The Treaty of Waitangi and Child Custody: some legal and rhetorical issues

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Introduction

During the past two decades, New Zealand Maori, the indigenous people of New Zealand,[1] have intensified their assertion of rights to complete authority over themselves, their culture, and over resources such as land, fisheries and waters. The basis of their claims has been the Treaty of Waitangi, a treaty between the Maori people and the British Crown which was completed in 1840 as part of the process of colonization of New Zealand by British

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1 "Maori" denotes members of the indigenous tribes of New Zealand constituting some 10-12% of the New Zealand population. Maori share a common language and many common cultural characteristics. In colonized nations such as New Zealand, definitional problems will inevitably be associated with identifying the total population of indigenous peoples. Official census figures once had a biological basis, using the criterion of half or more Maori "blood".Since the 1986 census, Maori have been identified by individuals' own sense of racial identity. Statutory definitions also differ. In all contexts, it is preferable that Maori be allowed to solve the identity 'problem' according to Maori methodologies. See I Pool, *Te Iwi Maori, A New Zealand Population, Past, Present & Projected*, Auckland University Press, 1991. Identification issues should be scrutinised carefully as they can too easily be generated by those hostile to Maori claims to block social policy and legal initiatives. See also W Renwick, (ed) *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, Victoria University Press, 1991.

settlers.[2] Whereas the Treaty of Waitangi was once disregarded by New Zealand courts, it is now acknowledged as a major source of Maori rights to key New Zealand resources.

This article examines the relevance of the Treaty of Waitangi to New Zealand child custody law. Compared with Treaty jurisprudence on resource claims, the significance of the Treaty to New Zealand family law is less clearly established. This is reflected in the little commentary provoked by a recent child custody decision, *R v R*,[3] in which a Maori father's claim based on the Treaty was rejected by the New Zealand High Court.[4] The father had argued the Treaty of Waitangi gave him an absolute right to the custody of his child. The Court considered the Treaty of Waitangi was irrelevant to child custody issues. This article examines reasons for the rejection of the father's arguments.

The legal explanation needs to be understood in the light of the development of Treaty jurisprudence over recent years and its relationship to New Zealand child custody law. Traditional constitutional orthodoxy requires that before the Treaty of Waitangi can be justiciable in domestic courts, certain rules of recognition must be satisfied. The father in *R v R* had not properly laid the grounding for the Treaty's recognition within the legal frameworks that presently deal with child custody issues.

As well as examining the legal nature of the father's case, this article also examines some rhetorical issues relevant to the relationship between the Treaty of Waitangi and child custody law. The official rhetoric of modern child custody law gives further clues as to why the father's claim did not succeed. By promoting the judicial discretion as neutral and value-free, modern child custody law insulates itself from ideological challenges. This article suggests a further reason why the father's claim did not succeed was it could not be accommodated within the dominant child custody discourse.

It is important to clarify what this article is not about. It does not examine alternatives to the jurisdiction of the New Zealand courts to determine the custodial arrangements for Maori children. Even less does it attempt to

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2 Waitangi is the settlement in the North Island of New Zealand where the Treaty was first signed. In the Maori language, the Treaty is known as, "Te Tiriti o Waitangi".

3 (1990) 6 FRNZ. 232. The case was heard in the New Zealand High Court on appeal from the Family Court. Limited analysis of the case appears in PRH Webb, *et al*, *Family Law in New Zealand*, 5th ed, Butterworths, 1992, 6054.

4 The case was on appeal from the Family Court. See, pp 99-102 below.

establish what a "Maori law" of child custody or child placement in general might look like or whether its application would be preferable to existing legal structures. These issues are secondary to issues associated with the *recognition* of the relevance of the Treaty to New Zealand's official family law. Before analysis can be undertaken of the precise nature of the Treaty's guarantees to Maori in an area such as child custody law, the first task is to establish its relevance in general terms. Whetherthe father in *R v R* was correct in his interpretation of the Treaty of Waitangi, that it gave him an absolute right to the custody of his child, there is certainly scope for argument that the Treaty is relevant to child custody so far as it guarantees the general authority of Maori people to monitor their own conduct.[5] One possibility is that decisions made about the custody of Maori children should be made by Maori themselves within Maori fora. How, or even if, Maori might wish to monitor the custody disputes concerning Maori children is a question properly for those with authority within Maori communities and is deliberately avoided in this article.[6] It should be noted that the existence of Maori law is beyond question.[7] Maori people are closely associated with and guided by a set of distinctive "tikanga Maori", or "right ways", many of which spring from and feed back into family life.[8] Maori social policy objectives have persistently emphasised the need for Maori family forms to be viewed in the context of wider social and spiritual groupings[9] - all of

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5 M Jackson, "Criminality and the Exclusion of Maori" (1990) 20 *Victoria University of Wellington Law R* (3rd. Monograph) 23.

6 Research in this area must accord with Maori methodologies and consultation processes. In any area of policy research specific concerns are "Who has defined the research problem?", "Who will benefit from the study?" and "Who are the researchers accountable to?" These questions will be answered differently by Maori and non-Maori researchers, possibly leading to different policy agendas. For recent discussion in the family law context, see, *New Zealand Human Rights Commission, Who Cares For the Kids?* (1992) 78-85.

7 Jackson, above, n 5 at 27.

8 J Metge and D Durie-Hall, "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in M Henaghan and WR Atkin (eds), *Family Law Policy in New Zealand*, Oxford, 1992, p 54.

9 The three main traditional structures of Maori society are "whanau" or extended families, "hapu" or sub-tribes, and "iwi" which are composed of hapu related by a common ancestor. See R Walker, *Ka Whawhai Tonu Matou; Struggle Without End*, Penguin, 1990, pp 63-65; Metge, "Te Rito o Te Harakeke: Conceptions of the Whanau" (1990) *Jnl. of the Polynesian Society* 55. Literature on Maori and non-Maori identity suggests Maori to be more readily identified with wider kin networks than non-Maori. See *Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare, Puao-Te-Ata-Tu* (1986); Jackson, *The Maori and the Criminal Justice System, A New Perspective: He Whaipaanga Hou* (Department of Justice 1988); RW Perrett, "Individualism, Justice, and the Maori View of the Self" in G Oddie and Perrett (eds.), *Justice, Ethics & New Zealand Society*, Oxford, 1992. On the relevance of these issues to New Zealand social policy, see MH Durie, "The Treaty of Waitangi - Perspectives on Social Policy" in IH Kawharu (ed), *Waitangi, Maori and Pakeha Perspectives*

which regulate behaviour unfamiliar to many non-Maori. How principles of Maori law might be applied to child custody matters is beyond this article's scope. Its central concern is *why* the High Court refused to recognise the relevance of the Treaty to the jurisdiction of New Zealand Courts to decide on custodial alternatives for Maori children. Some reasons may be characterised as legal. Others need to be understood by reference to the particular character of child custody rhetoric.[10]

Sections II and III outline the legal background for the father's claim in *R v R*. These sections outline the relationship between the present state of New Zealand child custody law and developments in Treaty jurisprudence, including developments that have occurred more recently than the decision in *R v R*. Part IV suggests that despite major legal developments that have recognised the significance of the Treaty to domestic jurisprudence, the particular character of the dominant child custody discourse makes it particularly resistant to claims based on the Treaty of Waitangi. Analysis of the legal principles at stake needs to be accompanied by analysis of the dominant discourse - in an area such as child custody law, that may be as important as the legal avenues that changes in Treaty jurisprudence may have made available.

Treaty Jurisprudence

The Treaty of Waitangi was signed in 1840 by some 500 Maori chiefs and by Captain William Hobson who represented the British Crown. It is the legal meeting point between two peoples. For Maori, the Treaty has always been a sacred document, a solemn contract between Maori and the Crown. Once British settlers achieved numerical supremacy the Colonial Government all but completely disregarded it and engaged in military, economic and legal activities that represented grave breaches of the Treaty's terms, principles and spirit. While Maori protests against Treaty breaches have been persistent, their intensity in recent decades has made it impossible for the New Zealand government to continue its refusal to acknowledge them. A gradual process

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oF the Treaty of Waitangi, Oxford, 1989.

10 It is recognised that any rhetoric/law division is contingent, and relies on an intellectual history that has undervalued rhetoric and privileged other modes of discourse. See, for instance, S Ijsseling, *Rhetoric and Philosophy in Conflict, an Historical Survey*, Nijhoff, 1976. The division in this article is itself stylistic, and does not seek to deny work by the "law and rhetoric school" that would portray law *as* a species of rhetoric. See, for instance, Peter Goodrich, *Legal Discourse - Studies in Linguistics, Rhetoric and Legal Analysis*, St Martins, 1987.

of accommodation of Maori grievances has begun. Changes have occurred in government policy, in the willingness of government to compensate for past wrongs, and in the law. A considerable body of learning and traditions about the meaning and significance of the Treaty has been fostered within Maori society since the Treaty's signing.[11] There has also been an upsurge in writing on the Treaty across various disciplines including law, anthropology, history, sociology and political science.[12] For this article, the most important aspects of these developments are the issue of sovereignty, the recognition of the Treaty within existing legal structures, and the status of customary law.

* Maori Sovereignty

In its official form, the Treaty exists in two versions, one in the Maori language, the other in English,[13] a fact that makes the meaning of some of its terms highly controversial.[14]

Most Maori signed the Maori language version. Under Article One, in the English version, the Maori signatories ceded "to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty". In the Maori version, in place of sovereignty, is a cession of "kawanatanga".[15] Different opinions exist on whether, according to the Maori version, full sovereignty was ceded or something less. Some associate "kawanatanga", as it was presented in the text of the Maori version of the Treaty, with "governorship" a notion which connotes something less than full sovereignty. It has also been equated with the authority to make laws for

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11 See ETJ Durie, "The Treaty in Maori History" in W Renwick (ed), *Sovereignty and Indigenous Rights; The Treaty of Waitangi in International Contexts*, Victoria University Press, 1991, p 156.

12 Leading texts are: P McHugh, *The Maori Magna Carta*, Oxford, 1991; C Orange, *The Treaty of Waitangi*, Allen & Unwin, 1987; Andrew Sharp, *Justice and the Maori*, Allen & Unwin, 1990; J Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989*, Allen & Unwin, 1990; Kawharu, above, n 9; Walker, above, n 9; Renwick, above, n 11.

13 Contained in the *Treaty of Waitangi Act* 1975.

14 See RM Ross, "Te Tiriti O Waitangi; Texts and Translations" (1972) 6 *JNL. of NZ History* 129; Bruce Biggs, "Humpty-Dumpty and the Treaty of Waitangi" in *Kawharu*, above, n 9. On the original translation from English into Maori by missionaries, see Orange, above, n 12 at 39-43. According to Orange, there is no evidence of Maori assistance with the translation of the original documents.

15 Ross, above, n 14, explains that the root of "kawanatanga" is "kawana", itself a transliteration of the English word, "governor". It was used in missionary translations of the Bible to describe the office of Pontius Pilate.

New Zealand's good order and security. Under Article Two of the Treaty Maori are guaranteed "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession". In the Maori text, Maori are guaranteed "te tino rangatiratanga" over their lands, their settlements and over their "taonga". Te tino rangatiratanga is associated with full chieftanship, the absolute authority of the Maori people collectively over their lives and resources.[16] The Maori version specified neither forests nor fisheries but relied on the more abstract term, "taonga", a term which certainly includes forests and fisheries and other material possessions. It also encompasses other cultural treasures, such as language, carving and dance.[17] There is general consensus that the term "taonga", also applies to children.[18] Under the third Article, Maori are guaranteed the full rights of British subjects. Doubts have been expressed about what this would have meant to Maori; most would have had little idea of what rights existed in England at the time.[19] Maori also rely on a fourth Article, one not expressed in the written text, but which can be forged out of oral guarantees[20] made when the Treaty was signed. This article guarantees "te ritenga Maori", as one commentator puts it, "the basic threads of law, religion, language, and other taonga which wove Maori society together".[21]

The tension between Articles One and Two has been described as the Treaty's "essential dichotomy"[22] and has generated greatest debate, particularly as it relates to the issue of sovereignty. How can the cession in the first Article of the Treaty be reconciled with the guarantee in the second? According to Ranginui Walker, a leading Maori scholar, the answer is found in the Maori version:

> Ceding governorship is not the same as ceding sovereignty. A governor is merely a satrap who rules on behalf of the

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16 Kelsey, above, n 12 at 5.

17 Biggs, above, n 14 at 307-308.

18 Metge and Durie-Hall, above, n 8.

19 ETJ Durie, above, n 11 at 158.

20 D F McKenzie, *Oral Culture, Literacy & Print in Early New Zealand: The Treaty of Waitangi*, Victoria University Press, 1985, p 40, explores the significance of the Maori oral traditions to understanding of the Treaty and suggests that the written documents were "only partial witnesses to the events."

21 Jackson, above, n 5 at 33.

22 J Williams, "Not Ceded but Redistributed" in W Renwick, above, n 1 p 193.

> sovereign. Furthermore, there were no governors in New Zealand as a referent by which the chiefs would have more readily understood the term. The understanding of kawanatanga would be understood as a benign term not even remotely connected with the basic question of sovereignty.[23]

According to this view, Maori did not cede sovereignty at all. It was preserved by the guarantee of te tino rangatiratanga in Article Two. Leading Treaty scholar, Paul McHugh, concludes:

> [t]he indications are that the chiefs thought they were retaining their own authority over their people according to their customary law (te tino rangatiratanga).[24]

This discussion needs to be set against conventional understandings of New Zealand's constitutional structure. New Zealand has a Westminster system of government within which Parliament is sovereign. A separate Maori sovereignty has not been recognised within officialdom. Under *classical* constitutional theory, if Maori are to achieve an independent power of government, based on their own legal sovereignty, that must come from a redistribution of the legal sovereignty presently held by the Crown.[25] This conclusion, based on a European view of sovereignty, has taken the imported law and fitted the Treaty to it; a better view might be that the Treaty *itself* contains the law on the relationship between the Crown and the Maori, central to which is the guarantee of te tino rangatiratanga.[26] Whatever the final resolution to this dispute, it is clear judicial decisions on Treaty issues, political activism among Maori, and the theoretical contributions by scholars in the area, have wrought major changes to the New Zealand legal system over recent years. The very fact the grounding of New Zealand's constitutional order is open to vigorous dissent reflects a radical departure from classical constitutional understandings.[27]

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23 R Walker, "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu, above, n 9 p 264.

24 McHugh, above, n 12 p 46.

25 McHugh, above, n 12 p 48.

26 J Williams, above, n 22 p 192.

27 McHugh, "Legal Reasoning and the Treaty of Waitangi" in Oddie & Perrett, above, n 9, p 91.

* Statutory and Common Law Recognition of Maori Claims

The main forum for determining claims based on the Treaty is the Waitangi Tribunal. The Tribunal, a body established by statute,[28] hears grievances raised by Maori about breaches of the Treaty. It is not a court. The Tribunal makes recommendations to government relating to breaches of the Treaty and the practical application of the Treaty's principles. It has no significant powers to enforce its recommendations. Since its inception in 1975 it has heard claims about fisheries, pollution, land, broadcasting and the Maori language. Where it considers a grievance to be well founded, the Tribunal usually includes its recommendations in comprehensive Reports prepared at the conclusion of its hearings. The typical stance of the Tribunal has been that the Treaty allows the New Zealand government to govern, so long as it gives proper regard to Maori interests. Commentators have noted the Tribunal's attitude towards the tension between Articles One and Two of the Treaty has shifted ground over the years. Whereas the Tribunal considered kawanatanga meant something less than sovereignty, by the late 1980s it was content to find a cession of sovereignty was implicit in the circumstances surrounding the Treaty's signing.[29] Greater consistency exists in the Tribunal's commentary on the significance of "taonga". This term is vital to child custody law for, as McHugh notes, "[t]he concept of taonga combines with rangatiratanga to form the basis of non-resource related Maori claims under the Treaty of Waitangi".[30] The Tribunal has accepted the broad interpretation of taonga noted above and said that taonga are not limited to property and possessions. It suggested the term might mean anything highly prized. In one Report, the Tribunal considered that the concept of taonga includes the Maori language.[31]

As children also come within the notion of taonga, there is a basis for the argument that the Treaty is relevant to the laws relating to children. No claim has been made to the Tribunal that has directly challenged the state of New Zealand's family law statutes and policies, although there is certainly scope for such a claim. A recent survey of family law statutes has pointed out many instances where legislation does not properly accord with Maori interests or concerns. A central criticism is that existing family law statutes provide

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28 *Treaty of Waitangi Act* 1975.

29 See Kelsey, above, n 11 pp 224-225.

30 McHugh, above, n 12, p 8.

31 WAI 11 (1986) Huirangi Waikerepuru and Others, (re: Te Reo Maori).

insufficiently for input from the child's wider kin net-works.[32] Whatever the Tribunal might one day decide about the relationship between the Treaty and New Zealand family law, its recommendations, if any, are likely to result in changes at the policy level, perhaps leading to redrafted family law statutes. A separate issue is the recognition of Treaty claims in the existing law of child custody. Before argument based on the Treaty can have any immediate impact in an individual case, it must be recognised within the existing law.[33] New Zealand constitutional orthodoxy has it that the Treaty of Waitangi cannot override an Act of the New Zealand Parliament. This was the Privy Council's ruling in 1941 and is binding on New Zealand Courts.[34] In some contexts, the Treaty has become part of domestic jurisprudence. These developments need to be traced in general terms before their relevance to child custody cases may be assessed.

A handful of New Zealand statutes make the Treaty's principles directly justiciable in New Zealand's domestic Courts, albeit in a limited range of contexts. For instance, the *State Owned Enterprises Act 1986* contains the wording: "Nothing in this Act shall permit the Crown to Act in a manner that is inconsistent with the principles of the Treaty of Waitangi." This section was relied upon by the New Zealand Court of Appeal in *New Zealand Maori Council v Attorney-General* to block execution of a Government policy to alienate Crown Land that might be the subject of a Maori grievance.[35] The Court in this case emphasised the partnership between the Crown and the Maori people anticipated by the Treaty and mentioned other guiding principles such as the fiduciary obligations of the Crown towards Maori. Other enactments have slightly different wording. For instance, section 88(2) of the *Fisheries Act 1983* provides that "nothing in this Act shall affect any Maori fishing rights." This section has been held to refer to fishing rights preserved by the te tino rangatiratanga guarantee in Article Two of the Treaty and has been pleaded successfully to quash convictions for the taking of

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32 Metge and Durie-Hall, above, n 8. Though *R v. R* was confined specifically to the issue of child custody, similar issues arise in the contexts of adoption, youth justice, child protection and wherever else the state impacts upon relations between children and their caregivers.

33 McHugh, above, n 12, p 11 draws on Hart's distinction between "primary" rules conferring substantive rights and "secondary" rules of recognition to explain this aspect of Treaty jurisprudence. See HLA Hart, *The Concept of Law*, Oxford, 1961.

34 *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308.

35 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The concern underlying the case was that once land held by the Crown had been alienated, it would be more difficult to secure its return to the Maori people.

prohibited fish, so long as the persons convicted were acting consistently with the applicable indigenous Maori fishing law.[36]

These decisions did not impinge on the sovereignty of the New Zealand Parliament. The Courts were simply applying Parliament's words. Within these legislative schemes, the New Zealand Parliament has itself incorporated the Treaty's principles and has required officials acting under the relevant statutes to act consistently with them.

The wording of section 88(2) has also provided impetus for the resurrection of the common law aboriginal rights doctrine in New Zealand. In the 1986 decision of *Te Weehi v Regional Fisheries Officer*, a New Zealand judge quashed a conviction for the taking of undersized shell-fish on the basis section 88(2) recognised the existence of an aboriginal right to fish.[37] Such rights are preserved by the common law unless expressly overridden by an Act of Parliament. Express recognition of these rights within a statute is not strictly necessary - they exist as part of New Zealand's common law. This is the main advantage the doctrine has over the Treaty - unlike rights acknowledged by the Treaty, aboriginal rights can be enforced in the ordinary courts without express statutory recognition.[38] Because they are part of the common law they can be extinguished by the central legislature.[39] It has been suggested that rights articulated in the Treaty of Waitangi themselves are merely declaratory of New Zealand's common law.[40] In any event,

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36 For example: *Ministry of Agriculture and Fisheries v Harakira and Scott* [1989] DCR 289. Noted, GW Austin, "Maori Fishing Rights in the New Zealand Courts" (1989) *U of Western Australia Law Rev* 401.

37 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. The leading author on aboriginal rights in the New Zealand context is Paul McHugh. His work in this area is too numerous to cite here. In addition to the works cited above, see "The Aboriginal Rights of the New Zealand Maori" (Sidney Sussex College, Cambridge University PhD thesis). See also, J Hookey, "Milirrpum and the Maoris: The Significance of Maori Land Cases Outside New Zealand" (1973) *Otago L. Rev.* 63; F Hackshaw "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi" in Kawharu, above, n 9 p 92; K McNeil, *Common Law Aboriginal Title,* Clarendon, 1989.

38 See RP Boast, "Treaty Rights or Aboriginal Rights?" [1990] *NZ Law JNL* 32.

39 What is sufficient to extinguish aboriginal rights remains uncertain in New Zealand. For discussion, see Boast, above, n 38.

40 The Waitangi Tribunal discussed this proposition in the *Muriwhenua Fishing Report* WAI 2 (1988), 208-209. The Tribunal rejected the argument that the Treaty was merely "declaratory" of aboriginal title, preferring the view that in New Zealand, Treaty and aboriginal rights exist side by side. See Boast, above, n 38; DV Williams points out that accepting the declaratory theory is also to accept the English constitutional law version of the sovereignty analysis, "Te Tiriti o Waitangi - Unique Relationship Between Crown and Tangata Whenua" in Kawharu, above, n 9, pp 84-89.

recognition of Maori "rights" either within statutes or as part of the common law leaves room for some degree of legal pluralism within New Zealand's legal system although the exact scope of aboriginal rights remains uncertain. Such rights are considered usufructory in character, limited to resources which were "aboriginally" used. On conventional understandings of this doctrine, it would not extend to non-traditionally used minerals, or to interests such as the preservation of the Maori language[41] - or, presumably, the rights of parents to custody of their children. Quashing the conviction in *Te Weehi*'s case was consistent with these principles. Maori fishing rights and accompanying Maori law come within the New Zealand version of the aboriginal rights doctrine.

Legislation not expressly incorporating Maori rights presents greater difficulties. In *New Zealand Maori Council*, the President of the Court of Appeal, Sir Robin Cooke, suggested, obiter, that courts will not ascribe to Parliament an intention to permit conduct inconsistent with the Treaty. His Honour said this was the correct approach to the interpretation of ambiguous legislation. Presumably, this dictum extends to legislation that does not mention the Treaty. In a later case, *Huakina Development Trust v Waikato Valley Authority*,[42] the High Court was faced with the interpretation of the *Water and Soil Conservation Act 1967* which does not mention the Treaty or other sources of Maori rights. The Court considered the Treaty to be "part of the fabric of New Zealand society" and the few interpretive guidelines provided in the 1967 Act meant that the Court could use the Treaty of Waitangi and developing Treaty jurisprudence to aid in the Act's interpretation. Other enactments which do incorporate the Treaty have created an interpretive environment which, according to the *Huakina* view, has made the Treaty part of the legal background against which statutes which do not incorporate the Treaty need to be construed. In 1990, the Court of Appeal[43] adopted a similar approach in a case requiring interpretation of the *Radio Communications Act 1990*, another statute which does not expressly incorporate the Treaty principles. Although the source of the obligation remains unclear,[44] one interpretation of the decision may be that

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41 Boast, above, n 38 p 33. Boast acknowledges that rights to oil or natural gas might follow from aboriginal title to land.

42 [1987] 2 NZLR 188.

43 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129.

44 See McHugh, above, n 12, p 276. It is uncertain whether the need to consider the Treaty is due to a general parliamentary intention suggested by those statutes expressly incorporating the Treaty, or for more fundamental reasons which are not dependent on Parliament's intention. In a subsequent Court of Appeal decision in the same litigation, *Attorney-General v New*

action taken by officials without proper consideration of Treaty principles may be challenged by judicial review.[45] A complicating factor was that a Report on Maori broadcasting by the Waitangi Tribunal was pending - and it was the Crown's failure to wait for the Tribunal's Report that was emphasised by the Court in its holding the Crown had not considered relevant considerations.[46] For this reason, the decision is one step removed from demanding the Treaty *itself* be considered, yet that remains a possible future development in New Zealand's administrative law.[47]

* Recognition of Customary Law

In 1988 a major series of recommendations that there be a separate Maori criminal justice system in which Maori law would apply was roundly rejected by the New Zealand government,[48] though customary law is clearly an aspect of te tino rangatiratanga.[49] The establishment of a separate criminal justice system for Maori would have been the most significant acknowledgment yet to occur of the te tino rangatiratanga guarantee in Article Two of the Treaty. Reasons for the rejection are many, but one central difficulty that would need to be squarely faced is that the existing New Zealand criminal justice system is culturally specific. The recommendations cut across assumptions about the neutrality of New Zealand law. While many Maori claims have been accommodated within the existing legal system - and have caused important changes to it - these recommendations were considered too radical a challenge to the "one law for all" assumption upon which most aspects of the existing legal system rests.

Zealand Maori Council (No 2) [1991] 2 NZLR 129, two other members of a court of three declined to express their views on the relevance of the Treaty in legislation that does not expressly refer to it.

45 As McHugh, above, n 12, notes this would be according to the principles articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

46 In New Zealand Maori Council (No 2) [1991] 2 NZLR 129, after the Tribunal's decision was reported and considered by the Crown, the Court held that there was insufficient evidence that the Treaty had not been properly considered.

47 A recent decision of the New Zealand Court of Appeal, *NZ Maori Council v Attorney-General*, CA 206/91 30 April 1992, suggests something of the limits of this trend. By a majority, the Court held that the Court could not supervise the Crown's activities in *legislating* inconsistently with the Treaty even though the resulting new policies might be inconsistent with the Treaty.

48 Jackson, (1988) above, n 9.

49 On the alternative analysis, that customary law is a taonga see, A Frame, "Colonising Attitudes Towards Maori Custom" [1981] *NZ Law JNL* 105.

There are some ways customary law may be recognised and applied by the Courts. Where associated with aboriginal title customary law is part of the common law. In *Te Weehi*, evidence was led by experts in the fishing law of the particular tribe in order for the Court to assess whether the defendant was acting in accordance with the rights acknowledged by the *Fisheries Act 1983*. Where the customary law is not attached to aboriginal title the recognition of customary law in the New Zealand Courts depends upon the scope of the discretions found in the relevant statutes.[50] Maori law relating to family matters falls into this category and, as we shall see below, has been applied to a limited extent by judges of the New Zealand Family Court when exercising their discretion in child custody cases.

The Treaty and Child Custody Law

* The Welfare Principle

The foregoing discussion shows assessment of the legal relevance of the Treaty to child custody decisions requires Treaty principles to be accommodated within the statutory and common law schemes that currently regulate child custody. The main statutory scheme regulating child custody disputes in New Zealand is the *Guardianship Act 1968*. It requires judges to regard the welfare of the child as the first and paramount consideration in child custody cases.[51] The welfare principle was once fettered by a number of rules of thumb, or generalisations: a mother who had been guilty of matrimonial indiscretions was presumed to be an unfit custodian; the welfare of a male child was presumed to be furthered by his being entrusted to his father; children of tender years were presumed to be better off with their mothers, and so on. Due to legislative reforms and judicial rulings, New Zealand judges may not now apply such rules. Whereas decisions in this area once gained authority by their correspondence with earlier decisions, now the welfare principle must be applied afresh in each new case. Modern child custody law is a product of a gradual abatement of legal principles,

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50 See, McHugh, above, n 12, pp 95-96.

51 Much early New Zealand statutory law was based on Westminster templates and the law relating to children was no exception. The *Infants Guardianship and Contracts Act 1887* required that when making a child custody decision, the Court should have regard to "the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father." In substance, this was a re-enactment of the *Guardianship of Infants Act 1886* (UK). When the Westminster Parliament legislated in 1925 that the welfare principle was to be the paramount consideration in decisions affecting children, New Zealand did likewise the following year. This was re-enacted as the key provision in the *Guardianship Act 1968*.

presumptions and rules. A frequently quoted observation on the nature of the child custody discretion was made by the New Zealand Court of Appeal in 1978:

> An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. All aspects of welfare must be taken into account and that will include consideration of the child's physical and mental and emotional well being and the development in the child of standards and expectations of behaviour within our society.[52]

Along the same lines are more recent statements in which judges have emphasised the individual qualities of every child custody decision. The following extract from a 1990 case well summarises this approach:

> It is a question of this child with this particular father and mother and with this particular upbringing. It is dangerous and undesirable to apply any generalised notions to the extent that the general is allowed to block out or blur the particular. The remedy has to be tailored to meet the particular family situation, otherwise the welfare of the individual child is in danger of losing its force as the first and paramount consideration.[53]

The courts which hear most family matters at first instance, including custody matters, are the Family Courts. The close association between the New Zealand Family Court and its publicly funded counselling services means the courtroom itself is peripheral to the main work of the Family Court, which is to facilitate dispute resolution without the need for formal, judicial intervention. If disputes do get to the courtroom, a key aspect of child custody jurisprudence is the "team approach" to dispute resolution adopted by New Zealand Family Court judges. Specialist counsel are appointed to represent the children, and psychologists, psychiatrists and other medical practitioners are appointed to assist the Court. These procedural aspects of New Zealand family law reflect the view that not all matters concerning children can or should be dealt with by judges sitting alone without the assistance of specialist personnel.

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52 *G v G* [1978] 2 NZLR 444 at 447.

53 *Kidd v Kidd* (31 May 1990) unreported decision, Family Court, Hastings, FP 021.128.89.

An alternative type of dispute resolution process was established by the *Children, Young Persons and Their Families Act 1989*. If a child is thought to be "in need of care and protection" a Family Group Conference can be held at which the child's family[54] meets to develop a plan to resolve the child and the family's problems. Family Group Conferences are unique to New Zealand.[55] The *Children Young Persons and Their Families Act 1989* locates a child's needs in the context of the family system, and attempts to minimalise state intervention. Some members of the Maori community have expressed approval of this process and have suggested Family Group Conferences better accord with the greater significance attributed to wider kin networks among Maori.[56] While some custody disputes can be referred to Family Group Conferences, the high statutory threshold needing to be satisfied before a child can be described as "in need of care and protection" means that most child custody cases come under the more traditional provisions of the *Guardianship Act 1968*.

* The Decision in *R v R*

It was against this legal background that the father in *R v R* brought his case. Despite the father's arguments, the judge who heard the case gave little attention to the Treaty in his reasons for dismissing the father's appeal. Consistent with the dominant concerns of modern child custody law, Tipping J emphasised the factual background. The father had had very little contact with the child, a girl aged three, since her birth. The mother had been the primary caretaker. She had another child from an earlier relationship, a boy aged five, and the judge agreed with a psychologist's view that the children should not be separated. The mother had established a home for her two children in Australia with her extended family with whom she and her children were settled. The father, on the other hand, had a history of violence, was financially unstable, was unemployed, had not bonded with the child and appeared to be without a network of family support. On the merits of the case, the judge found in favour of the mother.

The father's main legal argument was that the Treaty of Waitangi overrides the *Guardianship Act 1968* and that Article Two of the Treaty gave him an

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54 Or "whanau"; see n 9.

55 See W R Atkin "New Zealand: Let the Family Decide: The New Approach to Family Problems" (1990) 29 *Journal of Family Law* 387.

56 Pare Hopa, "From the Flax Roots" (1991) *Office for the Commissioner For Children, Toward a Family Policy for New Zealand* 54-58.

absolute right to custody of his daughter. Among the cases the father cited in support of his claim were *New Zealand Maori Council v Attorney-General* and *Te Weehi*'s case. Tipping J described the father's submissions as "rather startling" and went on to point out these cases did not apply to the *Guardianship Act* as they involved statutes that expressly recognised Maori rights, whereas the *Guardianship Act* does not. In rejecting this part of the father's claim, the judge relied on the Privy Council's ruling that the Treaty cannot, in itself, override an Act of the New Zealand Parliament.[57]

It is unfortunate this issue arose in a case in which the judge had taken such a negative view of the party putting forward the Treaty arguments. Just as the father himself was not a sympathetic candidate for custody of his child, the submissions based on the Treaty were unsympathetically received. Though the judge was correct about the proper scope of the *rations* of the *New Zealand Maori Council* case and *Te Weehi*, it may be that the relationship between Treaty concepts and the *Guardianship Act 1968* is more complex than his discussion might suggest. Doubtless, this was no fault of the judge. There is no indication in the case that the father's arguments were anything more than skeletal. The father had not properly laid the grounding for the recognition of the Treaty within the particular area of legal regulation - something orthodox constitutional theory requires of anyone who pleads the Treaty in support of his or her case. Furthermore, given the description of the facts in the case, and the attitude the judge took towards the father's parenting potential, it is unlikely the father in *R v R* would have benefited from further analysis of the relationship between the Treaty and child custody decisions. The father's arguments were tantamount to an attempt to resurrect the *paterfamilias* doctrine and it is highly unlikely this would have been spelt out of the Treaty. If anything, proper recognition of the significance of the Treaty is more likely to lead to greater control of decision-making about children within and by the child's wider kin networks. Despite Tipping J's ruling and the somewhat unfortunate circumstances in which the issue arose, whether alternative bases now exist for the recognition of the Treaty in child custody cases warrants further examination.

* The Relevance of Cultural Heritage in Family Court Custody Decisions

At first glance, Tipping J's approach in *R v R* seems to contrast with the attitudes of some New Zealand Family Court judges towards the relevance

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57 See, above, n 34.

of Maori customary concerns in custody cases involving Maori children. Some judges have suggested that a child's cultural heritage needs to be considered when making decisions about the child's welfare. In a 1986 case, *Rikihana v Parsons*,[58] Inglis J granted a Maori father's application for custody of his twelve year old son. The boy was already the subject of a custody order made in 1981 by the Metropolitan Children's Court in Sydney, New South Wales in favour of the mother which had been registered in a Family Court in New Zealand. The registration meant the New Zealand Family Court could not make a custody order unless there were "substantial grounds for believing that the welfare of the child will be adversely affected" if the Court did not exercise jurisdiction.[59] Under these circumstances, if a New Zealand Court varied or discharged the Sydney order, it was required to forward to the Sydney Court its reasons for doing so.[60] The Court's reasons focussed almost entirely on the child's racial heritage. The child had been living with his father in New Zealand and had been immersed in the culture of his father's family. The judge mentioned the "intense spiritual significance" now relevant to the child's life and the "strength and depth of the cultural influence". Some comments in the judgment seem aimed directly at the Sydney Court, such as his Honour's observation that one needs to live in New Zealand to appreciate the significance of the child's cultural background. While emphasising that the New Zealand Family Court "does not of course make special rules for any segment of the New Zealand community", the Judge considered that the child needed his father's New Zealand family "around and about him, to breathe in and live its values and awareness and to grow as a good young Maori". In these circumstances, his Honour had "no difficulty at all" in concluding that the child's welfare would be adversely affected if custody were not granted to the father.

In *M v H*,[61] a case decided after *R v R*, a child's Maori maternal grandmother applied for custody of her granddaughter. The parents had agreed the child should be entrusted to the custody of her father, a man of German background. The grandmother needed to seek leave from the Family Court to apply for custody. Only parents, step-parents, and guardians may apply for custody as of right[62] thus protecting the child's nuclear family from the trauma of a full custody hearing except in rare cases. In *M v H*,

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58 (1986) 4 NZFLR 289.

59 *Guardianship Act 1968*, s 22C(1)(b).

60 *Guardianship Act 1968*, s 22D(1).

61 (1990) 6 FRNZ 256.

62 *Guardianship Act*, s 11(1)(b).

Inglis J gave the grandmother leave to apply, observing that if the matter were looked at purely from a European perspective, the grandmother might not have demonstrated "a sufficiently serious issue of welfare to justify her intervention". Leave was granted on the basis the child was one half Maori, and the case was not one that could be viewed solely from a European perspective. The judge observed that "in terms of accepted Maori traditions and concepts" the grandmother and other members of the mother's family were undoubtedly concerned about the child's welfare and it was proper to hear her application. On the facts of the case in the substantive hearing the father was entrusted with the child's custody, based on his "youth", "resourcefulness" and his ability to manage money.

While cases such as these have been appreciated by the Maori community,[63] they are a long way from laying down a legal basis for recognition of the Treaty in child custody cases. The emphasis given a child's race depends on the sympathies of the individual judge.[64] Neither *Rikihana* nor *M v H* established that the Court must refer to Maori law as an aspect of the te tino rangatiratanga guarantee in Article Two of the Treaty. A 1988 contest for custody between a Samoan father and a Maori mother illustrates how far from that position the Family Court remains. Faced with claims from members of two minority cultures, the judge observed:

> It is important at the beginning of this case to say what this case is not about. It is not about which of the two cultures, Samoan or Maori, is the best for this little girl, aged nearly five, or which of them should have predominance in her life. Such an enquiry is, of course, impossible. The hearing is to do with the best interests of J, and the question for the Court is how these competing parents can best provide for the present needs of J. Matters of cultural upbringing will necessarily flow from that decision.[65]

According to this view, culture is one issue among many to be considered by the Court. On closer analysis, these Family Court cases are entirely consistent with Tipping J's ruling in *R v R*. The main implication of the father's claim in *R v R* was that there was some *legal* basis for the Treaty's relevance in the child custody jurisdiction. By treating a child's cultural

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63 Metge and Durie-Hall, above, n 8.

64 McHugh, above, n 12, p 290.

65 *AH v T* (14 September 1988) unreported decision, Family Court, Porirua FR 4.87.

heritage at the level of a "factor" to be considered, and insisting no "special rules" are made for any sector of the New Zealand community, the Family Court has tacitly agreed no such basis exists.

* Statutory Recognition of the Treaty in Existing Child Custody Law

Though the *Guardianship Act 1968* purports to be a code, it only partially ousts the common law. This is only to be expected as no statute in the area of child law can ever anticipate the variety of problems that might arise. Family law statutes tend to use general concepts such as "guardianship" and "custody" and leave scope for courts to develop principles in a variety of areas where statutory lacunae remain. Judicial deliberation on which of the available alternatives will best promote the "welfare of the child" is an obvious example of the need to flesh out the provisions of the statute. Like most family law statutes, the *Guardianship Act* is a more open-textured piece of legislation than would first appear.[66] If a court wished to read into the Act a requirement that the Treaty be considered, it might look to Cooke P's dictum in the *New Zealand Maori Council* case, that the Treaty is relevant to the interpretation of "ambiguous legislation". While the welfare principle is seldom described as "ambiguous" it has certainly been characterised as indeterminate[67] and it would not be stretching things too far to bring the principle within the dictum. On this approach, if courts are not to ascribe to Parliament an intention to permit conduct that is inconsistent with the Treaty, the *Guardianship Act* might be interpreted as *requiring* the Family Court to consider the Treaty when making any decisions about the future welfare of any Maori child. If accepted, these arguments require the *Guardianship Act* to be interpreted consistently with the guarantees in the Treaty. Furthermore, from the Court of Appeal's 1990 decision on the *Radio Communications Act 1990*, it would not be too great a step to recognise a failure to consider the Treaty as impinging upon the lawfulness of any decision made by the Family Court. This approach would require a court to do what Tipping J avoided by his ruling. It would require a court to determine what principles can be spelt out of the Treaty's Articles that are relevant to interpretation of a child's welfare.

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66 This analysis was suggested by W.R. Atkin in relation to the incorporation of "*Gillick*" principles in the New Zealand jurisdiction. See, "A Blow for the Rights of the Child; Mrs Gillick in the House of Lords" (1985) *Butterworths Family L. Bulletin* 35 - reprinted as "Parents and Children: Mrs Gillick in the House of Lords" [1986] *NZ Law JNL* 90.

67 See, below, n 82.

That it is possible to construct legal arguments supporting the Treaty's relevance to existing legal regimes dealing with child custody is evidence of the major developments in New Zealand's constitutional framework. Many of these arguments would have been unimaginable a decade ago. The dynamism and responsiveness of the common law have been apparent in many decisions of the New Zealand courts on Treaty issues and, as Paul McHugh puts it, Treaty jurisprudence has required many New Zealand lawyers to "reassess and reorientate the traditional positivist methodology".[68] McHugh suggests Treaty jurisprudence is responsible for the loosening of positivism's grip on New Zealand's constitutional theory. The Treaty is gradually becoming a recognisable part of New Zealand's legal background, even within mainstream responses to the issue of sovereignty. If the issue of the Treaty's relevance to the scheme of the *Guardianship Act 1968* arose again in more sympathetic circumstances and if a more rigorous analysis of the relationship between the *Guardianship Act 1968* and the Treaty were put before a judge, it is possible, on the basis of developments in Treaty jurisprudence, that a Maori applicant might have greater success.

One problem with applying this line of thinking to child custody law is that child custody law has already rejected much of mainstream legal thinking and reasoning. That Treaty jurisprudence mounts a challenge to mainstream legal doctrine is largely irrelevant in an area of judicial activity that has itself said farewell to most of traditional legal reasoning's confines. Paradoxically, it may be the absence of mainstream legal content that makes child custody law most resistant to an argument that the Treaty is relevant. As well as considering the legal arguments supporting incorporation of the Treaty of Waitangi into the regimes that currently deal with child custody, it is also important to assess how its incorporation gels with the discourses that dominate this area of judicial activity.

The Treaty and Child Custody Rhetoric

Before the significance of the Treaty to child custody law is recognised fully, major shifts will need to occur in the nature of the discourses that presently win currency in relevant official fora. This is suggested by the fact that though *M v H* was decided one month after *R v R*, Judge Inglis QC did not mention *R v R*, a decision in a superior court, when giving his reasons. No doubt this was because the grandmother in *M v H* did not argue, as a matter

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[68] McHugh, "Legal Reasoning and the Treaty of Waitangi: Orthodox and Radical Approaches" in Oddie & Prerret, above, n 9, p 96. But see, n 84 below for criticism of these developments.

of law, that the dispute over her granddaughter's custody should be treated differently because of her racial heritage. Her claim could be accommodated within the dominant child custody rhetoric. The child's race was a factor, albeit an important one, to be considered in determining what alternative would best promote her welfare. The father's claim in *R v R*, on the other hand, if pursued to its logical conclusion, would represent a challenge to the cultural specificity of the dominant legal order. This is the very kind of argument that modern child custody discourse resists.

Analysing child custody in this way draws on work by scholars such as Martha Fineman[69] and Mary Anne Glendon[70] whose writing has concerned the kinds of stories told by the law and the ways these stories often serve to exclude competing discourses. Fineman has shown how mothers' voices and concerns are excluded from the dominant joint custody discourse.[71] This approach also draws on Steven Parker and Peter Drahos's recent discussion of legal reasoning and its relationship with the indeterminacy thesis associated with the Critical Legal Studies movement. They suggest that the acceptability of any argument needs to be assessed against the world views of the various actors within the legal community and its correspondence with methods of reasoning conventionally accepted by them.[72] The argument that the Treaty of Waitangi is relevant to child custody law is excluded by official child custody rhetoric in its present state in New Zealand. It is not the kind of argument that will be heard amidst the dominant discourse. First, it conflicts with the ways that family matters are conventionally privatised in legal discourse. Second, it contests the judiciary's power to define the welfare of children. Third, it might be interpreted as a criticism of New Zealand courts' tendency to colonize Maori culture. As well as exploring the scope of the Treaty's relevance through developments in legal doctrine, it is also useful to scrutinise and critique the rhetorical strategies associated with child custody law. Before the Treaty's relevance is acknowledged, changes will need to occur in the manner child custody is currently characterised

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69 Martha Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking" (1988) 101 *Harv L Rev* 727.

70 Mary Ann Glendon, *Abortion and Divorce in Western Law; American Failures, European Challenges*, Harvard, 1987. Glendon draws specifically on JB White, *Heracles' Bow: Essays on the Rhetoric and the Poetics of the Law*, Wisconsin, 1985. See also J Montgomery, "Rhetoric and Welfare" (1989) 9 OJLS 395.

71 See Fineman, above, n 69 and Fineman, *The Illusion of Equality; The Rhetoric and Reality of Divorce Reform*, Chicago, 1991, Part II chs. 5-9.

72 Drahos and Parker, "The Indeterminacy Paradox in Law" (1991) *U of Western Australia L Rev* 305.

within its official discourses. Analysis of the law should be accompanied by analysis of the stories that presently win currency in this area of judicial activity. Any claim the Treaty is relevant to child custody must face entrenched ways of thinking about the law's role in child custody disputes. These are reflected in the dominant discourses of child custody and need to be overcome as much as any legal constraints.

* Private Families, Public Treaty

Tipping J supported his conclusion in *R v R* with some general observations on the proper scope of Treaty jurisprudence:

> As an additional point, it seems to me that the concept of partnership and fiduciary duty at the heart of the *Maori Council* case denotes a partnership between the Crown and the Maori people and is not something which directly affects the rights of citizens inter se in a matter such as the custody of children. I reject the proposition that as a matter of law the father in this case can appeal to the Treaty of Waitangi as taking precedence over the *Guardianship Act 1968* and the principles which guide the Court thereunder....It all comes back in the end to what the Court considers to be best for [the child] on a careful and dispassionate review of the evidence which has been presented.[73]

These comments will be recognised as a version of the familiar dichotomy between public and private realms of regulation. Behind the judge's words is the suggestion that the Treaty properly concerns public issues, such as claims over Maori lands that have been wrongfully confiscated, breaches of criminal statutes and regulations, and other unfair treatment of Maori by the Crown that would amount to breaches of the Treaty. Relations between family members, on the other hand, are private concerns and are outside of the scope of the constitutional issues raised by many Treaty claims. A matter such as child custody does not concern relations between the Maori *people* and the State and therefore the Treaty has no relevance. This argument has much in common with prevalent perceptions of the family as a private realm, whose regulation by the State should be minimised.

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[73] (1990) 6 FRNZ 232 at 236.

Scrutiny of the privatisation of families by the law is an important theme in critical legal theory. It has been demonstrated that the family is ignored in almost all traditional theories of justice, countenancing largely by default major injustices of family life.[74] Critical theorists argue that the relegation of the family to the private sphere is socially constructed and is not due to any natural characteristic families might have.[75] Families are not free from internal dynamics of power, nor are they insulated from activities of the State. It is a truism that almost all State policies impact upon families to some extent. One measure of the power of a party to a relationship is the ease with which that party can leave the relationship - for many New Zealand women, government policies on issues such as housing, pay equity and child care will be a measure of their ability to leave unsatisfactory relationships, an ability which will inevitably impact on the quality of family life for individual women. In turn, little imagination is needed to connect government policies on such issues as Maori land, fishing, and tribal autonomy, those issues Tipping J would accept as being proper subjects of Treaty jurisprudence, to relations within families. Changes to tikanga Maori, including life within families, have been due to social, economic and political circumstances - aspects of social regulation associated with the public realm.[76] The large scale property transfers which occurred in the wake of the colonization of New Zealand inevitably affected social, economic and cultural developments.[77] More specifically, government intervention into family life, through child protection policies and practices, truancy laws, welfare payments and so on, *create* the private sphere by defining the terms upon which families may be free from state intervention. Tipping J's rhetorical division between aspects of public regulation which are properly the subject of Treaty jurisprudence and those private aspects of life which are not ignores the impact of the general regulation by the Crown on relations between its subjects. The judge defined the custody of children as a private matter and concluded on that basis that the Treaty was not relevant without inquiring into the contingent basis of the definition. Because the family is constructed by the dominant discourse as a private sphere, it is especially difficult for traditional Treaty jurisprudence to access it. Furthermore, the specific analysis in *R v R* ignored the more basic point that, as children are

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74 SM Okin, *Justice, Gender, and the Family*, Free Press, 1989.

75 The literature on this topic is vast. See for example, FE Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv L Rev* 1497; MDA Freeman, "Towards a Critical Theory of Family Law" [1985] *Current Legal Problems* 153.

76 Metge and Durie-Hall, above, n 8.

77 MH Durie, above, n 9.

taonga, the Treaty is relevant for that reason alone. Tipping J's analysis suggests that the private/public dichotomy, as it applies to family law and Treaty discourse, needs to be critiqued before the relevance of the Treaty to child custody law will be realised fully.

* The Power to Name Welfare

The dominant rhetoric in recent New Zealand child custody decisions emphasises that every case involving a child's welfare is unique and should be treated accordingly. Decision-making is portrayed as being driven by the specific concerns of the individuals before the law. When applying the welfare principle, New Zealand judges persistently promote it as a neutral and value-free standard whose application requires a dispassionate review of the evidence. Child custody decisions are portrayed by judges as dictated solely by the individual facts of the case and as "tailored"[78] to meet the needs of the families who come before the law. Official child custody discourse exemplifies law's neutrality.

Child custody law involves many processes and the interaction of a range of disciplines, legal, psychological, psychiatric, medical. It also invokes a power to name. To favour one custodial alternative over another is to name what will promote a child's welfare. "I now have the last word"[79] said a New Zealand judge in a child custody case of recent years, a comment that aptly captures the interpretive and definitional power given to decision-makers in this area. Weighing factors relevant to a child's welfare demands establishing what is relevant and what is not. Decision-making involves a power to sift information, to break down complex stories into simpler ones, to redefine lived realities of the legal system's consumers, to make choices about custodial alternatives seem objective and natural. All of this depends on the power of those who tell law's stories, of those allowed the last word.

Official child custody discourse seeks to avoid such issues. Tipping J's suggestion that "[i]t all comes back in the end to what the Court considers to be best...on a careful and dispassionate review of the evidence which has been presented" is consistent with the dominant rhetoric in its insistence decisions are dictated by the facts and are unconstrained by general rules. The dominant rhetoric amounts almost to a denial that any decision is being

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78 *Kidd v Kidd* unreported Family Court Hastings, 31 May 1990 FP 021.128.89.

79 *F v TeP* unreported Family Court Palmerston North 17 December 1987 FP 054.343.87.

made at all. Decisions made about children's welfare are portrayed as flowing naturally from the facts before the Court. They are no longer the product of judicial rules of thumb or generalisations. They are merely tailored to meet the individual needs of the individual families. All a Court need do is draw all the strands of evidence together and fit the outcome to suit a particular family's needs. The dominant child custody discourse seeks to decontextualise the decision-making process by making the outcomes of cases seem neutral and inevitable. The "team" approach adopted by the New Zealand Family Court enhances the picture. It implies a maximisation of data about specific children through the input of different child welfare experts in the human sciences. It contributes to the view that judicial decisions about children are neutral, objective, and scientific. The official characterisation of the judicial discretion exercised in a child custody case seeks to dispel all suggestion that truths about children generated by the law and relied upon in the assessment of a child's welfare might have anything remotely to do with power.

The official picture has been vigorously attacked from a number of directions. For instance, in the light of the attacks on positivist methodology occurring across many disciplines, neutrality cannot be said to follow from child custody law's scientific character. As Fineman and Opie have found, "[f]eminism, phenomenology, critical theory, and linguistic theory all tackle the positivist's basic assertion that the social sciences are sciences with testable hypotheses and theories framed and assessed in a value-free manner".[80] With Foucault, many writers conclude that "truth is not by nature free - nor error servile - but that its production is thoroughly imbued with relations of power".[81] Moreover, problems with the paramount principle in this area, the welfare of the child, have been highlighted again and again in academic critique. Application of this principle is inevitably subject to personal value systems and judicial perceptions of societal values.

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80 M Fineman and MA Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce" [1987] *Wisconsin L Rev* 107, 127.

81 M Foucault, *The History of Sexuality*, Volume 1 M Huxley (trans.) Penguin, 1978, p 60, cited in Fineman and Opie, above, n 80.

The principle's indeterminacy[82] and the impact of the subjective ideology of the judiciary[83] are perennial concerns.

Little impact is evident in official child custody discourse of the many challenges that have been mounted against the purported neutrality of child custody decision-making. Modern child custody law prides itself on its ability to respond uniquely to the unique problems families might face. It gains much of its authority by reminding its various audiences that the days of generalised rules have gone and that now, child custody law involves grappling with the human problems coming before the law in a dispassionate and value-free manner. To acknowledge ideological issues are associated with the exercise of the discretion might remain would seriously undermine the authority that comes with the sensitive, responsive stance adopted by judges who deal with these questions. By deeming the Treaty irrelevant to child custody disputes, *R v R* typified the dominant way modern child custody law is perceived and characterised. The father's claim risked challenging the law's neutrality where such challenges are most resisted. Arguments founded on the obligations contained in the Treaty of Waitangi were considered by the Court to be irrelevant, just as any discourse would be that raised questions about the distribution of power and its relationship to the production of knowledge. The claims in cases such as *Rikihana v Parsons* and *M v H*, on the other hand, were acceptable because they brought the issue of race under the aegis of the imported law's own principles. Race could be dealt with as an aspect of the welfare of the individual children involved in those cases but not as a challenge to the law's very authority to define welfare. An implication of the father's claim in *R v R* was the law dealing with child custody in New Zealand is culturally specific. Potentially, it was a powerful counter story to the dominant child custody rhetoric. After all, if the law's approach to child custody issues *is* value-free and reliant on a dispassionate review of the evidence, if outcomes of cases do flow inevitably from the specific issues and data before the court, there should be no problems with the identity of those who make decisions. If the official story is true, there should be nothing on which the father could base a Treaty claim.

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82 The *locus classicus* is RH Mnookin, "Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy" (1975) 39 *L. and Contemporary Problems* 226, 255. See also Mnookin, *In the Interests of Children*, Freeman, 1985. Most other writing on the topic repeats Mnookin's indeterminacy thesis. Compare J Heaton, "Some General Remarks on the Concept 'Best Interests of the Child'" (1990) 53 *THRHR* 95.

83 J Eekelaar, "'Trust the Judges?' How Far Should Family Law Go?" (1984) 47 *Mod Law Rev* 593.

Recognition of the connection between knowledge about children and the power to define knowledge is essential to the Treaty's relevance in an area such as child custody law but it is something allowed little scope by the official story. Treaty claims are about power - but the dominant child custody discourse renders the topic of power out-of-bounds. Before the significance of the Treaty of Waitangi to child custody disputes will be realised fully, the assumption that knowledge about children and their welfare exists in the abstract, untainted by the systems of thought that produced it, needs to be reassessed. While resource claims by Maori can be accommodated within the central administration's instrumentalist frameworks, concerns that go further and dispute law's very power to construct reality, to define and interpret, cannot.[84] Lurking beneath the father's claim in *R v R* was just such a challenge. Though the father did not make the point expressly, if his argument were accepted, it would challenge child custody law's own truth claims. It would suggest definitions of welfare do not occur in the abstract, unaffected by race, gender, sexual orientation or economic status. It would be to say the unsayable - at least, according to child custody law's official discourse.

* The Colonization of Maori Culture by Child Custody Discourse

So long as the challenge to child custody law presented by Treaty jurisprudence is resisted, Maori culture concerning children will remain open to colonization by the mainstream legal system. This suits the legal system well. By absorbing Maori concerns, courts resist challenges based on them. Not only can the courts display their sensitivity by incorporating Maori issues in the reasoning, they can also use Maori concerns to further particular policy agendas. Judicial joint custody policy provides an example. Though there is no statutory presumption in favour of joint custody in New Zealand, there exists a judicial policy that outcomes of child custody cases should maximize the input of both parents in their children's lives as far as possible. One judge has gone so far as to suggest the *first* principle to apply in such cases is that "both parents are equally responsible for the children's upbringing and

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[84] Parallel constraints exist in Treaty jurisprudence itself. Moana Jackson argues that though the "bluster of colonialism" has been largely superseded by developments in Treaty jurisprudence that have been more sympathetic to Maori claims, arrogance and racism still remain, albeit cloaked in a 'newspeak of bicultural rhetoric or legal pluralism'. Treaty jurisprudence absorbs and deals with Maori concerns on its own terms, rather than assessing the racism in mainstream law's own philosophical bases. See Jackson (1992), in Oddie & Perrett, above, n 9 pp 1-2.

welfare".[85] The leading case in this development, the 1988 case of *Makiri v Roxburgh*,[86] dates from the period in New Zealand's recent history of greatest recognition of Maori claims based on the Treaty to land and other resources. It involved a Maori child. Though the mother had been the child's main caretaker for a number of years, the court ruled the parents should share in the custody of the child. In support of this outcome, the Court stated:

> It is an approach which is particularly responsive to the sensitivities of the Maori community. The idea that a child should be placed in the exclusive care of one parent only is alien to Maori tradition. A custody order excluding one parent altogether from the possession and care of a Maori child is seen as imposing European values on an ancient and now strongly reviving culture .... Though the Family Court ... does not make special rules for any segment of the New Zealand community, it must and does recognise that each case involving the welfare of a child must be considered according to its own individual circumstances, important traditions and cultural values being one such obvious factor.[87]

Contrary to what is suggested here, while individualised parenting by a sole custodian might be alien to Maori tradition, there is no readily ascertainable consensus that a shared parenting regime is "particularly responsive to the sensitivities of the Maori community". If such a consensus does exist, it would more likely emphasize the role of the child's wider kin net-works. If anything, *M v H* misread Maori traditions.

Reference to Maori traditions in *Makiri* served rhetorically to support the judicial policy in favour of shared parenting spearheaded by this case. No evidence was cited in the case that the particular result did accord with Maori law concerning children. Nor does it appear any experts on Maori law were consulted. Rather, Maori tradition was appropriated - or colonized - in support of a particular policy agenda. At first glance, the passage from

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85 *Marshall v Marshall* (4 April 1990) Family Court New Plymouth FP 043 303 89; see GW Austin, "The *Guardianship Act 1968* - A status statute?" (1991) 3 *Butterworths Family L Bulletin* 14.

86 (1988) 4 FRNZ 78.

87 (1988) 4 FRNZ 78 at 89.

Makiri v Roxburgh seems to accord properly with Maori interests. It might be objected that concern for Maori family traditions was merely absorbed within the overarching concern to establish a shared parenting presumption in subsequent New Zealand child custody cases.[88] No bad faith need be imputed to any individual judge. Misreadings are institutional. They are simply to be expected so long as child custody law refuses to acknowledge that who gets to tell - or retell - its stories is an important issue. This suggests a further reason for the rejection of the claim that the Treaty of Waitangi should be incorporated into child custody law. Full acceptance of this argument might highlight problems with the appropriation of Maori cultural issues in the furtherance of other agenda. Within this context, it would contest the legitimacy of the grip the dominant culture attempts to maintain over Maori. Again, scrutinising the ways child custody discourse achieves this may usefully bolster any legal responses that may be generated if the general issue of the relevance of the Treaty of Waitangi to child custody law were considered afresh by the New Zealand courts.

Conclusion

This article has examined the relationship between the Treaty of Waitangi and child custody law according to two methodologies. First, it examined the relevant legal rules of recognition requiring satisfaction before the Treaty can become justiciable in New Zealand Courts. Despite the ruling the Treaty is irrelevant to child custody disputes, some scope exists for the argument that the Treaty is part of the interpretive background for the statutes that presently deal with child custody and courts must establish the relevant Treaty principles that might apply to resolving child custody disputes.

The second approach was to examine the kind of rhetoric presently winning currency in judicial decisions of this type. Modern child custody law has rejected most of its legal content, warranting closer scrutiny of its rhetorical characteristics. The story that dominates child custody jurisprudence does not easily countenance the suggestion that the meaning of welfare is subject to institutional and ideological power and adopts a number of rhetorical strategies to resist it. One route towards recognition of the Treaty in child custody law is through legal channels. Perhaps this route will be rendered

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[88] Potential exists here for analysis according to the methodologies suggested by Michael King and Christine Piper, drawing on the jurisprudential field of "autopoiesis." See King & Piper, *How the Law Thinks about Children*, Gower, 1990 and King, "Child Welfare Within Law: The Emergence of a Hybrid Discourse" (1991) 18 *JNL of Law and Society* 303.

more successful by an accompanying analysis of the truth claims embedded in the stories that child custody law tells about itself.