REBUS SIC STANTIBUS AND THE TREATY OF WAITANGI

Mark Bennett and Nicole Roughan*******

The question of the continuing significance of the Treaty of Waitangi is one to which neither legal practice nor scholarship has offered a definitive answer. The question is often regarded as less legal than political; a question of intercultural justice to be contested in the political realm. From within the law, however, the suggestion that the Treaty ought to be reassessed in light of modern circumstances was revived in 2005 when Jeremy Waldron, then University Professor at Columbia University, offered the international law doctrine of rebus sic stantibus *as a possible tool for analysis. This article responds to Professor Waldron's suggestion that the Treaty might be considered overridden by a fundamental change in political circumstances. It first argues that the structuring logic which Professor Waldron advocates is a misreading of the "signpost" which international law offers towards the role of treaties in problems of intercultural justice. The article then presents a comparative assessment of United States practice relating to treaties, before examining tikanga Māori to consider how its core values might offer guidance on the continuing relevance of the Treaty. Finally, the article looks to contributions from political philosophy relating to the political morality of Treaty-based intercultural justice.*

I INTRODUCTION

The attempt to explain the continuing relevance of the Treaty of Waitangi in Aotearoa New Zealand invites responses from all positions on the political spectrum. It has also been tackled by legal academics concerned to put these political persuasions to the tests of legal doctrine and philosophy. A recent discussion of this type was presented by expatriate New Zealander Jeremy Waldron, who asked in a 2005 address whether the international law doctrine of *rebus sic stantibus* could be applied to the Treaty of Waitangi.[1] This article does not give a definitive legal or political answer to the question. Instead, it offers four alternative approaches to the same issue Waldron

* Frank Knox Scholar, Harvard University. The authors wish to thank Alberto Costi and Māmari Stephens for their comments on drafts of this article.

** Ethel Benjamin Scholar, Fulbright New Zealand Graduate Student Scholar, Yale University.

1 Jeremy Waldron "FW Guest Memorial Lecture 2005: The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*" (2006) 11(2) Otago LR 161 ["Half-Life"].

grapples with: the question of whether the obligations under the Treaty remain relevant today, despite the very real changes which have occurred since its signing in 1840.

Waldron's analyses of the importance of indigeneity and the Treaty of Waitangi are timely and sophisticated analyses of perhaps the most politically sensitive issue of the last 30 years: the rights of the tangata whenua of Aotearoa New Zealand. We might characterise his general approach towards issues of indigeneity and the role of the Treaty as a search for a blue-print, and a detailed investigation of the relevance to that search of particular philosophical and legal approaches, or pointers.[2] Waldron's contributions have suggested alternative signposts to follow in order to work out what inter-cultural justice requires. His argument in "Indigeneity: First Peoples and Last Occupancy"[3] relied upon an understanding of liberal property philosophy from within the Western tradition, namely that liberal property principles of first occupancy and prior occupancy have been appropriated by indigenous peoples and indigeneity "aficionados" in an unsophisticated and ultimately unconvincing way.[4] Having presented that challenge to those who seek to justify the rights of indigenous peoples from within the Western political tradition, Waldron then turned to international law as an additional signpost pointing in the direction of a disregard for Treaty-based justice. His latest article is an argument for the applicability of the international law doctrine of *rebus sic stantibus* – the notion that Treaties can be terminated or suspended if there has been a fundamental change in circumstances – to the Treaty of Waitangi, suggesting that there has been a fundamental change in circumstances since 1840 that renders the promises contained in the Treaty inapplicable in the 21st century.[5]

This article argues that Waldron's proposition, though a novel addition to the debate, is not a convincing legal or political argument for applying the doctrine of *rebus sic stantibus* to the Treaty of Waitangi. Further and more importantly, the argument reflects upon Waldron's (and others') fixation on the Treaty of Waitangi as a blueprint that offers a fully mapped-out theory of intercultural justice for Aotearoa New Zealand. An alternative account, and that favoured here, involves a sketch of the landscape and the relevant complementary or contradictory signposts which may be followed to determine the continued significance or otherwise of the Treaty of Waitangi. This article argues that the structuring logic or signpost which Waldron advocates is a misreading of the international legal signpost, then considers alternative signposts which point in the opposite

---

2 Waldron's earlier works in this domain include "Indigeneity: First Peoples and Last Occupancy" (2003) 1 NZJPIL 55 ["Indigeneity"]; "Superseding Historic Injustice" (1992) 103 Ethics 4; *The Right to Private Property* (Oxford University Press, Oxford, 1988).

3 "Indigeneity", above n 2.

4 For a critique of that argument, see Mark Bennett "Indigeneity as Self-Determination" (2004) 4 Indigenous Law Journal 75.

5 "Half-Life", above n 1.

direction to Waldron's in offering guidance over the role of the Treaty of Waitangi in the problem of intercultural justice in Aotearoa New Zealand.

The next four sections will draw on selected intellectual resources that we have at our disposal to answer the question of the continuing relevance of the Treaty. First, attention is given to international law to offset Waldron's application of *rebus sic stantibus*. Second, consideration is given to a comparative assessment of United States practice relating to treaties, with alternative conclusions to those Waldron offers. The third approach examines tikanga Māori to consider how its core values might offer guidance on the continuing relevance of the Treaty, while the fourth considers contributions from political philosophy relating to the political morality of indigenous rights and Treaty-based justice. In each of these streams of intellectual resource, the Treaty is to some degree affirmed as a document of continuing relevance to intercultural justice in New Zealand. This assessment will undoubtedly reveal our own preferences for a particular interpretation of the four signposts, but it aims to situate these as complementary pointers within a wider landscape of debate, rather than position them as determinative paths to follow.

II A "LANDSCAPE OF TREATY DEBATE"

Perhaps the biggest difficulty facing the "Treaty debate" is not, as Waldron suggests, a lack of argument from those broadly opposed to Treaty principles, but rather that there are now countless contributions from writers across many disciplines, with no clear suggestion of how those contributions might be marshalled into a coherent debate.[6] If we go looking for perspectives which deny the importance of the Treaty, or deny that it can legitimately be relied upon as a basis for present justice, we can find them with relative ease.[7] The tricky part is to work out how (or whether) those contributions relate to alternative approaches employed by the competing arguments. This article suggests that the organising principle is not logically one of political perspective – what

---

6 Many of these contributions defy characterisation. Broadly, we might indicate the range of contributions from history and legal/political history: see for example the essays in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss* (Bridget Williams Books, Wellington, 2001). From critical perspectives, see Moana Jackson "The Treaty and the Word: The Colonisation of Maori Philosophy" in G Oddie & R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 1. From legal theory see F M (Jock) Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999); P G McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland 1991) [*The Maori Magna Carta*]. From political theory/philosophy: Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1997) [*Justice and the Māori*]; Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005).

7 Dr Don Brash MP, Leader of the National Party "Nationhood" (Orewa Rotary Club, 27 January 2004); Kenneth Minogue *Waitangi: Morality and Reality* (New Zealand Business Roundtable, Wellington, 1998); David Round *Truth or Treaty: Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998).

Waldron refers to as those arguments which have been called "redneck" versus those who have supposedly been doing such name-calling – but the identification of perspectives which follow fundamentally different signposts in making their argument.

The guiding metaphor used here helps to locate those signposts and the multiple directions in which they point. It uses the image of the inter-cultural justice debate as a "landscape", which is framed by the question of the continuing relevance of the Treaty as a guide towards legal and political outcomes. The landscape, unlike the blue-print or road-map exercises, seeks to depict an abstract of the issues and their conceptual detail rather than a detailed plan of the direction to follow.[8] This treats particular signposts not as indications of the correct path to choose, but as features of a landscape which lacks a clear method for choosing between them.

The landscape of inter-cultural justice in Aotearoa New Zealand begins, for better or worse, with the Treaty of Waitangi as a starting point. Whatever the legal niceties surrounding its actual effect on the legitimacy of Crown authority,[9] the de facto starting position for any sketch of contemporary relations between groups is that our history includes this Treaty, and arguments such as Waldron's – that we might consider it superseded by circumstances – are made against that starting point. What the lasting significance of the Treaty is made out to be is a question subject to sustained political and academic consideration, but at the heart of the sketch stands the Treaty itself as an agreement constituting the arrangements for power and authority in New Zealand in 1840.

From that starting point, a number of alternative signposts might be identified. Four of these are examined here, though there are undoubtedly others. First, there are recognised "legal" signposts – which include signposts of State-centred domestic law and international law. Second are those signposts which have been treated as political traditions or political philosophies, but which may also be characterised as "legal", the signpost of tikanga Māori[10] and contributions from Western political theory.

---

8 See for example *Justice and the Maori,* above n 6; David Williams "Myths, National Origins, Common Law and the Waitangi Tribunal" (2004) 11(4) E Law, available at <http://www.murdoch.edu.au/elaw> (last accessed 2 November 2006).

9 Brookfield, above n 6.

10 Tikanga Māori has been characterised as "Māori law and custom", or as something more philosophically based. The extent to which tikanga Māori goes beyond the usual explanation of "Māori law and custom" is a matter of debate. See for example New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (SP 9, Wellington, 2001) 1, which notes the inexact correlation of tikanga with "custom" or "law" but describes tikanga as "the body of rules and values developed by Maori to govern themselves – the Maori way of doing things." Also see chapter 3 of that report. Here it will be regarded as both a legal system and a philosophy or political tradition, which has a quite different character from the State legal system in New Zealand, in particular with its implications of "correctness" and "truth" according to Māori philosophy (tika and pono) which positive law is thought to dissociate itself from. Also see Māmari Stephens "Māori Law and Hart: A Brief Analysis" (2001) 32 VUWLR 853.

The pointers attached to each signpost themselves diverge into alternative paths. The pointer towards domestic law offers both what we can identify as an orthodox legal position, and an alternative legal position. In the field pointed to by international law, divergent paths take us towards doctrines of *pacta sunt servanda*[11] or towards *rebus sic stantibus*. The pointer towards tikanga Māori and the practice of Māori philosophy, taken as a system regulating correct and incorrect conduct, itself offers competing paths between employing tikanga to suggest how Treaty relationships may be practised, and suggesting that tikanga itself stands apart from the question of the relevance of the Treaty today.

The signpost offered by political traditions and political philosophy is similarly complex, with pointers to "Western" political and philosophical positions on one side, and mātauranga Māori (and its practice through tikanga) on the other. The Western tradition offers diverging pathways of following difference-blind liberalism,[12] or overlapping consensus liberalism,[13] while under mātauranga and tikanga, the options for the continuing relevance of the Treaty of Waitangi are similarly divergent. There remains, of course, a large degree of intersection between the pathways which stem from different pointers, and a sense in which the signposts themselves are not distinct but are informed by their counterparts from law or political thinking. This is particularly so in the case of tikanga, which does not aim for the same separation of political and legal practice which characterises the currently prevailing positivist legal tradition.

Importantly however, this article does not address the assessment of each signpost for its persuasiveness in answering the question of the Treaty's continued relevance. Rather it identifies the signposts as possible tools for pursuing that inquiry. It therefore leaves the question of how a choice might be made between signposts for a separate inquiry, one which would need to consider whether it is arguments from substantive justice, efficiency, predictability, or policy which might support the choice of one over another.

A A Legal Academic Consensus?

Waldron begins his discussion with the suggestion that academic debate on matters of intercultural justice has shut down in the direction of favouring the Treaty and all it stands for.[14] Though others have made similar points,[15] Waldron's observation seems incongruent in light of the

---

11 See below n 44-46 and accompanying text.

12 See below Part VI Western Political Theory.

13 See below Part VI Western Political Theory.

14 "Half-Life", above n 1, 180.

15 Nigel J Jamieson "Talking Through The Treaty – Truly A Case Of Pokarekare Ana Or Troubled Waters" (2005) 11 Revue Juridique Polynésienne 101, 114-115.

seeming dominance of the difference-blind liberal model in recent domestic politics.[16] Nevertheless, Waldron observes:[17]

> One thing that strikes me when I visit New Zealand – and I do so regularly – is that although everyone talks about the 'Treaty debate', there is in fact very little real adversarial discussion of the fundamental status of the Treaty of Waitangi in academic circles. I am thinking particularly of academic law. … Maybe every legal academic in New Zealand really does support the Treaty and no one can think of anything critical to say or publish. … [P]erhaps New Zealand academics should be a little more reluctant than they are to use words like 'redneck' and 'racist' to stigmatize anyone who wants to think carefully or reflectively or critically about these matters.

This is a serious accusation. Given the potency of the indigenous rights issue, our academics and universities should be engaging in open and rigorous debate about these issues. However, though it is not useful here to conduct some sort of name-calling tally, it is arguable that the situation is actually the opposite, with public name-calling shutting down views from the other end of the Treaty spectrum. Perhaps New Zealand academics, politicians, and citizens should be a little more reluctant than they are to use words like "radical", "racist", "grievance", "racial division",[18] "Treaty industry", "violations of democracy",[19] "anachronism", "special right[s]", and "haters and wreckers" to stigmatize anyone who wants to think carefully or reflectively or critically about these matters. Here we are referring to those who argue that New Zealand does not do enough to recognise indigenous rights (for example, to the foreshore and seabed)[20] and the Treaty of Waitangi as our foundational document, or that further constitutional change is necessary to recognise the Treaty partnership, in the form of Māori self-government, Parliamentary representation, a Māori legislative body or any other remedy.

It might also be noted, against any suggested "consensus", that there are legal academics and practitioners who question the relevance and interpretation of the Treaty, for example David Round,[21] Nigel Jamieson,[22] EJ Haughey[23] and Guy Chapman.[24] These commentators usually point

---

16 See for example the revival of the National Party's political fortunes after Don Brash's "Nationhood" speech (Brash, above n 7), the Labour party's response through a review of all "race-based" policies, and Trevor Mallard's claim that "we're all indigenous now": Hon Trevor Mallard MP "We are all New Zealanders Now" (Speech to the Stout Research Centre for NZ Studies, Victoria University, Wellington, 28 July 2004).

17 "Half-Life", above n 1, 180.

18 Brash, above n 7.

19 Brash, above n 7: "Some local authorities are introducing Māori wards without regard to whether the guiding democratic principle of 'one person, one vote, one value' is violated."

20 See Claire Charters and Andrew Erueti "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 VUWLR 257.

21 Round, above n 7.

22 Jamieson, above n 15.

to the legal irrelevance of the Treaty, often arguing that the Treaty is a legal nullity, as it was presented in *Wi Parata v Bishop of Wellington*.[25] These counter-examples are uncommon (perhaps they were discouraged by the abrupt negative response to their assertions?),[26] but certainly not invisible.

However, if any legal academic consensus does exist in support of the Treaty, it might be explained in several ways. First, the orthodox legal position of the Treaty of Waitangi – based on prevailing positivistic assumptions about the nature of law and authority – is relatively clear at the core: the Crown is the sovereign to the exclusion of any Māori authority.[27] In this picture of formal legality – the one legal academics are inclined to write from within – the Treaty is not enforceable in New Zealand law except to the extent it has been incorporated.[28] This contrasts with the United States (and Canada), where treaties are in most cases enforceable by the courts, and therefore there is much more to write about in terms of interpreting and applying treaties.[29] The orthodox legal analysis of the legal place of the Treaty has been comprehensively addressed by Paul McHugh[30] and Jock Brookfield.[31] If there is no debate within this picture of legality – if "[t]here's next to nothing in the university law reviews"[32] – it is probably for this reason.

Second, if we switch from legality to legitimacy and justice, we have a more contestable question. McHugh and Brookfield again figure large, but we also find figures such as Andrew Sharp,[33] Jane Kelsey,[34] and Moana Jackson.[35] If we put to one side the differences between their

---

23 EJ Haughey "A Vindication of Sir James Prendergast" [1990] NZLJ 230.

24 Guy Chapman "The Treaty of Waitangi – Fertile Ground for Judicial (and Academic) Myth-Making" [1991] NZLJ 231.

25 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC). For comment on the academic debate over *Wi Parata*, see Grant Morris "James Prendergast and the Treaty of Waitangi: Judicial Attitudes to the Treaty During the Latter Half of the Nineteenth Century" (2004) 35 VUWLR 117.

26 Paul McHugh "Constitutional Myths and the Treaty of Waitangi" [1991] NZLJ 316; Pita Rikys "Trick or Treaty" [1991] NZLJ 370; Joe Williams "Chapman is Wrong" [1991] NZLJ 373.

27 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC).

28 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

29 See for the United States *Minnesota v Mille Lac Band Of Chippewa Indians* (1999) 536 US 172, 188-208 O'Connor J for the Court; and for Canada *R v Marshall* [2005] 2 SCR 220, paras 7-36 McLachlin CJ (Major, Bastarache, Abella and Charron JJ concurring).

30 *The Maori Magna Carta*, above n 6.

31 Brookfield, above n 6.

32 "Half-Life", above n 1, 180.

33 *Justice and the Maori,* above n 6.

positions and their often bitter debates,[36] it might be argued that the collection of scholars cited do exhibit a loose consensus on the legitimising effect of the Treaty of Waitangi and its continuing importance in the present. Waldron is right to say that this would be a "remarkable consensus".[37] However, an explanation may be found in the work of philosopher Brian Barry, Waldron's former colleague at Columbia University. Barry argues that so-called philosophical consensuses in particular areas are often the result of the people who write in an area's personal prejudices. Of the supposed liberal consensus with regard to Will Kymlicka's political theory of "multiculturalism", Barry writes:[38]

> What is true is that those who actually write about the subject do so for the most part from some sort of multiculturalist position. But the point is that those who do not take this position tend not to write about it at all but work instead on other questions they regard as more worthwhile. Indeed, I have found that there is something approaching a consensus among those who do not write about it that the literature of multiculturalism is not worth wasting powder and shot on. … [I]t is merely an illustration of a pattern that occurs throughout moral and political philosophy (and elsewhere).

Of course, this explanation of consensus is a bit embarrassing for an issue so fundamental as the place of Māori in our constitutional and legal framework, which deserves "a sense of urgency, openness, and outreach in debate for all the resources of critical intelligence that we can find."[39] Indeed, the lack of academic debate, and the place around which the consensus falls in legal academia, seem to be out of tune with a large proportion of New Zealanders' visions of the continuing relevance of the Treaty.[40] It would be a shame if the alternative position was so neglected by philosophers that the public would have to rely on arguments that others might see as

---

34 J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin, Wellington, 1990).

35 Jackson, above n 6.

36 For a discussion of the conflicting positions see Paul Havemann "The 'Pakeha Constitutional Revolution?' Five Perspectives on Maori Rights and Pakeha Duties" (1993) 1 Waikato LR 53; Karl Upston-Hooper "Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi" (1998) 28 VUWLR 683.

37 "Half-Life", above n 1, 180.

38 Brian Barry *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity, Cambridge, 2002) 6.

39 "Half-Life", above n 1, 181.

40 See *Treaty of Waitangi and Related Issues: Omnibus Results* (survey by UMR Research for the Human Rights Commission, February 2006), available at <http://www.hrc.co.nz> (last accessed 2 November 2006). Twenty seven per cent of non-Maori people disagreed with the statement "The Treaty of Waitangi is the founding document of New Zealand and as such has a place in New Zealand's proposed constitution", with 47 per cent agreeing; this compares with 82 per cent of Maori agreeing and only 4 per cent disagreeing. When it came to self-determination, even more non-Maori (44 per cent) were against the statement "Māori as New Zealand's indigenous peoples have the right to self-determination, that is, the ability to manage their own affairs, make their own judgements, and provide for themselves", with 32 per cent agreeing.

"redneck" or "racist". Thankfully, Waldron offers a possible alternative signpost, the detail of which cannot be dismissed as redneck, but must be assessed against the alternative pointers offered within legal and political debate.

III INTERNATIONAL LAW

A Why Not Rebus Sic Stantibus?

Waldron offers up the international law doctrine of *rebus sic stantibus* as "a starting point" for "reflection and reconsideration" on the possibility of the Treaty of Waitangi's obsolescence due to changes in circumstances.[41] The face value appeal of the doctrine is understandable – it offers States one of the few international legal tools for extricating themselves out of a binding treaty. However, the doctrine under the Vienna Convention on the Law of Treaties,[42] and its status as customary international law, is more complex than the face value view that Waldron presents.[43]

Perhaps most misleading within Waldron's account is his lack of attention to the operation of *rebus sic stantibus* in its international legal context. In international law the *rebus sic stantibus* doctrine is an important but limited exception to the foundational principle of *pacta sunt servanda* – the notion that agreements are to be kept – which Waldron himself mentions as the thesis against which *rebus sic stantibus* is constructed.[44] He cites arguments in international law that reject *rebus*

---

41 "Half-Life", above n 1, 179.

42 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 62, provides:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

   (a) if the treaty establishes a boundary; or

   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

43 On the intellectual and diplomatic history of the *rebus sic stantibus* doctrine, and for analysis of realist, functionalist, and "primitivist" perspectives on its operation, see David J Bederman "The 1871 London Declaration, *Rebus sic Stantibus* and a Primitivist View of the Law of Nations" (1988) 82 AJIL 1.

44 Waldron suggests only that the relationship between the two "seems ripe for a Critical Legal Studies diagnosis": "Half-Life", above n 1, 169. Compare the original commentary on the draft article (then article 59) of the Vienna Convention, which indicates the need to "emphasise the exceptional character of this ground of termination or withdrawal by framing the article in negative form." See "Draft Articles on the

sic stantibus outright for its opposition to the organising structural principle that *pacta sunt servanda* offers,[45] to which might be added a long list of comments on that principle's foundational status in international law.[46] Waldron's analysis, however, treats *rebus sic stantibus* as a stand-alone principle rather than considering first what might support the retention of the Treaty.

The problem with that approach, at least as a matter of international legal doctrine, lies in its failure to recognise the *rebus sic stantibus* doctrine as an attempt to constrain by law the otherwise far-reaching ability of a State to unilaterally disregard its obligations because it considers circumstances to have changed.[47] John Stuart Mill's argument upon which Waldron relies, that "no treaty is fit to be perpetual",[48] is not a call to apply *rebus*-type doctrines wherein one party unilaterally repudiates its obligations, but rather a "challenge to create a legal ground for reconciling perpetual treaties with peaceful change."[49] However, allowing a State to repudiate, by law, a treaty obligation only makes senses in light of two more fundamental principles: that agreements must be kept, and that treaties are regulated through the operation of law not the whims of politics. The result of both principles is that treaty obligations remain binding unless they are legally excluded. The (likely unintended) corollary of Waldron's concern to apply *rebus sic stantibus* to the Treaty of Waitangi is that the Treaty must therefore be internationally binding on its face, and represents an attempt to regulate by law a relationship that would otherwise be determined through political power.[50]

This international legal status has been considered at length by academics concerned to indicate whether or not the international law of treaties is a relevant tool of analysis.[51] Sir Kenneth Keith, now New Zealand's first judge elected to the International Court of Justice, argued in a 1990 article

---

Law of Treaties with Commentaries", commentary on art 59, para 9, in "Reports of the Commission to the General Assembly" (1966) II Yearbook of the ILC 259.

45 "Half-Life", above n 1, 169 citing Antony Carty "Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law (2003) 14 EJIL 817, 832.

46 For analysis see Bederman, above n 43; Athanassios Vamvoukos *Termination of Treaties in International Law: the Doctrines of Rebus Sic Stantibus and Desuetude* (Oxford University Press, New York, 1985); Oliver Lissitzyn "Treaties and Changed Circumstances" [1967] 61 Am J Int'l L 895.

47 Bederman, above n 43, 13, considers the view allowing treaties to be repudiated unilaterally due to changing circumstances raises the concern that a "man should not be judge in his own cause."

48 "Half-Life", above n 1, 161.

49 Bederman, above n 43, 27.

50 For an argument that we should apply *pacta sunt servanda* to indigenous treaties, see Siegfried Wiessner "American Indian Treaties and Modern International Law" (1995) 7 St Thomas LR 567.

51 See for example Benedict Kingsbury "The Treaty of Waitangi: Some International Law Aspects" in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi,* (Oxford University Press, Auckland 1989) 121-157 [*Waitangi: Maori and Pakeha Perspectives*].

that the Treaty of Waitangi was in line – both in substance and form – with other international treaties made by colonial powers and the United States with indigenous peoples, and that these "resembled treaties concluded at the same time among the European powers."[52] The Treaty of Waitangi takes its place in the Consolidated Treaty Series and other international collections, "after British treaties with Mexico and Muscat … and before treaties of navigation and commerce with Oldenburg and Persia."[53] Where Waldron dismisses the Treaty's possible international status as being surpassed by the later establishment of sovereignty,[54] Keith argues that it is only once the Treaty is:[55]

> [M]ore firmly put in its historical and legal setting, [that it] can more properly take its place as marking the beginning of constitutional government in New Zealand and as stating promises which can be judged as still valid and relevant.

The argument raised by Waldron is therefore notable for its reliance on a particular pathway off the international law signpost, which neglects to consider how other international legal doctrines might impact upon that path. Of these, Benedict Kingsbury's outline of "conceptual approaches", namely human rights law, self determination, minority rights, sovereignty, and indigenous peoples,[56] might be seen as alternative pathways, with quite different results than the one which Waldron suggests we should consider.

A more direct response to Waldron's suggested application of *rebus sic stantibus* questions the technical applicability of that doctrine to the Treaty of Waitangi, first through analysis of the doctrine and the nature of the Treaty, and second through analysis of the legal significance of any change in circumstances since its signing. On the first point, the applicability of the doctrine under international law depends not only upon the Treaty having international status, but also upon the recognition that *rebus sic stantibus* is an exception to the fundamental premise of binding treaty obligations, without which international treaty law would be nonsensical. *Rebus sic stantibus* is a

---

52 Sir Kenneth Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 38.

53 Keith, above n 52, 38, fn 8. (The specific location refered to is 6 Herslet's Commercial Treaties 579 (1845)).

54 "Half-Life", above n 1, 163-164, fn 12 and 13. Here Waldron's attribution of this view to other commentators is unconvincing – he relies upon Cooke P refusing to decide the question in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655 (CA); and a comment by Pocock that the Treaty establishes conditional sovereignty – which implicates nothing about whether it was also an international cession of sovereignty. J G A Pocock, "Waitangi as Mystery of State" in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, 2000) 25.

55 Keith, above n 52, 40.

56 Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues" (2002) 52 U Toronto LJ 101.

limited exception; it can apply only if the change in circumstances goes to the essence of the parties' consent to be bound, and is not caused by the party seeking to repudiate its obligations.[57]

It is these exclusions and limitations upon *rebus sic stantibus* which must be accounted for in any analysis of changes in circumstances. Waldron concentrates his version on the issues of shifting political responsibility and political mentality as between tribal authorities, urban Māori authorities, and the State.[58] These issues, as crucial elements of the controversy surrounding Treaty-based justice, issues of power-sharing, and questions of identity, have been the focus of a number of scholars which Waldron's analysis neglects to consider.[59] The detail of that analysis cannot be repeated here, but it is apparent that Waldron's brief foray into the issue and suggestion of a "change in political mentality" may be begging the question he seeks to answer.

To illustrate, although Waldron avoids offering an account of what a "fundamental change of circumstances" might mean, he draws analogies before offering the example of "changes in character and responsibilities of iwi and their relation to those New Zealanders of Māori descent".[60] He considers in particular that many of the functions once assumed by traditional authorities are now subsumed by the State, and it is the State to whom individual Māori look for authority.[61] Without submitting a threshold of what might constitute a fundamental change, Waldron's description of the changed functions of iwi authorities vis-à-vis the State assumes the fundamentality of those changes, and furthermore neglects to consider the extent to which the purported changes are either empirically observable or morally relevant. The changes, so far as they are evident among some Māori individuals and groups, might be fundamental in the sense that they are basic or foundational changes, but they might also be regarded as specific to particular groups rather than of a fundamental character for many Māori. Perhaps more significantly, and as Hirini Moko Mead has argued, the most significant change is not that tikanga is no longer universally authoritative among Māori groups, but that living through tikanga, in accordance with the philosophies it embodies, is now a choice rather than a given.[62]

---

57 Vienna Convention on the Law of Treaties, above n 42, art 62.

58 "Half-Life", above n 1, 171.

59 The problem of reconciling these two conceptions of Māori authority have been well-documented in recent academic work, as well as in the reports of the Waitangi Tribunal. See for example Andrew Sharp "Traditional Authority and the Legitimation Crisis of 'Urban Tribes': The Waipareira Case" (2003) 6 Ethnologies Comparées; and Lyn Waymouth "The Bureaucratisation of Genealogy" (2003) 6 Ethnologies Comparées, both available at <http://recherche.univ-montp3.fr/mambo/cerce/revue.htm> (last accessed 2 November 2006).

60 "Half-Life", above n 1, 175.

61 "Half-Life", above n 1, 176-177.

62 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) 6.

That element of choice was, of course, missing in the process of change which Waldron suggests as the basis for *rebus sic stantibus*. Waldron considers that the "clean-hands" qualification to the doctrine should not preclude thinking about the changes that have occurred and the application of it, despite arguments that "it is *the Crown's fault* that we have had [a] sea-change in governmentality".[63] In particular, he considers that a change in Government's attitude could constitute the type of fundamental change imagined within the *rebus sic stantibus* doctrine, despite that being a change brought about deliberately by one of the Treaty parties. However, the examples he cites[64] seem inappropriate analogies for the New Zealand context, which involves a more powerful Treaty party deliberately forcing change upon (what became) the weaker Treaty party. It was the presence of de facto power, then the assumption and enforcement of legal authority, which allowed the Crown to disregard its Treaty obligations and undermine or prevent the operation of tino rangatiratanga and the continuation of tikanga. The other Treaty party remains (in many but not all cases) in profound opposition to the notion that its authority has been subsumed. In Waldron's examples, the changes in governmental attitudes involve variously: an appeal to *accepted* principles and rules of the international community relating to sovereignty, a change in attitude to environmental responsibilities which might be characterised as a widespread trend amongst States of similar makeup and histories, and a change in attitude in the context of a re-imagining of the ideological landscape after the Cold War which went far beyond the ability of any one State to control. In so far as the direction of international law and ideology today is consistent with a degree of cultural integrity, self-determination and non-discrimination for indigenous peoples,[65] a change in government attitudes which goes against that direction is unlikely to be a defensible ground for repudiating a Treaty which seems consistent with that landscape. This much seems consistent with the way *rebus sic stantibus* principles have been applied in other jurisdictions.[66] In considering the operation of the doctrine's provisions and conditions, as Waldron invites us to do, it seems pertinent to consider these more discreet but perhaps more influential limitations upon the use of the doctrine by the party responsible for bringing about any changes.

Waldron's invitation to consider the application of *rebus sic stantibus* also requires attention to the threshold of "fundamental" change in the context of the Treaty debate. It is indeed difficult to articulate a threshold when the types of changes invoked range from physical to attitudinal, but some attempt must be made if the doctrine itself is to have any practical operation. A threshold of

---

63 "Half-Life", above n 1, 179 (emphasis in original).

64 Waldron's examples include East Germany's repudiation of the Warsaw Pact, Turkey's repudiation of capitulations treaties and changing attitudes towards environmental obligations. See "Half-Life", above n 1, 168-172.

65 See below Part V Tikanga Māori.

66 See discussion of *Washington v Washington State Commercial Fishing Vessel Association* (1979) 443 US 658 below, Part IV B Indigenous Treaties in the United States.

fundamentality which might account for both material, economic and abstract changes might be set, for example, at a level such that no one could reasonably deny that the circumstances no longer pertain and the relevant obligations no longer hold. Taking Waldron's argument that the location of political authority and the obligations of political responsibility in New Zealand have changed, it is far from clear that that threshold would be met. Others asking the same question, whose contact or very identity remains with groups organised along whakapapa lines in accordance with tikanga, might reach a very different conclusion as to the extent of any relocation of authority and representation. The numbers do not matter; the fact that there are Māori who identify with voluntary and non-traditional political or social groupings instead of or in addition to whakapapa-based associations does not mean such traditional authorities do not exist, nor that their claims to Treaty-based justice have been superseded.

It is in this sense unclear how Waldron's suggestion of *rebus sic stantibus* would deal with the particularity of the changes he rests that doctrine upon. Would Waldron's argument suggest that where iwi or hapu maintain or try to maintain functions that have largely been confiscated from them,[67] and where individuals still look to traditional authorities for political action and support, the Treaty remains relevant and binding? The problem is intensified if it is considered that the Treaty was signed not by single "Māori States", but by a confederation and a number of independent tribal leaders. If its international legal status is accepted, a question Waldron raises but does not assess, the Treaty might have to be regarded as a multilateral Treaty – in which case the operation of *rebus sic stantibus* becomes far more difficult. A Treaty between multiple parties can surely not be invalidated through the *rebus sic stantibus* doctrine if the change in circumstances only affects relationships between some of the parties. This problem of dealing with diverse sets of circumstances, rather than a clear and coherent situation applying to all groups similarly, is not explored in Waldron's discussion.

International law not only requires an assessment of *rebus sic stantibus* in light of its opposing legal doctrines, but also the prospect of outcome-focused constraints on the revision of existing treaties or their relegation to historical instruments. The self-determination principle, which Anaya considers to be foundational as a matter of customary international law,[68] would suggest that any cancellation or revisiting of the Treaty of Waitangi must not be undertaken in violation of the recognised rights of indigenous peoples to control their own affairs. Although the New Zealand government has consistently rejected self-determination as an unlimited principle including a right

---

67 The language of confiscation here is not a purely emotive appeal – the inherent connection under tikanga Māori between authority and land ("mana whenua") makes particularly pertinent the successive acts of land confiscation perpetuated by the government since 1840; and the equally significant operation of authority as expertise means that the action taken to repress activities of tohunga as experts and sources of authority can also be seen as a confiscation of hapu authority.

68 S James Anaya *Indigenous Peoples In International Law* (Oxford University Press, New York, 1996) 29.

to secession,[69] the minimal support they offer to "internal" self-determination would seemingly preclude any attempt to revisit the Treaty unless that is what Māori wanted. The joint proposal of New Zealand, Australia and the United States to the United Nations Commission on Human Rights Working Group states:[70]

> We want, once and for all, to affirm that indigenous peoples are not only equal in human dignity, but are empowered to chart their own destinies through self management over their local and internal matters in close cooperation with the States in which they reside.

This position would not preclude a revision of the Treaty relationship, but requires that Māori groups be behind that process rather than have it imposed upon them. Similarly, international law guarantees of cultural integrity and non-discrimination would require that the continuing relevance of the Treaty be considered against this matrix of rights that require non-assimilationist policies.[71] As Anaya argues:[72]

> The rights of indigenous peoples to maintain the integrity of their cultures is a simple matter of equality of being free from historical and ongoing practices that have treated indigenous cultures as inferior to the dominant cultures. The right to equality and its mirror norm of non-discrimination are at the core of the contemporary human rights regime.

Waldron's argument, that the use-by date of the Treaty is invoked by the effective shift of Māori political authority onto the branches of the State, comes very close to the assimilationist model which international law expressly precludes. The suggestion that the Crown's first deliberate and now de facto assimilation of tribal authority functions could be relied upon to negate one of the strongest remaining claims against that process – the Treaty of Waitangi – is more than a little problematic.

---

69 For more detail on the New Zealand government's recent position, see *Self-Determination Proposal of Australia, New Zealand and the United States: Explanatory Note* (submitted to UN Commission on Human Rights: Working Group on the draft Declaration on the Rights of Indigenous Peoples, 13 December 2005), available online at <http://www.mfat.govt.nz/> (last accessed 28 October 2006) [*Self-Determination Proposal*].

70 *Self-Determination Proposal*, above n 69.

71 On the articulation of the cultural integrity and non-discrimination principles, see S James Anaya "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21 Ariz J Int'l & Comp L 16-27 ["International Human Rights and Indigenous Peoples"]. New Zealand is not a party to all of the specific instruments articulating these principles, but is party to the core documents from which these have been elaborated, including the International Convention on the Elimination of all Forms of Racial Discrimination (7 March 1966) 660 UNTS 195 and the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

72 "International Human Rights and Indigenous Peoples", above n 71, 16.

The point of this analysis, however, is not to evaluate the strength of the international arguments in each direction, rather to indicate the presence of multiple pointers attached to the international legal signpost. There are reasons to choose the international law signpost and follow one of its paths, but the choice of which direction to follow is inevitably informed by the other signposts on the landscape. Furthermore, the relative manipulability of international legal arguments – where a criticism of the treatment of Māori from the United Nations Committee on the Elimination of Racial Discrimination (CERD) is dismissed by the Government as stemming from a United Nations sidebar, lacking any rigorous process,[73] but praised by indigenous groups as a vindication of their claims[74] – means it will likely never stand alone as a persuasive signpost to follow towards intercultural justice. Other signposts must be invoked to see where their respective paths might intersect.

IV LEGAL AND CONSTITUTIONAL COMPARISONS WITH THE UNITED STATES

A The Use of Legal Comparison

Waldron pushes the New Zealand Treaty and indigeneity debates in a useful direction by recommending the consideration of United States treaty jurisprudence, and suggests that New Zealand academics have been guilty of constitutional parochialism "in our studied ignorance of American treaty jurisprudence".[75] Waldron goes on to look at the United States constitutional law of treaty rights, and examines two cases that he sees as illustrating the *rebus sic stantibus* approach to treaties with indigenous peoples.

However useful Waldron's reminder, it must be kept in mind what use we are making of others' legal practice – are we arguing that their legal doctrine should be applied in our currently existing law, or are we advancing normative arguments that our law should contain such a legal doctrine, even though it currently does not? We must ask (i) whether others' legal doctrine could inform our legal doctrine because of the similarities in our respective legal systems and laws, or (ii) whether there are constitutional or legal differences that militate against useful comparison. If (ii) applies, then any further use of the comparative example must be (iii) asking whether the political and normative impulses that underlie their legal practices are ones that we share and should therefore seek to emulate in our own legal practice.

Paul McHugh considered this need to recognise constitutional and legal differences in *The Māori Magna Carta*, devoting two pages to considering the legal import of United States treaty law

---

73 Charters and Erueti, above n 20, 258.

74 Charters and Erueti, above n 20, 288.

75 "Half-Life", above n 1,173.

for New Zealand.[76] He spends nine pages describing Canadian treaty law.[77] The obvious reason for the discrepancy is that Indian treaties in the United States are supreme law (unless abrogated by Congress), and – applying (ii) above – this doctrine is so foreign to New Zealand's legal structure that United States practice, except perhaps their interpretation doctrines, has little to teach us. In contrast, the Canadian context is similar enough to consider applying, but McHugh cautions against using it given the constitutional recognition of treaty rights in Canada;[78] differences in the status of the parties (sovereign Māori versus non-sovereign Canadian Indians); and the subject matter of the treaties (sovereignty cession versus land cession).[79] What *The Māori Magna Carta* makes clear is that the comparative importance for New Zealand of United States and Canadian legal practice relating to indigenous treaties is limited by the particular legal circumstances that pertain in those two countries. From the supreme status of treaties in the United States and their constitutional protection in Canada, there is little legal doctrine that can be applied in New Zealand. Our legal situation means that we can import a recognition that the Treaty binds the Crown in its executive capacity (and not its legislative capacity) and the interpretive approach to treaties and legislation that affects treaty rights.[80] This is the comparative doctrinal legal importance of North American treaty law, in relation to the orthodox law relating to the Treaty in New Zealand.

If, however, we move from (i) to (iii), and consider the wider principles and normative impact of that legal practice, more can be said. This is what we take Waldron to be doing when he identifies what looks like the application of *rebus sic stantibus* in United States Indian law. His argument seems to run thus: there is a useful normative principle that lies behind the international legal principle of *rebus sic stantibus*; we should consider whether the normative principle can inform our question of the continuing significance of treaties in Aotearoa New Zealand; and it seems that this normative principle has also made it into the United States law relating to indigenous treaties. Waldron argues that while we cannot apply United States legal doctrine, we should access it to

---

76 *The Maori Magna Carta,* above n 6, 157-158.

77 *The Maori Magna Carta,* above n 6, 158-161.

78 Treaties were given constitutional recognition in 1982. See Constitution Act 1982 (Can), s 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

79 *The Maori Magna Carta,* above n 6, 161.

80 *The Maori Magna Carta,* above n 6, 166.

inform our legal doctrine.[81] Though it has shades of (i), in terms of our analysis above, Waldron seems to be using (iii).[82]

It is always useful to ask (iii) questions in comparing our legal and political practices with those that go on elsewhere. We might consider, for example, the normative impulses that lay behind the constitutional recognition and affirmation of aboriginal rights and treaties in the Canadian constitution, and ask "why not the same here?" Indeed there is ample precedent to suggest that in many matters, the comparative question of "why not here?" is answered "no reason", and the courts might move as far as they constitutionally can to remedy the discrepancy.[83] We see similar appropriations of other legal systems' practices in the Canadian interpretation of treaties,[84] Australian recognition of native title,[85] our own (unsuccessful) proposals to include Maori rights in the New Zealand Bill of Rights Act 1990,[86] and our suggestions of recognition of common law (as opposed to statutory) fiduciary duties.[87] Similarly, it is conceivable that the same sort of comparative borrowing might apply to international law, as Waldron suggests.

But cautions of the (ii) variety must always remain in terms of identifying comparatively relevant legal principles. A legal doctrine might seem to serve a just and useful purpose in one legal system, and still be ill-suited to appropriation into another legal system. What then can we say in response to Waldron's invitation to draw upon United States federal jurisprudence relating to indigenous treaties?[88]

---

81 "Half-Life", above n 1, 173: "My question now is not: why are we not *applying* American doctrine in New Zealand cases? My question is: why are legal scholars who study the Treaty of Waitangi not even accessing this body of jurisprudence for consideration and discussion in the New Zealand context?"

82 "Half-Life", above n 1, 173: "legal analysis always works on the basis of imperfect analogies and the exploration of similarities in the midst of difference. (That is what I am doing in this lecture.)"

83 As Cooke P (as he then was) observed: "in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America". See *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655 (CA) Cooke P for the Court.

84 *R v Sioui* [1990] 1 SCR 1025, citing *Jones v Meehan* (1899) 175 US 1.

85 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

86 See Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Oxford, 2004) 347.

87 See the comments by Cooke P (as he then was) in *Te Runanga o Muriwhenua Inc v Attorney-General,* above n 83, 655; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 306-309 (CA); and *Te Runanganui o Te Ika Whenua Inc Soc v Attorney General* [1994] 2 NZLR 20, 25-27 (CA). For discussion see Alex Frame "The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?" (2005) 13 Waikato LR 70.

88 The response is necessarily limited to United States jurisprudence for reasons of brevity. The Canadian practice has attracted considerable academic attention: see for example *Royal Commission on Aboriginal*

B Indigenous Treaties in the United States

1 No signs of rebus sic stantibus

In the United States constitutional order, Indian treaties have the same force of law as international treaties.[89] They are similarly subject to the rule that treaties with foreign nations can be abrogated or modified, expressly or (if the intent is clear) impliedly,[90] by a subsequent Congressional statute, as seen early on in *Lone Wolf v Hitchcock*[91] and later in *Rosebud Sioux Tribe v Kneip*.[92] Despite this looming federal power, treaties made hundreds of years ago still provide binding legal protection to tribes, as seen in *United States v Dion*[93] and *Minnesota v Mille Lac Band of Chippewa Indians*.[94] This provokes the obvious (iii) question: "the treaties between the federal government and the tribes continue to provide legal protection to tribes – why not here?" We will set this question aside for a moment to look at the one that Waldron asks: "*rebus sic stantibus* is applied to indigenous treaties in the United States – why not here?"

One answer to that question is to deny that the United States courts apply a normative principle of *rebus sic stantibus*. In *United States v Dion* the Supreme Court applied a constitutional doctrine relating to treaty abrogation through legislation, not the *rebus sic stantibus* principle.[95] New

---

Peoples (Minister of Supply and Services, Ottawa, Canada, 1996), Robert Williams Jr *Linking Arms Together: American Indian Treaty Visions Of Law & Peace, 1600 - 1800* (Oxford University Press, New York, l997). See generally Thomas Isaac *Aboriginal Law: Commentary, Cases and Materials* (Purich Publishing Ltd, Saskatoon, 2004) 71-110. For leading cases see above n 29.

89 US Constitution, art 6 cl 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." That tribes could make treaties with the United States was made clear in US Constitution, art 1, s 8 cl 3: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

90 On the evidence necessary to show an intention to abrogate treaty rights see *United States v Dion* (1986) 476 US 734, 738-740 and David E Wilkins "The Reinvigoration Of The Doctrine Of 'Implied Repeals': A Requiem For Indigenous Treaty Rights" (1999) 43 Am J Legal Hist 1.

91 *Lone Wolf v Hitchcock* (1903) 187 US 553, 566. On the legislative abrogation of Indian treaties generally, see Charles F Wilkinson & John M Volkman "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth' - How Long a Time Is That?" (1975) 63 Cal L Rev 601.

92 *Rosebud Sioux Tribe v Kneip* (1977) 430 US 584.

93 *United States v Dion*, above n 90.

94 *Minnesota v Mille Lac Band Of Chippewa Indians* (1999) 536 US 172. See also "State Sovereignty – Compatibility with Indian Treaty Rights" (1999) 113 Harv L Rev 389.

95 *United States v Dion,* above n 90.

Zealand already has this constitutional feature: the legislature can abrogate the Treaty as much as it wants, as a matter of law.[96]

Similarly, the *Puyallup Tribe* cases that Waldron cites do not disclose an application of *rebus sic stantibus*.[97] In each case, the treaty was held to bind the federal and State governments unless it was abrogated by Congress. Any derogation from or "balancing" of tribal rights was explained with reference to the treaty's express terms.[98] The result was reached through standard treaty interpretation and constitutional analysis, not through appeals to fundamental changes in circumstances rendering the treaty inapplicable. The normative impulse of *rebus sic stantibus* that Waldron identifies is either non-existent, or else a very shallow undercurrent. Again, this same current already exists in our system, where Treaty rights to lands, forests, fisheries and taonga do not result in restoration of full legal ownership, but a share balanced against the competing interests.[99]

In fact, the Supreme Court decision in *Washington v Washington State Commercial Fishing Vessel Association* established that treaties from 1854 and 1855 reserving tribal fishing rights "in common with all citizens" were to be applied in 1979 so that the tribes were entitled to a 45-50 per cent share (again "in common") of harvestable fish passing through their recognized tribal fishing grounds.[100] *Rebus sic stantibus* was not applied to avoid the United States' treaty obligations. Instead the Treaty was applied, with its original "in common" rights upheld, even in the face of a fundamental change in circumstances since the 1850s:[101]

---

96 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board,* above n 28, 313-314 and 316 Viscount Simon LC for the Court.

97 *Puyallup Tribe v Department of Game* (1968) 391 US 392; *Department of Game of Washington v Puyallup Tribe* (1973) 414 US 44; *Puyallup Tribe v Department of Game of Washington* (1977) 433 US 165; *Washington v Washington State Commercial Fishing Vessel Association*, above n 66.

98 See *Puyallup Tribe v Department of Game,* above n 97, 397-399; *Department of Game of Washington v Puyallup Tribe*, above n 97, 49: "the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets"; *Puyallup Tribe v Department of Game of Washington,* above n 97, 174-177: "if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and 'pursue the last living [Puyallup River] steelhead until it enters their nets.' In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek".

99 See for example Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) ch 3: the guarantee of fisheries resulted in a settlement constituting 23 per cent of the commercial fishing quota and 20 per cent of the quota for new species.

100 *Washington v Washington State Commercial Fishing Vessel Association*, above n 66, 674-685.

101 *Washington v Washington State Commercial Fishing Vessel Association*, above n 66, 675.

> [T]here was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need. Their right to take fish could therefore be adequately protected by guaranteeing them access to usual and accustomed fishing sites which could be – and which for decades after the treaties were signed were – comfortably shared with the incoming settlers.

Perhaps *rebus sic stantibus* exists in the Court's suggestion that percentage was a maximum that could – in line with the previous principle of treaty rights that they should be only enough for a livelihood (a moderate living) – be modified, "in response to changing circumstances" *related to the tribe*, for example if it dwindled to a few members or found other means of subsistence.[102] However, the Court suggested that a change in circumstance *related to the resource* would not lead to a diminishment of the 50 per cent share of the tribe, but a higher share. The Court stated: "We need not now decide whether priority for such uses would be required in a period of short supply in order to carry out the purposes of the treaty."[103] The implication is that if supplies fell so significantly that a 50 per cent share would not secure what was necessary for ceremonial and subsistence needs – the rights secured by the treaty – the court might consider excluding fish taken for such purposes from the total harvest to be shared between the Indians and other citizens. This does not flow expressly from the words of the treaty, which merely guarantee the right to fish as a share "in common". The Supreme Court is speculating that *rebus sic stantibus* might be applied to alter the treaty *to the benefit of the tribes*, consistent with the *United States v Winans*[104] view that treaty rights are reservations from grants from the tribes, rather than grants to the tribes. *Washington* only discloses a suggestion of *rebus sic stantibus* in favour of indigenous rights, which is an affirmation that the treaty is of continuing relevance.

2 Changing circumstances, continuing tribal sovereignty

It is notions of tribal sovereignty, rather than a *rebus*-like doctrine, that is the intellectual resource able to be extracted from United States practice to inform our question of the continuing significance of our Treaty, because it informs our understanding of the continuing existence of tribal political authority. The practice of tribal sovereignty in the United States provides a vivid example of how little has "fundamentally changed" in terms of *cultural identity and political allegiance*

---

102 *Washington v Washington State Commercial Fishing Vessel Association*, above n 66, 686-687.

103 *Washington v Washington State Commercial Fishing Vessel Association*, above n 66, 688.

104 *United States v Winans* (1905) 198 US 371, 381: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, *the treaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted.* And the form of the instrument and its language was adapted to that purpose" (emphasis added).

among at least some Indians and their tribes.[105] Perhaps the most striking – and sometimes misleading – notion that a New Zealander can take from United States Indian law is that the tribes remain sovereign.[106] The New Zealand lawyer, schooled in absolute Parliamentary sovereignty and the non-justiciability of sovereign power, would be forgiven for being shocked at Chief Justice Marshall's decision in *Worcester v Georgia*, which held that the tribes retained sovereignty even though they were within the bounds of the United States. New Zealand and Australian courts throw such pleadings out with little effort,[107] affirming the current jurisdictional jealousy of the common law.[108] New Zealand's early common law history of Crown sovereignty even refused to recognise any prior sovereignty in the Māori tribes, in deference to the then orthodox constitutional theory.[109]

The point is that a concept of *rebus sic stantibus* – or something like it – has not been applied to eliminate or renounce social facts of tribal allegiance and the continuing sovereignty of tribes in the United States. There have been fundamental changes in the circumstances relating to the relative power of tribal, state, and federal governments, and these have been recognised by federal government and judiciary decisions. This was the enduring point laid down by *United States v Wheeler*:[110]

> Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.

Thus, the basic approach in federal Indian law – that some elements of tribal sovereignty have been divested by the incorporation of the tribes into the United States federal system – is premised on the recognition of fundamental changes in circumstances that have arisen because of that incorporation. This is not *rebus sic stantibus* being applied to treaties, but recognition of the continuing political existence of the treaty partner, albeit with powers that differ from pre-treaty days. This continuing relevance of both treaties and the treaty-paradigm of self-determination policies provides an important normative impulse that should be considered for its applicability to our own situation. This is the lesson we should take from the United States.

---

105 For a discussion of the evolution of tribal sovereignty in the United States see Robert Clinton "There Is No Federal Supremacy Clause for Indian Tribes" (2002) 34 Arizona State LJ 113.

106 See *Worcester v Georgia* (1832) 31 US 515; *United States v Lara* (2004) 541 US 193.

107 *Berkett v Tauranga District Court*, above n 27; *Coe v Commonwealth* (1979) 24 ALR 118.

108 For an analysis of a time when the British Crown accepted co-existing sovereignty see Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2004) Chapter 2.

109 Paul McHugh "A History of Crown Sovereignty in New Zealand" in Sharp and McHugh (eds) *Histories, Power, and Loss*, above n 6.

110 *United States v Wheeler* (1978) 435 US 313, 323.

C Lessons for New Zealand

The foregoing analysis has shown that in the United States, *rebus sic stantibus* does not dominate legal doctrine. Instead, treaties are considered to be enduring compacts, which remain legally binding despite fundamental changes in circumstance. This recognition might be characterised as a recognition that despite changed circumstances, treaties represent negotiations and agreements about justice that fulfil an "overlapping consensus" or overlapping consensus function. They mediate between existing ways of life, and recognise inherent rights of sovereignty and self-government that still inhere in indigenous political entities. In the United States this is seen in a wide range of federal, state, and Supreme Court measures and decisions that affirm a degree of tribal sovereignty, in accordance with self-determination policy.[111]

This conclusion has also been offered within in our own debates, for example in the words of J G A Pocock:[112]

> [I]t is evident to our historic sensibility that any [indigenous] treaty was a compact between two discourses, two means of understanding and operating what it was, and the modern indigenous nation has access to both European means of interpreting a treaty and to the modernised form (whatever it may be) of the indigenous discourse by which the treaty may have been understood then and is understood now. … The [indigenous nation] can therefore (1) claim to be the 'nation', sovereign to the point of ceding some things and retaining others, which the original treaty presumed it to be; (2) operate its indigenous discourse to affirm its customary, traditional, genealogical, and mythic identity, and employ this identity in affirming its legal personality under the treaty and claiming rights, or compensation for lost rights, in both treaty and traditional terms.

This vision of indigenous treaties infuses legal practice in the United States and New Zealand. It controverts *rebus sic stantibus* as a relevant optic through which to answer the question of the continuing relevance of our Treaty. The reasons for its adherence are likely complex, but we might suggest that it adheres because of its resonance with certain strands of western political theory, considered in part VI below, and with elements of what tikanga Māori might suggest for the continued significance of the Treaty.

V TIKANGA MĀORI

A The Signpost of Tikanga Māori

A number of (mostly Māori) academics have considered key aspects of tikanga in a way that makes them accessible to non-Māori audiences.[113] Although tikanga Māori and its underlying

---

111 The most recent affirmation of tribal sovereignty is *United States v Lara*, above n 106.

112 J G A Pocock "Law, Sovereignty and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi" (1998) 43 McGill LJ 481, 487.

values in mātauranga (Māori philosophy) provide an independent system which neither needs a foundation in a Treaty landscape, nor is always in line with Treaty-based outcomes, lessons from tikanga can be suggested where they may affect the continuing status of the Treaty. Importantly, the tikanga signpost offers guidance both in the manner of the international and State-centric legal signposts above, where particular doctrines, rules and practices are suggested, and in the manner of the philosophical positions assessed below which offer justifications and evaluations for those practical directions. The closely integrated nature of values and practices in tikanga means that the signpost cannot be considered as either one of law or philosophy, but rather synthesises both into a coherent system.

This article advocates the value of using both philosophical and practical frameworks of argument to indicate the role of the Treaty in the landscape of inter-cultural justice; it simply insists that where such knowledge is relied upon, it is done in a way which makes use of philosophy and practice from both sides of the cultural divide. Mātauranga and its practical manifestations in tikanga provide a rich array of arguments to be invoked in debates over Treaty-based justice and the continuing role of the Treaty.

It should be clarified that this discussion does not attempt to consider all relevant lessons from mātauranga and tikanga which may offer guidance on the relevance of the Treaty and suggest a pathway to follow. The perspective offered here is unavoidably an "external point of view" towards Māori philosophy and practice – but importantly it is from outsiders trying very hard to understand the "internal point of view" – so as to consider whether mātauranga and tikanga might offer wisdom and direction that even outsiders can understand. It therefore focuses on aspects of tikanga and mātauranga identified from the knowledge and experience of others willing to share or explain that taonga, but it uses the language of the outsider which, as Mead argues, automatically alters the process of understanding tikanga.[114] Though it can be argued that Pakeha commentators should not present the concepts of tikanga "as though they were qualified to understand what they meant",[115] such an attempt at understanding is precisely the basis upon which a Treaty process is conducted, and is not inconsistent with the practice of debate and dialogue within both tikanga and Western political philosophy. Treaties are always a dialogue between at least two parties. It falls on both sides to try to understand the others' positions and beliefs, and to correct each other when they make

---

113 See for example Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Maori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melborne, 2005); Mead, above n 62; C Barlow *Tikanga Whakaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1991). Also see New Zealand Law Commission, above n 10.

114 Mead, above n 62. Compare Pocock "The Treaty Between Histories" in Sharp and McHugh (eds) *Histories, Power and Loss,* above n 6, 78-79.

115 Ani Mikaere "Review of *Waitangi: Māori and Pakeha Perspectives on the Treaty of Waitangi"* (1990) 14 NZULR 97, 99.

the inevitable mistakes. Here, the task of understanding tikanga is more difficult from an outsider's perspective, but this does not preclude an appreciation of some central principles and practices where there is a willingness to try.

The Treaty and Te Tiriti – the Māori version – contain at least some pointers towards tikanga as one signpost for working out what inter-cultural justice requires. The Treaties are clearly based upon assumptions of difference and an assumption that negotiation is necessary to work out how to co-operate despite that difference. The difference assumption is evident in both texts, but is particularly clear from the Māori text. The guarantee of rangatiratanga in Article Two has been exhaustively debated by numerous scholars in work that will not be repeated here,[116] but is worth revisting from the perspective of a signpost towards upholding the relevance of the Treaty. Where it protects "the chiefs, the sub-tribes and all the people of New Zealand in the unqualified exercise of their chieftainship …", Article Two protects not the rights of settlers who will acquire the rights of British citizenship, but the rights of hapu and their authorities to continue as the administrators of citizenship in their own groups. Where it provides for Māori to acquire all the rights and duties of British citizenship in the English text, the Māori text, which protects "tikanga", rather suggests that rights, citizenship and identity would continue in accordance with tikanga and not be subsumed under British notions of citizenship.[117] Importantly, these guarantees of differentiated rights and authority are not time-limited, and nor is the grant of governorship to the Crown.

So much for difference-blind liberalism and *rebus sic stantibus*; the Treaty neither points us in that direction nor suggests a point in time at which that approach should be followed. Rather the Treaty leads us to ask how to give effect to inter-cultural justice not only by asking what the English concepts require, but also "what are the substantive concepts and procedural processes of tikanga [and] how are they to be applied today."[118] As Mikaere argues:[119]

> The Treaty considered in context is a reaffirmation of Māori authority, meaning that the highly developed and successful system of tikanga that had prevailed within iwi and hapu for a thousand years

---

116 See for example Bruce Biggs "Humpty-Dumpty and the Treaty of Waitangi" in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty*, above n 51.

117 Sir Hugh Kawharu argues that "There is a real sense here of the Queen "protecting" (ie, allowing the preservation of) the Māori people's tikanga (ie, customs) since no Māori could have had any understanding whatever of British tikanga (ie, rights and duties of British subjects.) This, then, reinforces the guarantees in Article 2." I H Kawharu's modern English translation of the Māori text of Te Tiriti, fn 11, available at <http://www.treatyofwaitangi.govt.nz> (last accessed 2 November 2006). Also see Nicole Roughan "Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy" (2005) 3 NZJPIL 1.

118 David V Williams "Unique Treaty-Based Relationships Remain Elusive" in Belgrave, Kawharu and Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, above n 113, 370.

119 Mikaere, above n 113, 334.

> would retain its status as first law in Aotearoa; the development of Pakeha law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Māori.

This textual approach, focusing on what can be derived from the Treaty's terms, is itself a product of the lawyer's lens, and one which, though useful for the purposes of juridifying Treaty claims, is not the approach which tikanga itself might support. The Waitangi Tribunal, for example, has considered that:[120]

> A Māori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.

To get to the heart of what tikanga might require in relation to the Treaty's role in contemporary inter-cultural justice, the underlying concepts and beliefs need to be explored in detail. What is a "Māori approach" to the Treaty? What is the wairua of the Treaty? And importantly, what does this indicate about the current importance of the Treaty despite any changes in circumstances that have occurred?

The difficulties of presenting a "Māori approach" to the Treaty go beyond the familiar empirical observations about differences between Māori groups and their distinct responses to the Treaty. Under tikanga, the histories that appear most influential are not necessarily "Treaty histories", but "whakapapa histories" which Māori groups and individuals use to indicate where they have come from and where the boundaries of their identity lie.[121] These histories of ancestors, land and group relationships, rather than those premised upon relationships constituted upon the Treaty, provide the explanation and justification for the myriad of differences between Māori groups which makes any search for a "Māori approach" an exercise in generalisation. It is these histories which are recounted in disputes between Māori groups, or in contrast to the notion that "Treaty constitutionalism" is the preferred path for contesting and rebalancing political authority.[122] The Treaty, even in its most optimistic light for the exercise of rangatiratanga, can never be the basis for deciding all issues of contested authority; only those which depend upon the inter-cultural relationship ties of friendship rather than whanau, and of entwined history rather than whakapapa.

Where there are Treaty histories, however, and where these are the subject of present-day claims made by hapu or iwi against the Crown, the tikanga and kawa of particular groups are unavoidably in play. The same must be true of a broader assessment of the continued role of the Treaty, not just in particular disputes, but within a landscape where so many grievances remain outstanding. In a

---

120 Waitangi Tribunal *Motunui-Waitara Report: Wai 6* (2 ed, Government Printer, Wellington, 1989) 10.1.

121 Andrew Sharp "Some Recent Juridical and Constitutional Histories of Māori" in Sharp and McHugh (eds) *Histories, Power and Loss*, above n 6, 48-56.

122 See generally Sharp, above n 121.

broad sense, the negotiation context, the interpretive context and the application context of the Treaty are all informed by the principles which, though varying in practice according to local preferences, might have been identified as the core elements of mātauranga upon which tikanga practices are based. These values must also underscore answers from tikanga to the question of the Treaty's continuing relevance today.

These core elements begin with the underlying concepts which underpin mātauranga and its embodiment in tikanga. These "fundamental principles and values that underpin Māori law"[123] do not lend themselves to a hierarchical diagram but are seemingly interconnected; the choice here to examine some basic values is open to contest, much as Western philosophy seems in perennial contest over the relative centrality of such concerns as justice, morality and truth. This discussion explores three fundamental elements: mana, i nga wa o mua, and whakapapa, considering how each informs the concepts of utu, whanuangatanga, manaakitanga, and aroha.

The concept of mana is significant here as a persistent force in Treaty debates, with implications for the continuing relevance of the Treaty or the converse arguments for its supersession. Mana is relevant both to understanding the intended persistence of the Treaty despite changes in circumstances, and for evaluating the argument that, regardless of intentions, the Treaty is now an inappropriate signpost for society to follow.

For both strands of analysis, the importance of mana lies in the personal and relational elements it brings to the Treaty debate. As Mead argues, the emphasis accorded to mana acts to mediate and guide personal relationships, and governs the place of individuals within their group.[124] At the Waitangi hui, the processes of the Crown-chiefs' agreement depended upon the possession and exercise of mana among the chiefs present, and the particular understanding of chiefly authority that came with it. As Lyndsay Head has argued, the rituals of treaty signing may have been fairly foreign to many chiefs unaccustomed to signing written agreements, but the act of giving one's name to something, of backing up a promise with one's chiefly authority, was not. According to Head:[125]

> [T]he chiefs offered to the British *the power of their names,* which was the effective form of their authority. This gives an idea of the weight of the world the chiefs hoped to gain, and constitutes the Māori authority of the treaty. ... The signatures give moral seriousness to the Treaty of Waitangi.

---

123 For discussion of what these principles are and how they relate see New Zealand Law Commission, above n 10, paras 124-129.

124 Mead, above n 62, 29.

125 Lyndsay Head "The Pursuit of Modernity in Māori Society" in Sharp and McHugh (eds) *Histories, Power and Loss*, above n 6, 110.

It was mana that the chiefs acted upon when signing the Treaty, and the separate mana of the Queen's representatives that was acknowledged by that signing. Mana was neither signed away nor signed over, rather it drove the actions of all parties in the processes of negotiation and agreement. The force of mana was "everywhere but unspoken", and its power "is indicated by its absence from the text."[126] Seen in this light, the Treaty is a product of the exercise of mana, not its explicit recognition. This suggests that mana is not (nor could ever be) conditional upon Treaty relationships, but it further suggests that whilst mana remains a fundamental regulator of Treaty relationships, those relationships cannot be unbound without some damage or insult to the mana of at least one party – and probably both.

Actions in accordance with the Treaty, or in the breach thereof, affect the mana of all actors in either a positive or negative fashion.[127] To argue, as Waldron suggests, that the Treaty is a product of circumstances which no longer prevail, and to use as evidence for that argument the decline of traditional tribal authority, would seem to offend the mana of those who signed the Treaty and their descendants, those who have continued to fight for its recognition, and those tribal authorities whose own mana remains very much alive. As Head argues, for Māori at the time of the Treaty, "authorities were people, not abstractions."[128] To the extent that this personalisation of authority through the concept of mana remains, any change in recognised authority is a change in the mana of a particular person or persons, not a change in political attitudes towards "governmentality" as Waldron suggests.

The concept of mana might also suggest the continuing significance of Treaty obligations through its fundamental role in giving effect to the Treaty's substantive guarantees. The Treaty's protection of tino rangatiratanga has been given content by analysts such as Mason Durie through the "four fundamental foundations" of mana wairua (spiritual dimension), mana whenua (relationships with land), mana tangata (individual well-being) and mana Ariki (the authority of Ariki/chiefs to lead peoples).[129] None of those principles or foundations can be time-limited, though they may be affected by the conduct of groups and individuals. Mana whenua, for example, has been characterised as depending upon whakapapa and could originate with take Tupuna (ancestral rights), then be maintained through ahi kaa (long burning fires).[130] Importantly, mana

---

126 Head, above n 125, 104.

127 For example, the Waitangi Tribunal in *Te Whanganui-a-Orotu Report on Remedies: Wai 55* (Government Printer, Wellington, 1998) considered that a restoration of land lost as a result of treaty breaches would be a restoration of the claimants' mana (see part I.6.4).

128 Head, above n 125, 106.

129 Mason Durie "Tino Rangatiratanga" in Belgrave, Kawharu and Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, above n 113, 8-9.

130 See for example Waitangi Tribunal *Te Whanganui-a-Orotu Report: Wai 55* (Brookers, Wellington, 1995) 2.5.3, citing claimant witness Toro Waaka (E14:4).

whenua sustained through ahi kaa relates not merely to physical presence, but the persistence of memory and relationships to that land.[131]

Changes in circumstances, therefore, even (or especially) where those circumstances involve the removal of a group from its domain of mana whenua and the rupturing of the inherent link between land and authority, do not end the operation of rights and obligations. Similarly, Durie's definition of mana tangata as "citizenship rights and freedom from financial dependence on governments"[132] indicates that mana tangata cannot be considered superseded by circumstances where the government has become the de facto authority and provider – because mana tangata is expressly defined in opposition to that structure of authority. The Treaty guarantees of tino rangatiratanga (and tikanga) draw much of their content from principles which cannot be overridden by the type of change in circumstances envisaged by Waldron.

A second philosophy underpinning tikanga practice and principle is the concept i nga wa o mua, which for Māori means what English would render as "the past", but which translates literally as "the times of front". Here, the past is regarded as being always in front of those in the present, because it can be seen and remains as a source of knowledge, in contrast to the future which is "behind us" because it is unknown and we cannot see it.[133] This guiding concept underscores many specific aspects of tikanga where the past is regarded as an ongoing element in the present. In relation to ancestry, recitations of whakapapa begin with the earliest ancestral lands and people; pepeha (introductions) start with whakapapa before giving details about an individual. The taonga of knowledge is passed on from ancestors and held in great regard for that reason; land and the physical world are to be protected by the guardians whose ancestors were guardians of that same land; and crucially, relationships between groups are perpetual, ongoing, and not to be covered over or forgotten by the passage of time.[134] All that which has occurred in the past, and those who have lived there, remain as part of the present community and on into the future.

---

131 For example see *Akuhata Wineera and others for Ngati Toa Rangatira* (Maori Appellate Court, Brief of Evidence of Matiu Nohorua Te Rei # 1, Wai 207) in Dr G A Phillipson *The Northern South Island: Rangahaua Whanui District 13* (Waitangi Tribunal, Rangahaua Whanui Series, June 1995) ch 10: "the maintenance of traditional stories, the maintenance of whakapapa … the remembrance of wahi tapu, battles won and lost, is evidence of the maintenance of that ahikaa."

132 Durie, above n 129, 8.

133 See for example Joe Williams "Truth, Reconciliation and the Clash of Cultures in the Waitangi Tribunal" (2005) ANZLH E-Journal 234-235, available at <http://www.anzlhsejournal.auckland.ac.nz> (last accessed 2 November 2006).

134 Joan Metge *New Growth From Old: The Whanau in the Modern World* (Victoria University Press, Wellington, 1995) 100.

The implications of this understanding of time and continuity could have been applied to examine the continued significance of the Treaty, where a popular argument would suggest:[135]

> It was because of this [philosophy] that the Māori did not conveniently forget about the Treaty of Waitangi once it was signed, as we face the past and it has always been in front of us, hence the reason that it has never been forgotten.

This ever-presence of the past in contemporary life is perhaps most significant for understanding ongoing relationships and the mutual expectations of interacting parties. It requires that the practice of utu[136] should work to link groups together in relationships – whether friendly or hostile – through generations past and future. Past wrongs, until addressed "with interest", remain outstanding, while past good deeds must be met with even greater kindness so as to ensure that relationship continues. From this principle the signing of the Treaty, whatever the nature of the relationship it embodied between Māori and the Crown, was an act within a previous history of interaction and which itself requires continuing deeds in kind by both parties.

It is precisely this idea of continuing relationships between generations that confronts Waldron's reliance on the argument that no Treaty – and specifically not the Treaty of Waitangi – "is fit to be perpetual."[137] Under tikanga, in accordance with the practice of utu based upon the understanding of i nga wa o mua, the Treaty would seem to have an end-date only if the obligations and expectations it imposed were met and then exceeded on both sides, such that a new basis for the relationship was formed. Even then, the Treaty would remain as part of the history of Crown-Māori interaction, understood always as a source of wisdom for future lessons in that relationship.

The second implication of i nga wa o mua is that it supports the characterisation of the Treaty as a living document, and as a symbol within a relationship which extends before and beyond the precise timing of its negotiation. This fundamentally repositions the nature of the Treaty action; rather than an act of "treating" where a full, final agreement is reached which relegates any prior negotiations to secondary interest, the act of treating is informed with the content of prior junctures in the relationship and contains expectations that the future relationship will be added to with new exchanges and interactions. As Lyndsay Head has argued:[138]

> From the Māori point of view, the 1830s were not so much a new dawn as the culmination of decades of traffic between themselves and Europe. This experience, long enough to have its own genealogy, created

---

135 This opinion, presented by an anonymous writer on the website <http://www.tikanga.com> (last accessed 28 October 2006) underscores the pursuit of Tribunal claims, negotiated settlements, and political action.

136 The notion of utu, though sometimes understood as revenge is more accurately a notion of reciprocity. See Metge, above n 134, 100; New Zealand Law Commission, above n 10, paras 156-162.

137 "Half-Life", above n 1, 161, quoting John Stuart Mill.

138 Head, above n 125, 103.

> the conditions where northern chiefs felt a choice had to be made. Their attention to the missionaries, and support for the British, was not without history, but a response to a lived change.

Thus the present view of the Treaty among scholars, lawyers, and politicians who characterise it as "our founding document" or "the great commissive",[139] are in accordance with understandings under tikanga in their suggestion that the Treaty "constituted" obligations and commitments within a relationship. However, by regarding the act of treating as a singular "document" or "act" from "the past", they risk a denial of this more extensive understanding of treating where the genealogy of the relationship extends back to the earliest days of contact and the practice of utu.

This is not to suggest that the signing itself does not have significance, rather that it was the culmination of a period of contact which had already established relationships between Māori groups and Crown representatives, and which was taken thereafter to be the measure against which to assess conduct within those relationships. The status given to the oral and written treaty process at Waitangi and subsequent hui is evident from the words spoken and the eventual agreement, and not only from the decidedly British formal rituals carried out. The practices and philosophies which the Maori treaty partners brought to the negotiation and debates inevitably underscored the significance of the Treaty itself as an act within the inter-cultural relationship.

A final implication of i nga wa o mua lies in the arguments from contemporary Māori political thought and practice, where the difficulties associated with Treaty justice have been considered no excuse for giving up on the full recognition of tikanga under the Treaty today. As Ani Mikaere writes, "the reality for Māori is that we have an obligation to generations past, present and future, to uphold tikanga."[140] The inter-generational obligations owed, to those ancestors in front as well as the descendants as yet unknown, require that no matter how different and difficult the present circumstances, the practices and principles protected by the Treaty must continue to be maintained. In this respect, the Treaty protections are as important (if not more important) in the present than they have ever been, and are not to be subjected to a dualistic view that regards history as having been superseded.

These understandings of time permeate understandings of the continued role of the Treaty following a tikanga signpost. They indicate both that the history of the Treaty's signing remains before us in the modern day, and that the Treaty itself is part of a continuous relationship which is neither confined to history nor without its own history. These understandings then direct attention to the notion of relationships and, in particular, a consideration of the inter-generational and inter-cultural relationships within which the Treaty sits.

---

139 Sharp, above n 121, 44. Sharp considers this view of the Treaty to have been the conception held by the treaty parties.

140 Ani Mikaere, above n 113, 331.

It is here that the final core values of whakapapa and aroha are crucial, along with the manifestations of both values in the obligations that hold between individuals and groups. Although the ties of blood and whanau are the primary organisers for individual relationships under tikanga, and the obligations of whanaungatanga are therefore paramount, the Treaty suggests a basis for the expression of a different kind of relationship. Head argues that in terms of Maori cultural patterning at the time of the signing, "the Treaty made Māori and Pākehā 'friends'."[141] Subsequent events will have developed and altered that relationship in the intervening years, and the extent of enmity or amity between different groups will always be variable, but the crucial element is that a relationship was formed under the Treaty. If Pākehā are tangata Tiriti,[142] or if the Treaty is seen as an immigration compact upon which Pākehā settlers were welcomed,[143] then the Treaty turns out to be central to the nature of the relationship between Māori and Pākehā and the types of obligations it entails.

According to Mead, the expression of manaakitanga ("nurturing relationships") underpins all tikanga, and is "always important no matter what the circumstances might be."[144] A relationship constituted upon the Treaty is no exception and changes in circumstances do not alter that principle. The extension of manaakitanga to visitors or outsiders suggests, as Mikaere argues, that:[145]

> [T]he opportunity to reconsider the treaty relationship should therefore be embraced by [Pākehā] as a means of working towards the security that has, until now, proven elusive. There's no reason to fear a reversal of roles of oppressor – Māori are generous hosts … there is no reason to assume that the generosity of spirit that has for so long characterised Māori conduct towards our visitors will come to an end.

The way to ensure the durability of the Treaty relationship therefore does involve a revision, but not, as Waldron suggests, the unravelling of the basis upon which that relationship was formed and developed. Instead, the revision requires a rebalancing. Tikanga before 1840 was founded upon the "imperative to maintain balance within whanau, hapu, and iwi, the importance of which stemmed from the interconnectedness or whanaungatanga or all living things though whakapapa."[146] The arrival of the Pākehā upset that balance in numerous ways, and the Treaty itself is a suggestion of how to deal with that imbalance so as to nurture the relationship which the Treaty constitutes. To do

---

141 Head, above n 125, 110.

142 This phrase is sometimes used to refer to "people of the Treaty" or "Treaty peoples", usually in a contrasting relationship to "tangata whenua".

143 Williams, above n 8, 66.

144 Mead, above n 62, 29.

145 Mikaere, above n 113, 345.

146 Mikaere, above n 113, 332.

away with that suggested path towards balance would be a revision of the relationship's history in contravention of Pocock's conclusion, that "the treaty commits Pākehā to a history which is theirs, but not theirs to rewrite."[147]

VI WESTERN POLITICAL THEORY

A Liberalism and Overlapping Consensus

The last of the pointers examined here to assess the Treaty's continuing relevance leads us to selections from Western political theory. Most theories with something to say about this question do so through a theory of intercultural justice, taking a branch of Western political philosophy, such as liberalism or communitarianism as their starting point, and justifying rights and responsibilities between cultures on that basis. Thus, Will Kymlicka's *Multicultural Citizenship* uses liberalism to justify minority rights and self-government,[148] Michael Sandel and Charles Taylor use communitarianism,[149] and James Tully appeals to general Western concepts such as liberty and self-rule.[150] The common-ground of these approaches is the acceptance – for reasons pragmatic or principled – of the Western political tradition as the starting point for argument. Kymlicka articulated the pragmatic case for justifying indigenous rights in the Western political tradition thus:[151]

> For better or for worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can understand. Aboriginal people have their own understanding of self-government drawn from their own experience, and that is important. But it is also important, politically, to know how non-Aboriginal [peoples] … will relate them to their own experiences and traditions. … Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.

Such a threshold choice to use Western political theory has tended to close the debate to indigenous political traditions and theories. As the above section indicated, this closure is likely

---

147 Pocock, above n 114, 83.

148 Will Kymlicka *Multicultural Citizenship* (Oxford University Press, Oxford, 1995) [*Multicultural Citizenship*].

149 Michael Sandel *Liberalism and the Limits of Justice* (2 ed, Cambridge University Press, Cambridge, 1998); Charles Taylor *Multiculturalism* (Expanded ed, Princeton University Press, Princeton (NJ), 1994).

150 James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995) [*Multiplicity*].

151 Will Kymlicka, cited in Dale Turner "Liberalism's Last Stand: Aboriginal Sovereignty and Kymlickas's Liberalism" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal, 2000) 136.

counter-productive. However, where indigenous peoples do reply in the language of their political traditions to arguments made using Western political traditions, we can arrive at an impasse. Alasdair MacIntyre argues that even *within* the Western political tradition, different strands have their own vision of justice and of the rationality that elucidates that vision of justice, so that we are doomed to perpetually talk past one another.[152] Something like this argument also appears in the work of our best political philosopher on these issues, Andrew Sharp:[153]

> [S]o Māori and Pākehā, in so far as they are different peoples with different histories and interests, must disagree on some matters of justice (as many other groups too must disagree). Justice for the Māori in New Zealand/Aotearoa – the political society conceived as made up of two *ethnie* – can never be done. It will never be done. Nor will the Māori do justice to the Pākehā. To think it otherwise would be to indulge in wishful thinking and to seek to escape the logic of justice. Each *ethnie* had to see what the other did as injustice. Each will continue to do so, arguing that rights are being violated and injustice done.

Whether this incommensurability does in fact pertain is a crucial question for intercultural justice in general, and for our particular question about the continuing significance of treaties.

In a previous article, Waldron rejected the idea that the liberal tradition cannot "comprehend what is distinctive about Indigenous claims to land and self-government"; that the discourse of indigeneity is incompatible with Western political philosophy altogether.[154] Instead he argued that the discourse on justice cannot be over as soon as "indigenous" is mentioned: "[s]uch claims are not self-justifying. They are meant to be heard and understood, and subject to reason and criticism and examination … by governments as well as by First Peoples."[155] Waldron cannot accept the idea that the indigenous political tradition cannot be interrogated by the Western one – primarily, it seems, because he had just subjected one strand of indigenous political tradition to rigorous critique.

There are two paths out of this impasse. One is through intercultural political engagement, whereby the differing political traditions and languages are compared to look for common concepts on which we might found intercultural agreement. The other path is monocultural, whereby each

---

152 Alisdair McIntyre *Whose Justice? Which Rationality?* (Duckworth, London, 1988). As Tully observes: "When [communitarians] ask the crucial question of 'whose justice?' and 'which rationality?' the answers are always the same: some European, male traditions of interpretation set within the stages view of intellectual history; never a dialogue with any of the non-European traditions … A change in Greek syntax from Homer to Aristotle or a change in the Scottish university curriculum in the seventeenth century appears to be of utmost significance." *Multiplicity*, above n 150, 97.

153 *Justice and the Maori,* above n 6, 285. Though, as below n 183 and accompanying text reveals, Sharp is less pessimistic about the consequences of these contrary visions.

154 "Indigeneity", above n 2, 81, quoting Ivison and others *Political Theory and the Rights of Indigenous Peoples*, above n 54, 9.

155 "Indigeneity", above n 2, 81-82.

political tradition is affirmed by its own constituents as the means by which our living together must be agreed. Similarly, our understanding of the continuing importance of treaties can be informed on purely Western terms, or through an intercultural dialogue. Which path to take – monocultural or intercultural – is a question that itself can be informed from a monocultural point of view, appealing solely to the Western political tradition. However, even such a monological analysis seems ultimately to lead to a search for dialogue between traditions: the ancient maxim *audi alteram partem* – hear the other side – is the best Western response to our question.[156]

Of course, the "Western political tradition" is a catch-all label covering a diverse set of viewpoints,[157] and given the specificity of our current question – the continuing relevance of the Treaty – only those strands most directly implicated can be examined. Here, Barry's criticism above – that those who write about a subject are those with the strongest prejudices about its outcome – does not seem to be met.

We see this most clearly by examining the theory of liberalism, the dominant basic Western political outlook of modern times; more specifically, we see the difference between those considering treaties and those who do not in two different conceptions of liberalism; (i) "ideal rational consensus", "Enlightenment", or "comprehensive" liberalism; and (ii) "overlapping consensus", "modus vivendi" or "political liberalism".[158] The basic difference between these "faces of liberalism", in the words of John Gray, is this:[159]

> Liberalism has always had two faces. From one side, toleration is the pursuit of an ideal form of life. From the other, it is the search for terms of peace among different ways of life. In the former view, liberal institutions are seen as applications of universal principles. In the latter, they are a means to peaceful coexistence. In the first, liberalism is a prescription for a universal regime. In the second, it is a project of coexistence that can be pursued in many regimes.

These two faces of liberalism map onto two enduring perspectives on the political relevance of historical agreements such as treaties. The ideal rational consensus liberal sees treaties as irrelevant to justice, at most epiphenomenal confirmations of the ideal. The modus vivendi liberal sees treaties as symbols of, or tentative steps along the path of, the search for peaceful coexistence between competing ways of life and traditions of justice. On the first view, liberal justice is a universal ideal

---

156 *Multiplicity*, above n 150, 115.

157 G H Sabine *A History of Political Theory* (3 ed, Rinehart and Winston, New York, 1961); Will Kymlicka *Contemporary Political Philosophy: An Introduction* (Oxford University Press, Oxford, 2002).

158 See *Multicultural Citizenship*, above n 148, 158-163; see generally Charles Larmore *Patterns of Moral Complexity* (Cambridge University Press, Cambridge, 1987) and John Gray *Two Faces of Liberalism* (Polity Press, Cambridge, 2000).

159 Gray, above n 158, 2. For an application of this argument to international law, see Gerry Simpson "Two Liberalisms" (2001) 12(3) Eur J In'tl L 537.

allowing the expression of pluralism, which can be worked out monologically. On the second view, liberal justice is the negotiated result of pluralistic ways of life engaging one another, and it must be found through dialogue.

John Rawls is often seen as moving from comprehensive to political liberalism in the transition from *A Theory of Justice*[160] to *Political Liberalism*.[161] Rawls' development of his liberal theory progressed after the 1970s to articulate a middle path between comprehensive liberalism and what Gray and he identify as modus vivendi.[162] The distinction between a modus vivendi and overlapping consensus is crucial for Rawls' political liberalism, and he has made it clear in *Political Liberalism* and its precursor essays.[163] Overlapping consensus seeks to base liberalism not on controversial "liberal" philosophical premises or foundations, but on basic *moral principles* that peoples living together with different ways of life can agree on.[164] Modus vivendi, in contrast, is merely a recipe for peace (the cessation of struggle or hostilities) or is based on "a convergence of self or group-interests".[165] Despite the clear difference between overlapping consensus and modus vivendi conceptions, they both have the crucial difference from comprehensive liberalism that they are not monological but dialogical: without actual negotiation and agreement between ways of life, we cannot have justice between them.

B Two Faces of Liberalism and Treaties

These two sides of liberalism can be illustrated by contrasting the otherwise quite similar positions of Will Kymlicka and James Tully. Both support cultural rights and self-government for groups such as indigenous peoples, but their approaches illustrate the difference between the rational consensus and overlapping consensus liberalisms.

Kymlicka, who is perhaps the most important current liberal supporter of multiculturalism as a theory of intercultural justice, provides a liberal examination of the continuing relevance of "historical agreements" such as treaties.[166] He notes that appeals to historical agreements in contemporary debates on intercultural justice – specifically relating to "group-differentiated rights"

---

160 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (MA), 1971).

161 John Rawls *Political Liberalism* (Columbia University Press, New York, 1996) [*Political Liberalism*].

162 For a comparison of Rawls and Gray's positions see Robert B Talisse "Two-faced Liberalism: John Gray's Pluralist Politics and the Reinstatement of Enlightenment Liberalism" (2000) 14(4) Critical Review 441.

163 John Rawls "The Idea of an Overlapping Consensus" (1987) 7(1) Oxford Journal of Legal Studies 1 ["Overlapping Consensus"]; John Rawls "The Domain of the Political and Overlapping Consensus" (1989) 64 NYU L Rev 233.

164 *Political Liberalism*, above n 161, 8; "Overlapping Consensus", above n 163, 9-12.

165 "Overlapping Consensus", above n 163, 10-11.

166 *Multicultural Citizenship,* above n 148, 116-120.

– have "had little success convincing opponents" of those rights.[167] This is because people who believe that cultural rights are not a part of justice in modern liberal democracies:[168]

> Have not been appeased by pointing to agreements that were made by previous generations in different circumstances, often undemocratically and in conditions of substantial inequality of bargaining power. Surely some historical agreements are out of date, while others are patently unfair, signed under duress or ignorance. Why should not governments do what principles of equality require now, rather than what outdated and often unprincipled agreements require?

This is ideal rational consensus liberalism: if treaties take us away from ideal liberal justice, we should ignore them.

Kymlicka's answer to this is that before we ask what the State must do to ensure equality between citizens, we must ask the prior question about "which citizens should be governed by which States?" or "how did the State legitimately acquire the authority to govern its citizens?"[169] Here Kymlicka links our question of the continuing relevance of treaties to the principle of self-determination. Acceptance of this move requires acceptance of the notion that self-determination is indeed a liberal principle, and this is a contested question.[170] Kymlicka nevertheless justifies the continuing relevance of historical agreements by arguing that they represent the exercise of self-determination by a group, in many cases specifying the terms of incorporation into another state.[171] These agreements therefore define the legitimate authority of the State over these groups' members.[172]

We should not lose sight of a point that Kymlicka makes clear: we are still addressing this article's key question – the continuing relevance of the Treaty – because "the question is not how should the state treat 'its' minorities, but rather what are the terms under which the two or more peoples decided to become partners?"[173]

---

167 *Multicultural Citizenship,* above n 148, 116.

168 *Multicultural Citizenship,* above n 148, 116.

169 *Multicultural Citizenship,* above n 148, 116.

170 Theorists such as Daniel Philpott, Margaret Moore, David Miller, Avishai Margarlit and Joseph Raz have made arguments relating the liberal value of autonomy or self-rule to group rights to self-determination. See Daniel Philpott "Self-Determination in Practice" in Margaret Moore (ed) *National Self-Determination and Secession* (Oxford University Press, Oxford, 1998); David Miller *Citizenship and National Identity* (Polity Press, Cambridge, 2000) 164; Joseph Raz and Avishai Margarlit "National Self-Determination" in Joseph Raz (ed) *Ethics in the Public Domain Essays in the Morality of Law and Politics* (Oxford University Press, Oxford, 1995) 159.

171 *Multicultural Citizenship*, above n 148, 117.

172 *Multicultural Citizenship*, above n 148, 117.

173 *Multicultural Citizenship*, above n 148, 118.

Look back to the point about our two conceptions of liberalism. Kymlicka's discussion of the continuing relevance of treaties appeals to universal rational consensus liberalism, because treaties are relevant only to the extent that they tell us something about a factor within Kymlicka's liberal theory: which citizens belong to which states, and on what terms did the State gain authority to rule specific groups of citizens. The answers to these questions provide only *additional* support for the cultural rights and national self-determination that he has already justified through his own examination of what a liberalism that everyone could rationally agree to would look like.[174] Treaties are only relevant for Kymlicka to the extent that they fit within his rational consensus conception of liberal multiculturalism.

The contrast between this position and Tully's is stark. Tully's position is that both a monological examination of Western political traditions and an intercultural dialogue between traditions would yield affirmation of historic treaties as being of continuing relevance for intercultural justice, and a political impetus to create new treaties in the present. His view of treaties rejects two views of intercultural justice: (i) that Western political traditions cannot be applied to recognise indigenous traditions, and (ii) that Western and indigenous political traditions are incommensurable and cannot be reconciled. Tully attacks the view of Aboriginal constitutional rights as sui generis through examining how Western political philosophy's almost universal appeal to freedom and equality can be extended to secure for indigenous peoples the same kind of freedom that "western political theorists and citizens already enjoy".[175] Similarly, the theme of *Strange Multiplicity* is that indigenous claims can be characterised as ones appealing to Western political "aspirations for appropriate forms of self-government … a longing for self-rule … the oldest political good in the world".[176] This is a monological, "second best" approach by inquiring into how Western political philosophy can be criticised from within to support indigenous claims.[177] Tully also makes clear his opposition to the second incommensurability of tradition's position. Tully has uniformly maintained that "intercultural dialogues", though difficult, are both possible and desirable.[178] Instead of conducting a mere monologue, we can engage in an intercultural political dialogue between Western and indigenous political thought.[179]

---

174 *Multicultural Citizenship*, above n 148, ch 5.

175 James Tully "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton, Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2001) 59 ["Struggles of Indigenous Peoples"].

176 *Multiplicity*, above n 150, 4-5.

177 "Struggles of Indigenous Peoples", above n 175, 51-52.

178 "Struggles of Indigenous Peoples", above n 175, 183.

179 "Struggles of Indigenous Peoples", above n 175, 51.

To reiterate and compare with the two conceptions of liberalism, Tully's position is twofold. He agrees to some extent with Kymlicka that in an application of a monological rational consensus liberalism, treaties would be of continuing relevance to our application of liberal values of freedom and self-rule, with treaties being vehicles to achieve that freedom. But, in contrast to Kymlicka, Tully seems to embrace dialogical overlapping consensus liberalism. This vision of liberalism sees treaties in a different light: not as mere social facts relating to which citizens are subject to which States, but as both (i) symbols of the dialogical overlapping consensus that liberalism seeks to achieve between different ways of life; and (ii) manifestations or tentative steps towards achieving that overlapping consensus.

Both theorists acknowledge that treaties are sometimes problematic because of relations of force, differing interpretations, changing circumstances, and they may therefore not correspond with an underlying theory of justice. That is, Kymlicka and Tully reach the point at which Waldron also concludes; that sometimes Treaties are not enough or are not all of what intercultural justice requires. In a sense, Kymlicka and Tully offer alternative pathways to follow if some type of *rebus sic stantibus* principle were to be applied – the "what if" position that Waldron himself does not entertain. The key difference between the pathways is that Kymlicka falls back on monological rational consensus liberalism that pre-dates the treaty, whereas for Tully if a treaty falls away we return to a situation of dialogical overlapping consensus search for principles that will allow us to live together justly. The consequence of this view is that, even if some type of *rebus sic stantibus* principle were to be applied to an indigenous treaty, the void left would still require the search for the very type of intercultural negotiation that the treaty was supposed to provide for.

C Seeking Overlapping Consensus Dialogically

Tully has begun to sketch out the premises of a dialogical overlapping consensus liberalism, as part of his examination of the practical problem of Western societies being established on the territory of pre-existing indigenous societies.[180] Tully provides an examination of Western constitutional theory, and the manner in which constitutionalism's organising terms and categories have required the use of a monological framework before a claim to cultural recognition can even be adjudicated upon.[181] Western constitutionalism is the framework in which argument takes place and arguments made in an unchanged indigenous voice simply do not fit, and will be rejected.

Tully identifies a way out of this closed practice through a challenge to "Westerners to see their conventional horizon as a limit."[182] The next step would be to engage in political/constitutional

---

180 "Struggles of Indigenous Peoples", above n 175, 37.

181 *Multiplicity*, above n 150, 35-41 "... when a demand for constitutional recognition is advanced, the customary uses of the terms of modern constitutionalism function as a normative foundation for the discussion … ."

182 "Struggles of Indigenous Peoples", above n 175, 51.

dialogue that is open to indigenous perspectives. Implicit in this are the notions that (i) for too long indigenous peoples have been challenged to see their horizon as a limit, rather than a resource for challenging Western ruling constitutional categories and horizons; and (ii) indigenous peoples have long engaged in intercultural dialogues, both in their everyday and political lives, and it is time for non-indigenous citizens from the Western political tradition to open up their horizons.

As noted above, Andrew Sharp is cognisant of the duality of Māori and Pākehā justice discourses, but he seems to favour the overlapping consensus model, rejecting the idea of incommensurability, the idea that each discourse had equal reason on its side and that therefore we could only talk past one another:[183]

> That [is] not the situation. The discourse of culture clash [is] not the only one; it [is] not impossible to find reasons for agreements; and some ways of seeing things and discussing them are better than others. Justice and sovereignty are fundamental issues in politics. They get raised in times of confusions and revolutions, and they will never be quieted by giving thought to them, so as to work out what they mean. … The thing to do is to continue to search out and create agreements as to what the content of justice would best be in this place and this time: on how material goods are to be distributed, for instance, and how tribal authority might be accommodated within the state. There is no reason in New Zealand/Aotearoa why the ethnie cannot agree on enough for there to be no question as to the content of justice being based on purely Pakeha ideas of just distribution. They would not be. A political community of the two ethnie would have decided …

Sharp recognises the multiplicity of visions of justice, and like Tully he argues that we must "search out and create agreements" about justice that both ethnie have agreed and decided upon. Just as it is fantasy to talk of "culture-specific" justice, it is also fantasy to suggest that in societies in which peoples adhere to different ways of life, each with their own conception of justice, we can specify the content of justice without recourse to negotiation and agreement between those peoples.

The results of those agreements are a combination of practices, customs, laws, constitutions, and treaties. Treaties are therefore never the final word, just as customs, laws and constitutions should never be frozen in a particular time. Almost all of our practices, laws, customs, and constitutions need to be changed when the circumstance that gave rise to them change. But we must be careful to consider how we change them: what are the assumptions and processes whereby we create anew these agreements? If the Treaty has lost its relevance, what is the process we should use to find justice in these changed circumstances?

The answer to this question – and to our original question – depends on which liberalism we subscribe to. The idea of agreement between ways of life, of which treaties are a subset, is either almost completely constitutive of liberal justice, or almost completely irrelevant to it. Rational

---

183 *Justice and the Maori*, above n 6, 286-287.

consensus liberalism does not need them to find the justice that applied between competing ways of life, for justice is a universal ideal framework that anyone could rationally agree to. Those who construct such theories have no reason to enter into dialogue with other traditions' visions of liberty, autonomy, and justice, because they have already found it themselves. The terms of treaties may or may not conform to justice, but they cannot change that justice. In contrast, overlapping consensus liberals have no universal justice to fall back on, because the negotiated political arrangements that different ways of life come to agree on – strategic, principled or a bit of both – are all we can know of liberal justice. Therefore, treaties carry a huge weight of political significance as articulations of the required overlapping consensus, at least presumptively. If our presumptions of fairness, non-coercion, and continuing relevance are wrong in fact, then we have to seek a new overlapping consensus. We cannot fall back on liberal justice, because it does not exist.

VII CONCLUSION

There are no simple answers to the question of the continuing relevance of the Treaty of Waitangi to our legal and political landscape. This account suggests that there are rather a number of signposts pointing to different answers to the question "what is the continuing significance of the Treaty of Waitangi?", and that each signpost has pointers in a number of directions. That is not to say that the signs point in completely different directions, or that each are equally relevant and valid. *Rebus sic stantibus* may correspond to some pointer on the international legal signpost, but it is merely one sign among others. Undoubtedly, the idea that our law and politics should take into account change is an indispensable one. Whether we phrase this as the international law principle of *rebus sic stantibus* because we are dealing with a treaty is another matter. Further, what kind of change would require revisiting a treaty is unclear, as is the "original" position we would find ourselves in if we did determine that a treaty is obsolete. As we have seen, there are a variety of positions in Māori and Western legal and political traditions; our personal bias is towards a reversion to a position in which two (or more) ways of life seek an overlapping consensus on how they are going to live together.

The four signposts we have examined are contested, and this article has only tentatively considered where their signs are pointing with regard to the question of the continuing relevance of the Treaty. Subsequent analysis might show that the pointers indicate different directions than we have presented, or that there are alternative pointers. Other might suggest how we might elect between signposts, or the grounds upon which such election might be made. Any such contributions, indicating that there is far from a consensus on the analytical tools to apply to the Treaty questions, would seem to be precisely what Waldron's provocative essay intended to provoke. Our hope is that that more engaged debate, or at least some of it, will seek alternative types of legal and political models such as those presented here.