineteenth century is doubtful.[171] It is certain, however, that today any attempt to seek recourse to the Sovereign personally will be referred to the appropriate New Zealand Minister.[172]

The Crown's obligations under the Treaty of Waitangi are now exclusively the concern of the Crown in right of New Zealand.[173] However, the personal involvement of the Sovereign as a party to the Treaty remains important to the Maori. This is illustrated by the strongly asserted Maori appeal to Her present Majesty Queen Elizabeth in 1984 to "honour the Treaty."[174] Many Maori share a widely and deeply held view of the Queen as the great-granddaughter of Queen Victoria,[175] though the numbers of people holding this view appear to be in decline.[176] Sir James Henare, a leading Maori elder, informed the Court of Appeal that: "[I]t's a very moot point whether the Maori people do love Governments in New Zealand because of what they have done in the past . . . . The Maori people really do have no great love for governments but they do for the Crown."[177]

Though this illustrates the confusion over the identity of the Crown,[178] the existence of such an attitude cannot be ignored. Thus, the apology from the Crown, enshrined in the Waikato Raupatu Claims Settlement Act of 1995 and signed by the Queen in November 1995, was of great symbolic importance.[179] The fact that the apology could not be attributed to Her Majesty personally was widely overlooked.[180]

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171. F.M. Brookfield, *A New Zealand Republic?*, 8 LEGISLATIVE STUDIES 5 (1994).

172. Graham Interview, *supra* note 10.

173. This is shown in the Canadian context in The Queen v. Secretary of State for Foreign and Commonwealth Affairs, 1982 Q.B. 892, 926 (C.A.).

174. *See* STRUGGLE, *supra* note 164, at 234 (1990).

175. Interview with David Lange, former Prime Minister, in Auckland, N.Z. (May 20, 1998) (on file with author); Graham Interview, *supra* note 10.

176. Te Heuheu Interview, *supra* note 129.

177. Statement quoted from the Affidavit of Sir James Henare, May 1, 1987 (on file with author), which is referred to in *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R. 641.

178. *See* Janine Hayward, In Search of a Treaty Partner (1995) (unpublished Ph.D. thesis, Victoria University of Wellington) (on file with author).

179. Waikato Raupatu Claims Settlement Act, 1995 (N.Z.); *New Zealand Sees New Era Dawn with Queen's Apology,* DAILY TELEGRAPH (London) Nov. 4, 1995.

180. Graham Interview, *supra* note 10.

The importance of the British connection remains strong for many Maori, who would prefer that the Crown not have an exclusively national identity.[181] Some value the perceived independence of a transnational institution.[182] Indeed, some have continued to see the Treaty as an agreement with the United Kingdom, rather than with the New Zealand government.[183] Thus, although the Crown may have evolved into the "New Zealand Crown," to many Maori this might be unwelcome, if it means the increased subordination of the head of state to the political government in Wellington.[184]

The legal status of the Treaty of Waitangi is secondary to how it is perceived by Maori.[185] Whatever the legal effect of the Treaty of Waitangi, the chiefs yielded, voluntarily or not, *kawanatanga* to the Queen.[186] It appears to be a widespread Maori belief that the Treaty was with the Crown, and that this link should not be amended, let alone severed, unilaterally — i.e., the Maori would have to be consulted before the government decided any change.[187]

The Treaty dispute settlement process has encouraged consideration of the system of government — of the constitution in

181. *Id.*; Te Heuheu Interview, *supra* note 129.

182. Jane Kelsey, *The Agenda for Change — the Effect and Implications of MMP and Republicanism on Treaty Settlement Methods and the Effect on the Treaty with the Crown*, paper presented to the Institute for International Affairs, Wellington (May 17–18, 1995) (on file with author). It was partly for this reason that Maori opposed the abolition of appeals to the Judicial Committee of the Privy Council. Te Heuheu Interview, *supra* note 129.

183. *See* Confederation of United Tribes of New Zealand, Historical Brief, *at* http://www.nzaif.com/historical_brief.html (last visited Oct. 10, 2002).

184. *See* McHugh, *supra* note 60, at 41–42.

185. The Royal Commission on the Electoral System concluded that Mixed Member Proportional Representation ("MMP") would obviate the need for Maori seats, indicating a lack of appreciation of the different perceptions of Maori; ROYAL COMMISSION ON THE ELECTORAL SYSTEM, REPORT OF THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM "TOWARDS A BETTER DEMOCRACY" 81–97 (1986); Interview with Sir Paul Reeves, former Governor-General, in Auckland, N.Z. (Nov. 11, 1998) (on file with author).

186. *Kawanatanga,* or "governance," is often used interchangeably with the term "sovereignty." *See* Brookfield, *supra* note 135, at 4. Though, in some parts of the country this only occurred as late as the latter years of the nineteenth century.

187. Kelsey, *supra* note 182.

general, and that of the Maori in particular.[188] The relationship between Crown and the Maori people is a regular subject of discussion in *marae*.[189] Because the legitimacy of the government in New Zealand is based, at least in part, on the Treaty of Waitangi, a commonly held Maori position is that the government has no right to make any change in its constitutional status without their consent.[190] There appears to be no more agreement among Maori than there is in the general population about the future direction of government, but there is a concern to preserve any structures or institutions that bolster the economic or social status of Maori.[191] General constitutional reform must precede or be integral to any move to a republic. This reform should include a consideration of *tino rangatiratanga* and *kawanatanga*.[192] Nor would a move to a republic absolve a future government of its Treaty obligations,[193] although some have advocated a republic for the purpose of ending these obligations.[194] There has been a fear expressed that governments could be using republicanism to evade Treaty responsibilities.[195] An example would be cutting appeals to the Privy Council, which is regarded as an external channel for re-

188. Te Heuheu Interview, *supra* note 129; Interview with Sir Paul Reeves, former Governor-General, in Auckland, N.Z. (Nov. 11, 1998) (on file with author). Examples are the constitutional proposals of the Rt. Hon. Mike Moore. M. Moore, *Explanation: New Zealand Constitutional [People's] Convention Bill 1998* (Feb. 11, 1998) (on file with author).

189. "Tribal meeting houses." This is true of the Ngati Tuwharetoa at least. Te Heuheu Interview, *supra* note 129.

190. Graham Interview, *supra* note 10.

191. Te Heuheu Interview, *supra* note 129.

192. *See* Kelsey, *supra* note 182, at 12–13. *Tino rangatiratanga,* defined in the Treaty of Waitangi Act 1975 as a people's "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties," Treaty of Waitangi Act, 1975 (N.Z.), is often defined more broadly to mean "sovereignty," Brookfield, *supra* note 135, at 4.

193. *See* sources cited *supra* note 192. *See also* Andrew P. Stockley, *Parliament, Crown and Treaty: Inextricably Linked?*, 17 N.Z.U. L. REV. 193, 212 (1996).

194. *See, e.g.,* Stephen Morris, Letter to the Editor of the NEW ZEALAND HERALD, June 21, 1999 (on file with author). This may also be implicit in the policy of the New Zealand Libertarians, which advocates "abolish[ing] the institutionalised apartheid that currently exists in New Zealand." *See LibertariaNZ: Less Government,* LAW TALK, Sept. 20, 1999, at 24.

195. Andrea Tunks, *Mana Tiriti*, *in* REPUBLICANISM IN NEW ZEALAND 117 (Luke Trainor ed., 1996).

dress[196] and formally as an appeal to the Crown.[197] Without specific concurrence from the Maori as the Treaty partner with the Crown, the abolition of the monarchy would appear to lack legitimacy.[198]

Formerly it might be said that the traditional national identity of New Zealand was one of a people with one culture, that culture being, predominantly, *Pakeha*.[199] This is no longer so, but just what the New Zealand identity is remains uncertain.[200] Especially since the 1970s, the liberal democratic ethos has generated what Jane Kelsey calls an integration ethic and a self-determination ethic — an attempt to incorporate Maori into the *Pakeha* majority, while preserving their separate identity.[201] These two views may ultimately prove impossible to reconcile.[202]

Both racial groups, however, are linked by the concept of the Crown, as it is variously understood. The argument that the Crown, as a party to the Treaty of Waitangi, is a fundamental postulate of the New Zealand constitution is important,[203] even if it is exaggerated.

V. CONCLUSION

This paper has developed the thesis that the legitimacy of the British Crown in New Zealand is derived, in part, from its partnership with the *tangata whenua*[204] in the Treaty of Waitangi.

196. Again, this attitude is not an indication of support for the monarchy, but of appreciation of the advantages of the Crown to a minority. Te Heuheu Interview, *supra* note 129. *See, e.g.,* New Zealand Maori Council v. Attorney-General of New Zealand [1994] 1 A.C. 466 (P.C. 1994).

197. Judicial Committee Act, 1833, 3 & 4 Will. IV, c. 41 (U.K.); Judicial Committee Act, 1844, 7 & 8 Vict., c. 69 (U.K.); Judicial Committee Act, 1881, 44 & 45 Vict., c. 3 (U.K.).

198. Robin Cooke, *The Suggested Revolution against the Crown*, *in* ESSAYS ON THE CONSTITUTION 28, 38 (Philip Joseph ed., 1995).

199. Kelsey, *supra* note 75, at 185.

200. Te Heuheu Interview, *supra* note 129.

201. Kelsey, *supra* note 75, at 185, 192–93.

202. *See also* BRUCE CLARK, NATIVE LIBERTY, CROWN SUPREMACY — THE EXISTING ABORIGINAL RIGHT OF SELF-GOVERNMENT IN CANADA 191 (1990); A. Ward, *Historical Claims under the Treaty of Waitangi*, 27 J. OF PACIFIC HISTORY 181 (1993).

203. Cooke, *supra* note 198, at 35–37.

204. *See* sources cited *supra* note 3.

This partnership is a major source of non-traditional legitimacy that depends not on popularity but on perception.[205]

Similarly, the establishment of Canada was founded to some degree on a series of treaties between the Crown and the native American people. The obligations under these treaties have been assumed by the Canadian authorities, but in such a way that the British Crown remains central to the relationship. Parallels are less clear in Australia, where the native peoples generally lacked the same treaty relationship with the Crown.

Retention of the "uncomfortable" idea that the Crown is sovereign avoids the problems inherent in a legal notion of popular sovereignty. Both Maori and *Pakeha* are under the Crown, which owes a special duty to the Maori as partners in the Treaty of Waitangi.

From the Maori perspective there are perhaps two questions central to any republican debate in New Zealand: who or what is the Crown and, more specifically, what is its function under the Treaty of Waitangi?[206] It continues to be, and in fact appears increasingly imperative to the Maori, that the Crown is not only something other than the government of the day,[207] but that the Crown is able to function in such a manner as to hold the government to the guarantees made under the Treaty of Waitangi.[208] The Crown is, at the very least, something distinct from the political government. Nor can it, as a Treaty partner, be equated with a State or the people, since it involves the preservation of a special relationship with one sector of society — the Maori.

The legitimacy of the present regime relies, at least in part, on a compact between the Crown and the Maori, as a basis for the assumption and continuation of sovereignty. Whether the Maori can be said to have actually benefitted from this cession to the Crown, and from the subsequent artificial distinction drawn between the Crown and government, is problematic. The

205. *See, eg.,* NEW ZEALAND 1990 COMMISSION, THE TREATY OF WAITANGI: THE SYMBOL OF OUR LIFE TOGETHER AS A NATION (1989); DOUGLAS GRAHAM, TRICK OR TREATY? (1997).

206. Hayward, *supra* note 178.

207. Te Heuheu Interview, *supra* note 129. Sometimes the Crown meant the government of the day, sometimes more. Graham Interview, *supra* note 10. *See also* Hayward, *supra* note 178.

208. Hayward, *supra* note 4, at 233–234.

British government would probably have been extended to New Zealand in any event, but the way in which it was done was important.

The perception the nineteenth century Maori had of the Crown was determined by their own cultural heritage and the way in which they perceived Queen Victoria's role. This perception differed markedly from that of the settlers or the British or colonial government. But the perception is more important than the reality. If the reality is that the Maori must negotiate with governments that owe their authority solely to the general, predominantly European population, then the majority ambivalence or hostility to the principles of the Treaty present real problems for Maori wishing to enforce the Treaty of Waitangi. The result is that, for pragmatic reasons alone, many Maori remain attached to the concept of the Crown. This is so even though the Treaty of Waitangi may itself be an insubstantial basis for a modern constitution.[209] The Crown may not be essential to the body politic, but its removal would raise questions of the role of Maori in society and government, which many, not least of all political leaders, would prefer to avoid.

209. Pepperell, *supra* note 2 (quoting Simon Upton, Member of Parliament, Address before the Parliament of New Zealand, Dec. 12, 2000).