UNIVERSAL PROVISION, INDIGENEITY AND THE TREATY OF WAITANGI

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I INTRODUCTION

When Sir Ivor Richardson presented the Report of the Royal Commission on Social Policy, the *April Report*, in May 1988, the media, and many politicians had difficulty digesting the contents of the four volumes and five books (Volume III was in two parts). Not only did the difficulty reflect the size of the report, the complexities they covered, the distinction (often not grasped) between social policy and social services, and the scope of social policy itself, there had also been an expectation that a radically new direction for social policy might emerge. The nation then was struggling with the principles - and the cost - of the welfare state; some wanted to hasten its demise, others sought to prolong its existence; and the opposing views were evident, as much within the Government, as without. The popular economic rhetoric, at the time, was that efficient economic policies would lead eventually to social wellbeing, and that the State's role was minimal since the market would deliver both economic and social gains. However, many communities and individuals were not confident that the market would address social justice and viewed the prospect of State withdrawal from social arenas with great alarm.

In the event, the Commission recommended a strong continuing role for the State in social services, not simply through cash transfers, but through the provision of services by the State and intervention in macro-policies, such as those policies that impact on the labour market. Moreover, as an alternative to the trickle-down theory the Commission concluded that economic and social polices should be regarded as "inseparable" and developed together in a co-ordinated way that took account of the mutual impacts of the economy and social wellbeing on each other.

During its life, the Commission operated in a rapidly changing environment that was to impact on the eventual outcome, and the history of the Commission itself. A less than enthusiastic response to the *April Report*, for example, was a product not only of the absence of a simple formula for social policy or a clear plan for reducing social spending, but the concurrent rapid unfolding of events within the Executive. In December 1987, the Minister of Finance had released a mini-budget that threatened to decide the direction for social policy even before the Commission had a chance to

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report. Caught up in high level political manoeuvrings, the Commission decided to release its findings some months before the appointed time; a decision that compromised both analysis and presentation, but provided timely caution against abandoning altogether the principles of social justice and fairness that had become part of the New Zealand tradition.

Shortly after the Commission commenced its work, another New Zealand foundation captured public attention. In May 1997, a Court of Appeal decision regarding the Treaty of Waitangi and the State Owned Enterprises Act 1986[1] had confirmed the significance of the principles of the Treaty of Waitangi to modern new Zealand, at least as they applied to State Owned Enterprises (SOE). Sir Ivor Richardson, as a member of the Court of Appeal, had taken leave from the Commission during the Court hearings so that his two roles – Court of Appeal Judge and Royal Commission Chair, would not cause confusion. But when the Commission visited Māori communities, the distinction between those two roles was not always observed. Having ruled in favour of the New Zealand Māori Council in their case against the Crown for transferring surplus State assets without consultation with Māori, there was an expectation that Sir Ivor would also recognise the significance of the Treaty to social policy in a no less emphatic way. It was, of course, not the only expectation placed on the Commission – hundreds of individuals took the opportunity to place on record their own concerns and often their own solutions. But the Treaty dimension was given added impetus by the concurrent Court of Appeal decision.

Apart from a coincidence of time, and Sir Ivor's dual contribution, the *State Owned Enterprises* case, and the *April Report* had a common thread – the Treaty could be applied to widely divergent fields in modern times. Findings from both broke new ground. The Court of Appeal had demonstrated how the Treaty could be applied in a powerful way to limit State restructuring, while the Royal Commission concluded that the contemporary application of the Treaty was not confined to land, fish, forests, or the environment – as had been generally presumed - but had significant implications for social policy as well. In each case, however, the conclusions reached had been dependant on parliamentary sanction. Section 9 of the SOE Act, for example, gave the Court of Appeal the authority to consider the Treaty, while the Terms of Reference for the Royal Commission on Social Policy, initiated by the Government, had identified the Treaty as a foundation of society and the economy. The Court and the Commission had not themselves introduced the Treaty to modern debate, but had acted to interpret a Government position.

However, while there were similarities between the two sets of findings, there were also differences. Even though the SOE case has been integrated into jurisprudence and policy, it was not entirely clear whether there had been a similar measure of acceptance of the Treaty's implications in respect of social policy. An acceptance that the ownership and alienation of physical resources warranted a Treaty framework has not been matched by a similar conviction for social policy. For

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1 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) (the *State Owned Enterprises case)*.

many New Zealanders, if not the majority, the Treaty spelled an unfair advantage to Māori over other New Zealanders, because it could create unequal access to goods and services. At the heart of the issue was the potential for a conflict between the tradition of universal provision and the rights associated with indigeneity.

II UNIVERSAL PROVISION

Two recent debates have questioned the compatibility of universality with the recognition of Treaty of Waitangi rights and obligations. Both are linked to wider political dogma and in that respect have neither academic nor motivational neutrality. Nonetheless, they highlight a growing concern within New Zealand that the State's recognition of Māori as a people who have privileged rights under the Treaty of Waitangi runs counter to the democratic principle that all people are equal. The first debate emerged in response to the Government's programme, *Closing the Gaps*, and eventually led to a withdrawal of the slogan, if not the policy itself, while the second debate was a by-product of the application of the Treaty of Waitangi to social policy legislation, in particular the Public Health and Disability Act 2000, and almost led to the Act being bereft of any reference to the Treaty at all.

Underlying both issues are fundamental questions about current constitutional arrangements, and the changing nature of New Zealand as an independent nation within the South Pacific. Moreover, the issues are being raised at a time when the country has endured major restructuring of the State, the economy, and the electoral system, and seems poised to explore the parameters of republicanism. From that perspective, and because the issues are germane to New Zealand's forward development, *Closing the Gaps* and the Public Health and Disability Act have largely been discussed as if they were entirely domestic matters. But in so far as they are about indigenous people, and the way in which States recognise indigeneity, the parameters of the discussion should not exclude a global perspective nor presume a single formula for the exercise of democracy within a Westminster system.

However, two more immediate obstacles threatened a rational and coherent discussion about either *Closing the Gaps* or the Public Health and Disability Act. First, there was conceptual confusion. The rights and privileges of individuals are often confused with group rights; the settlement of Treaty of Waitangi claims is sometimes confused with a Treaty policy for future development, and there has been inconsistency about exploring the implications of the Treaty, sometimes according to Treaty principles, sometimes relying on an article by article analysis.

The second obstacle came from an ongoing colonising spirit that would see all New Zealanders become as one. Under that philosophy, while ethnicity might add colour and contribute to an array of interesting codes and customs it would not be associated with privilege and would forfeit any pretence to self-governance. This argument makes much of equality between individuals and is sensitive to any hint of threat to the doctrine of a single, unitary State. The goal is to build a society without reference to ethno-political clout, except as a function of the voting power of individuals,

and to simply abide by the wishes of the majority. Underlying the goal is an intolerance of difference and a uni-dimensional view of citizenship that champions individuals as the only legitimate signposts on the road to democracy.

In the absence of a clearly articulated constitutional position, there is a dilemma for the State: is citizenship solely about the position of individuals *vis-à-vis* the State, or does it also have a dimension that embodies the relationship of groups to the State, and, in any case how can citizenship be reconciled with the rights and expectations of indigenous peoples without compromising notions of even handedness and social justice? While the potential for conflict has always been present, it was brought into sharper relief by the Government's recent application of the Treaty of Waitangi to social policy in a more explicit way, including the controversy surrounding the setting aside part of the two gigahertz (2GHz) radio frequency spectrum exclusively for Māori.

III VALUING INDIGENEITY

A Representation

However, although recent debate about the Treaty in the life of the nation has raised problems for those who subscribe to the "one New Zealand" view, in fact, New Zealand has long since adopted a policy of recognising and, often valuing, indigeneity. The 1835 Declaration of Independence was essentially recognition of indigenous rights including indigenous sovereignty. Its successor, the 1840 Treaty of Waitangi also acknowledged distinctive rights that flowed from notions of the doctrine of Aboriginal title, and went beyond mere recognition by prescribing a relationship between Māori and the Crown. Later, when arrangements for political representation within New Zealand were revised in 1867, indigeneity was clearly recognised through the Māori Representation Act 1867 that guaranteed four Māori seats in the House of Representatives. Whatever the rationale for the Act, it gave expression to an evolving convention that would recognise Māori as a protected group who had claim to a distinctive constitutional position. The extent of that distinctiveness is perhaps not the issue; the point is that at the height of British imperialism, the colonial government had not been able to dismiss an indigenous right to political recognition.

Since then, however, and for a variety of reasons, there have been regular calls for the abolition of the Māori seats. It was often argued, for example, that because there had been two or three Māori members of Parliament representing general seats, the need for separate Māori seats had become outmoded. Māori participation, rather than Māori representation, appeared to be the more pressing priority, a type of equal opportunities concern.

In addition, when first mooted, Mixed Member Proportional representation would also have led to the abolition of designated Māori seats. The Royal Commission on the Electoral System had concluded that a Māori party would provide adequate safeguards for Māori and the four seats would therefore be redundant. When the Electoral Reform Bill was drafted, it consequently made no provision for the four Māori seats. Widespread Māori indignation followed, the abolition of the

seats being seen as an erosion of an established constitutional convention. The result was the re-establishment of the seats, without very much debate, but with a new formula for deciding the number of seats. Whereas previously the number of seats had been fixed at four, regardless of the total Māori population or the number of voters, under the new Electoral Act 1993, the number of seats would be a function of the number of people enrolled on the Māori roll.

The retention of separate Māori representation, however, does not mean there is widespread agreement either as to the principle or the practice of making special electoral provisions for Māori. While there is strong Māori support, other New Zealanders are less enthusiastic, often arguing instead for a single system of representation based on equal rights for all New Zealanders. In that view, the focus is on the democratic rights of individuals, with no particular regard for the recognition of any group right based on indigeneity.

B Statutory Recognition

The recognition of Māori as an indigenous group warranting unique rights has also been encoded in the law. While many laws in the past were used to restrict Māori interests, there has been an increasing recognition of Māori rights in statute particularly since 1975 when the Waitangi Tribunal was established under the Treaty of Waitangi Act 1975. It is important to note, however, that the Treaty of Waitangi is not the only mechanism through which indigeneity can be recognised in law. From Table 1, it is evident that the special position of Māori within statute is only sometimes linked to the Treaty of Waitangi (when it appears to suggest a special relationship between Māori and the Crown; for example, Resource Management Act 1991, and the Public Health and Disability Act 2000); sometimes it seems to stem from Māori as a disadvantaged minority (for example, Health and Disability Services Act 1993), or a culturally different client group (for example, Children, Young Persons and their Families Act 1989), or an indigenous people with a distinctive culture (for example, Māori Language Act 1987), or a group with a unique constitutional right (for example, Electoral Act 1993).

Table 1: Recognition of Māori Interests in Statute

Basis for recognition of a Māori interest	*Effect of statutory provisions*	*Examples of Statutes*
The Treaty of Waitangi	An enforceable Treaty obligation Treaty is imposed on the Crown	State Owned Enterprises Act 1986 Resource Management Act 1991 Public Health and Disability Act 2000
Protection of customary assets	Māori language and Māori land are afforded protection	Māori Language Act 1987 Te Ture Whenua Māori Act 1993
Fairness and social well being	Requirement to consider Māori social networks, culture, and custom; and to reduce disparities	Health and Disability Services Act 1993 Children Young Persons and their Families Act 1989 Law Commission Act 1985
Constitutional position	Provision for Māori representation	Electoral Act 1993
Settlement of Treaty of	A process for claiming against the	Treaty of Waitangi Act 1975

Waitangi claims	Crown is established; the terms of settlement are protected in law	Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 Treaty of Waitangi (Tainui Waikato) Settlement Act 1995

As for recognising indigenous rights through the Treaty of Waitangi, the practice had been to restrict a Treaty clause to legislation relating to physical resources such as land, the environment, or surplus Crown assets, but not to refer to the Treaty when social and cultural properties are the focus. In an early draft of the Code of Health and Disability Services Consumers Rights, compliance with the principles of the Treaty had been included but was subsequently withdrawn from the final version. The Minister of Health, Hon Jenny Shipley MP, explained the removal:[2]

> ... I was concerned that the Crown's Treaty duties in respect of health and disability services have yet to be determined by the courts or the Waitangi Tribunal. Accordingly the reference to recognition of Māori as tangata whenua under the Treaty of Waitangi could create legal uncertainty as to its meaning in practice. In my view, it is desirable that the Code avoid such uncertainty.

The more usual pattern for social policy legislation has been to recognise a Māori interest without reference to the Treaty of Waitangi. However, the basis for recognition has not always consistent or explicit. In the Health and Disability Services Act 1993, for example, an objective was that Māori health should be at least as good as the health of non-Māori, implying a focus on disparities. On the other hand, the Children Young Persons and Their Families Act 1989 acknowledges customary values and the balance between individual and group rights while a requirement in the Law Commission Act 1985 to "take into account te ao Māori" (the Māori dimension), and to also give consideration to the multicultural character of New Zealand society seems to encourage the recognition of Māori custom in law. Then as earlier discussed, the Electoral Act 1993 implies that Māori have a special constitutional position that other ethnic groups do not have.

In one sense, these various provisions have suggested there is something special about the position of Māori in New Zealand though what is special has largely been left undefined. Such ambiguity has outlived any purpose it may have had. Is the Māori dimension about disadvantage (but there are many disadvantaged groups in society), or about righting past wrongs, or about indigeneity?

As if to answer that question the present Government inserted a Treaty of Waitangi clause in the Public Health and Disability Bill. The proposed wording was not dissimilar to section 8 of the Resource Management Act 1991, in that it required those with responsibility for the implementation of the Act to take into account the principles of the Treaty of Waitangi. In turn, because the Treaty

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2 Hon Jenny Shipley MP (Minister of Health) (17 March 1993) 319 NZPD 339.

of Waitangi recognised Māori as indigenous people who, prior to colonisation, had "title to the soil", the Treaty clause would explicitly recognise Māori on the basis of being indigenous to New Zealand. In other words, quite apart from questions of health status, or disparities between Māori and non-Māori standards of health, the Public Health and Disability Bill would value indigeneity *per se*, in much the same way as the Resource Management Act does.

But when the Bill was introduced in the House, Opposition Members appeared concerned about risks to the Crown and the litigation that might follow if Māori were to claim that the health sector had not delivered the best outcomes. By having a Treaty clause, it was also suggested that Māori might be able to make a demand on health services for preferential treatment. Although it was unlikely that a Treaty clause could have over-ridden other aspects of the Bill or even overturned clinical common sense, the perceived clash between the principle of universality and the principle indigeneity was sufficient to lead to a redraft of the Bill.

It was not only members of the opposition who opposed the use of a Treaty clause in social policy legislation. An editorial in *The Dominion* (14 September 2000), for example, was adamant that there was no place in the health sector for the Treaty and considered it "wildly misleading" to suggest that the health reforms had "anything to do with Treaty obligations" or that being Māori was of any consequence to the Government's welfare obligations. "There are no welfare obligations peculiar to Māori under the Treaty", said the editorial.[3] Ignoring the Court of Appeal's conclusion in the 1987 *New Zealand Māori Council* case,[4] *The Dominion* went on to refute any notion of a Treaty derived partnership between Māori and the Crown.

If *The Dominion's* case is to be believed, it appears therefore that the only basis for any special claim Māori might have in the social policy arenas is contingent on socio-economic disadvantage. What would be sidelined are the facts of indigeneity and, importantly the principle of partnership. Yet the Treaty of Waitangi is primarily about a partnership between Māori and the Crown regardless of the range of Crown activities or the sectoral arrangements that are employed to deliver the Crown's policies. To categorically reject the relevance of the Treaty to any particular aspect of the Crown's work is to miss the whole point of the Treaty, which was about forward planning and mutual benefits across the whole gambit of developmental interests – economic, environmental, cultural, and social. In the introduction to Volume II of the Royal Commission on Social Policy's *April Report*, Sir Ivor Richardson noted:[5]

> It [the Treaty of Waitangi] is not only an historical record upon which grievances from the past can be based, but more importantly we see it as a pro-active agreement with relevance into the twenty-first

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3 Editorial (14 September 2000) *The Dominion* Wellington.

4 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

5 Royal Commission on Social Policy *April Report: Volume II* (Government Printer, Wellington, 1988) AJHR, H2, 3.

> century and beyond. There is an anomaly between the place accorded the Treaty of Waitangi in our terms of reference and its recognition within the statutes of New Zealand. Our clear view is that anomalous situations such as that must be addressed …

IV RECONCILING DUAL OBLIGATIONS

For all its dogmatic assertions, *The Dominion* editorial was out of step with the actual Government position and with the New Zealand tradition. Even if the justification for recognising indigeneity is inconsistent, the State has long since taken significant steps in that direction. Leaving aside Crown concerns about Māori self-governance, and the fine line between self-management and self-determination, the State's recognition of indigeneity appears in statutes, in policies, and in certain State conventions. The difficulty appears to be that modern Governments have been more explicit in recognising the Treaty of Waitangi and the other expressions of indigeneity not only on the basis of disadvantage or historical grievances, but now, simply on the basis of being indigenous. That appears to be a sticking point. There has always been a measure of public support for improving Māori living standards even if some commentators have implied that Māori disadvantage is totally self-inflicted, or that there was no such thing as Māori disadvantage, but simply disadvantaged individuals. And support for settling past injustices has more or less found public tolerance, if only up to one billion dollars. But once the argument of indigeneity, rather than disadvantage was introduced to the social policy arena, there was concern that Māori might get a better deal than other citizens and that would offend the principle of equality and equal democratic rights.

For the State, the challenge is not whether indigeneity should be recognised by the Crown across all sectors (such recognition has evolved over a number of years); but how to reconcile the two obligations: to be fair to all citizens, and at the same time to endorse indigeneity.

Part of the solution lies in the way citizenship is understood. Individual citizens live as individuals but also as members of society. It is of limited value to grant one right, such as the right to vote, if the right to participate in society cannot be exercised. In other words, citizenship is more than simply fostering individual liberties. The corollary is that the State's obligations to its citizens includes enabling active participation in society. In turn, valuing indigeneity means enabling Māori people to participate in Māori society. Far from conferring special rights on Māori individuals, the task is to ensure that the right to participate in whatever society is appropriate applies to both Māori and to other New Zealanders.

Closing the Gaps, therefore, was but one measure of positive Māori development. If progress is determined solely by benchmarking Māori performance against non-Māori progress, then the significance of being Māori will be lost and indigeneity will not have been valued. Best outcomes for Māori, therefore, need to be measured not only against individual performance in health or education or employment, but also against the level of participation in te ao Māori – the Māori

world. In short, if a State-assisted programme facilitates individual performance, but in the process ignores participation in Māori society, then it may well have created a disadvantage.

This does not necessarily mean that the State will need to adopt one standard for Māori and another for non-Māori, but it does suggest that outcome goals should be capable of reflecting the different realities that distinguish indigeneity from broader societal norms and goals. By valuing the equality of individuals and at the same time valuing indigeneity, the most useful measures will be those that can determine individual gains within the context of participation in te ao Māori. Participation in Māori society means being able to access Māori language, culture, whānau, customary resources such as land, Māori social structures, and Māori political voice.

V THE TREATY OF WAITANGI AND INDIGENEITY

In contrast to the situation of many other indigenous peoples, issues relating to indigeneity in New Zealand have hinged largely on the application of the Treaty of Waitangi. Probably, especially in recent times, the Treaty has been a helpful vehicle for the promotion of Māori interests. Yet the Treaty does not embody the sum total of indigenous rights, nor do indigenous rights capture the uniqueness of the Treaty. At the heart of the Treaty is the promise of a mutually beneficial relationship between Māori and the Crown, a partnership. The fact that the relationship has not always been positive, or that it continues to dwell too much on the past and not enough on the future, should not distract from the potential to create an understanding where indigeneity can be valued alongside those other principles so dear to the democratic heart. Including a reference to the Treaty in the Public Health and Disability Act was entirely consistent with extending the relationship beyond land, the environment, and injustices of the past, to the development and implementation of social policy. Indeed, the current wording of the Act makes it clear that the Treaty of Waitangi obligation upon district health boards is not about Māori patients jumping the queue for grommets or renal transplants, but about joint planning and shared vision.

A similar prescription has been recommended for local and regional authorities. In the Local Government Bill introduced to the House of Representatives in December 2001, provision was made for separate Māori seats for the Bay of Plenty Regional Council. But in addition, a generic Treaty clause was inserted requiring all local authorities to provide opportunities for Māori to contribute to their decision-making processes.

According to this view, whereby the relationship between Māori and the Crown (including Crown entities) is the defining characteristic of the Treaty, dissection into articles one, two, and three, as if they can be considered independently of each other, makes little sense and runs the risk of missing the point. As well, because the Treaty's provisions are broad rather than specific, and the Māori and English texts differ on substantial points, the practice has been to understand the Treaty by recourse to principles – rather than relying exclusively on the words of each article.

At the same time, the Treaty is not always the most useful document to define the extent of indigenous rights. The Draft Declaration of the Rights of Indigenous Peoples, to which the New

Zealand Government is party, will do so in a more comprehensive way. In contrast to the Treaty, where 1840 represented a new beginning, indigenous rights have a longer memory. 1840 is somewhat incidental to a set of customs and lores that evolved over some hundreds of years. Increasingly, the State will need to be concerned about indigeneity as an issue that is related but not identical to the Treaty of Waitangi; and the language of indigeneity will need to be heard alongside the Treaty dialogue. Far from being a compendium of indigenous rights, the value of the Treaty will be in its potential to encourage a relationship between Māori and the Crown, upon which indigenous rights might continue to evolve.

In the *New Zealand Māori Council* case, Sir Ivor Richardson made a similar point:[6]

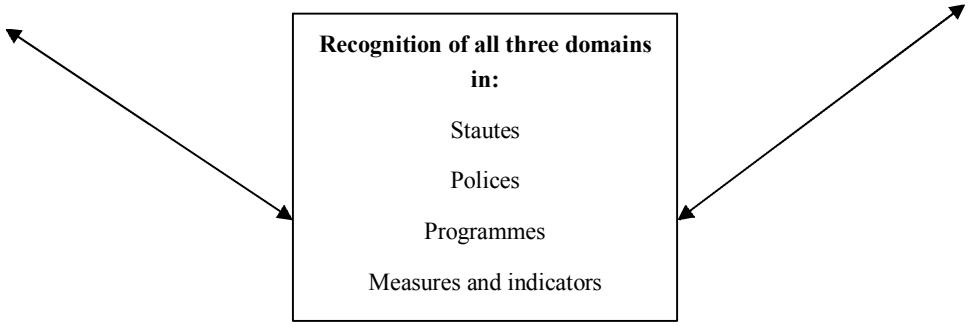
> It [the Treaty of Waitangi] was a compact through which the Crown sought from the indigenous people legitimacy for its acquisition of government over New Zealand. Inevitably there would be some conflicts of interest. There would be circumstances where satisfying the concerns and aspirations of one party could injure the other. If the Treaty was to be taken seriously by both parties each would have to act in good faith and reasonably towards each other.

VI CONCLUSION

Figure 1 brings together the challenges for the State in reconciling citizenship, indigeneity, and the Treaty of Waitangi. Citizenship is about equality and democratic rights, and participation in society, including te ao Māori. Indigeneity is about a set of rights that indigenous peoples might reasonably expect to exercise in modern times. The Treaty of Waitangi is about a relationship between Māori and the Crown and has been construed by both the Court of Appeal and the Royal Commission on Social Policy as a partnership.

The challenge for the State is to embrace all three - the Treaty relationship, indigeneity, and citizenship - in a way that values them all in statute, policies, programmes, as well as process and outcome measures.

Figure 1: State recognition of citizenship, indigeneity, and the Treaty of Waitangi



6 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 681 (CA) Richardson J.

While the New Zealand practice has been to recognise all three, recognition has been uneven, not always explicit, often based on inconsistent principles, and, more recently, threatened by an interpretation of citizenship that favours individual liberties over societal participation. As a modern democracy, New Zealand must make sure that its obligation to all citizens takes account of emerging world trends in relation to indigenous peoples, and the justice of their claims to a distinctive place in their homelands, without ignoring the nation's own historical foundations. Much will depend on a capacity to educate future generations of jurists so that the New Zealand system of justice might do justice to the New Zealand reality. In that respect Sir Ivor Richardson's contribution to the nation will long remain inspirational.