The Phenomenon of Agreement: A Maori View

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I: INTRODUCTION

Chitty expresses the view that a contract is a promise or a set of promises which is enforceable by law.[1] As Coote suggests:[2]

> To promise under oath, to swear to whatever is being promised, has been seen as the assumption of an obligation which was distinctively religious. If it is once accepted that a promisor may assume differing types or degrees of obligation, it is a very short step to appreciating that legal contractual obligation might as such also be assumed ... that a contractual promise involves an assumption of legal contractual obligation and that the institution of contract, itself, is a facility afforded by society or the state by which such an assumption is made possible.

Thus, in Pakeha society a contractual promise is differentiated from other promises by the assumption of a *contractual* or *legal obligation* on behalf of the promisor. The law of contract is a facility whereby individuals within society may undertake such assumptions and to which individuals turn for enforcement of such representations.

Investigating the theory of contract can establish the justification and recognition of a contract as well as predicting when a contract will exist.[3] Therefore, the

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1 Guest (ed), *Chitty on Contracts: General Principles* (24th ed, 1977) 1.

2 Coote, "The Essence of Contract: Part II" (1988) 1 JCL 183, 192.

3 Coote, "The Essence of Contract: Part I" (1988) 1 JCL 91, 97.

question of what constitutes a particular contract is inextricably linked to the purpose that contracts generally serve.

To understand traditional Maori concepts of promises and agreements, it is necessary to understand certain elements of traditional Maori society:[4]

> Never has contract occurred without society; never will it occur without society; and never can its functioning be understood isolated from its *particular* society.

It is impossible to discuss Maori concepts of law within the parameters of a Pakeha legal and social framework. In the common law jurisdiction the special feature of contractual obligations is that they arise consensually from the agreement of the parties brought about by their own free will. By contrast, a Maori understanding of agreements is of obligations imposed by circumstances or by nature of position. Obligations are imposed and controlled by the concept of *utu* (reciprocity) and *tikanga Maori* (etiquette).

This article will outline certain elements of traditional Maori society relevant to Maori concepts of agreement. It then illustrates a structured social custom known in Maori as *koha*, or what has been termed by Pakeha the "gift exchange process". As Maori society was fragmented into social units of *iwi* (tribes), koha created a course of dealings or an ongoing relationship of mutual benefit which bridged these divides. The writer proposes that the underlying philosophy of koha is present in land transactions between Maori tribes and early Pakeha settlers.

An understanding of Maori conceptualisation of agreement can be used as an interpretative tool. This understanding will be used to examine the Treaty of Waitangi and early land dealings between Pakeha and Maori.

II: A MAORI VIEW OF AGREEMENT

1. Elements of Maori Society

(a) Social structure

Maori organised themselves into structured bodies which provided the framework of traditional Maori society. The smallest social unit in Maori society is called the *whanau*.[5] With further generations, families grew extending the size of the nuclear family so that a new term was required. *Hapu* was used to denote these further groupings of people. Hapu is derived from the term for pregnancy and

4 Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980) 1-2.

5 The term "whanau" means either to give birth, offspring, or extended family. For a more detailed discussion see Buck, *The Coming of the Maori* (1949) 333.

expresses the idea of common ancestry and blood-ties.[6] The iwi was the largest body and denoted the blood-ties between hapu who descended from a common ancestor or *tupuna*. In Western terminology the iwi is the tribe, the hapu is the sub-tribe, and the whanau is the family unit.

(b) Hierarchy and the decision-making process

Within most iwi existed three tiers of rank and social position. This hierarchical structure is critically important, especially when discussing the machinery of administration and decision-making. There were the *rangatira* (chiefly class), *tutua* (commoners), and *taurekareka* (slaves). Rangatira occupied the highest social position, contributing in many ways to the success of the tribe, from military service to cultivation and harvesting.[7] The most senior member of this nobility, namely the first born of the most senior family in society, was called the *ariki* (paramount chief).

The iwi was directed by the ariki whose inheritance of leadership was a result of his lineage.[8] His exalted birth dictated his position, *mana* (power and prestige), and *tapu* (spiritual power or restriction). Rank and leadership were ordered by primogeniture in senior families, so purity of descent was jealously guarded by selection in marriage.[9]

A successful chief was one who followed the advice of his advisers. If he earned their trust and respect, his own word would become more influential. However, no one person could subject the iwi to an agreement with other iwi without the general consensus of the tribe.[10] If a matter arose involving implications for the iwi as a whole, discussion would take place on the *marae* (village courtyard, the spiritual and symbolic centre of tribal affairs).

2. Maori Philosophy Underlying Agreements and Promises

While Maori society had neither written law, courts, nor a legislature, Maori

6 Ibid.

7 Experts in crafts such as carving (*tohunga whakairo*), building (*tohunga whaihanga*), and canoe building (*tohunga tarai waka*) were drawn from the rangatira class. So too were the *tohunga makutu* who practised what Pakeha would term sorcery, witchcraft, or the black arts. For further commentary see Lewis and Forman, *The Maori: Heirs of Tane* (1982) 67.

8 The masculine pronoun is used intentionally because ariki were generally men. Nonetheless, some tribes, particularly those of the East Coast, have recognised female ariki of great distinction. See Mahuika, "Leadership: Inherited and Achieved" in King (ed), *Te Ao Hurihuri: The World Moves On* (1981) 64, 70 for stories of Materoa Reedy of Ngati Porou and Mihi Kotukutuku Stirling of Whanau-a-Apanui. These two women were born to the status of ariki and were even granted formal speech-making rights.

9 Ibid, 67.

10 Oliver (ed), *The Oxford History of New Zealand* (1981) 142 n5 and accompanying text.

possessed rules of social conduct regarded by all as binding.[11] Concepts of tapu and *tika* (etiquette) guided and regulated social behaviour. The mechanism of *muru* acted as a sanction dictating the response for a breach of an agreement. The principle of *utu* dictated the level of response and compensation. Combined, these elements helped to make up a system dealing with questions of mana, security, and social stability. This system was based on a spiritual order but nevertheless developed in a rational and practical way.[12]

Two important concepts underlying exchanges between iwi are the concepts of utu and tika.

(a) Utu

Utu has, in the past, been interpreted to mean retribution or revenge. For example, "[f]or insult, for crime, for death, for instruction in sacred lore, utu of one kind or another had to be obtained".[13] However the word for revenge in Maori is *utu-hia.*[14] The concept behind utu is one of reciprocity or balance - to put right a wrong, to balance that which has become unbalanced.[15]

To illustrate, if a person were murdered by a member of another iwi, the relatives of the deceased would demand utu. More correctly, the offender's iwi would have to compensate for the damage inflicted in a manner that would restore the imbalance created by the original offence. Arguably, the replacement of a life was an impossible task and could only be satisfied by taking the offender's life, which sometimes occurred. However, the deceased's relatives could often be satisfied by repayment through land and other goods.[16]

Muru was the mechanism through which utu could be achieved. It enabled the acquisition of compensation by the confiscation or destruction of the offender's goods. Because the offender's actions often placed a stigma upon the whanau or

11 Jackson, *The Maori and the Criminal Justice System: He Whaipaanga Hou - A New Perspective Part 2* (1988) 37. Using this general definition of law Jackson states: "Although there was some tribal variation, there was a distinct set of conventionally approved means of ensuring acceptable behaviour. Its bases, constructs, and methods of application were naturally quite different to the state centred models of Western jurisprudence. However a system of social control and dispute resolution did exist, and Maori people recognised it as a system of law."

12 Ibid, 39.

13 Firth, *Economics of the New Zealand Maori* (2nd ed 1959) 413.

14 Biggs, *English Maori, Maori English Dictionary* (1990) 143.

15 An analogy could be drawn from this philosophy and the principle of *restitutio in integrum* which guides the role of damages in the law of torts. The object of an award of damages in tort is to put the injured party into the position he or she would have been in had the injury, with its consequent damage, not occurred. See Todd, *The Law of Torts in New Zealand* (1991) 864.

16 See Sykes (ed), *The Concise Oxford Dictionary of Current English* (6th ed, 1976) 1290, where vendetta is defined as "[b]lood feud in which family of injured or murdered man seeks vengeance on offender or his family". This is the erroneous definition that in the past has been accorded to the word "utu".

hapu, the breach was not confined to the individual. Consequently, a muru raiding party made up of the victim's whanau could seek to acquire reparation or balance from the offender's whanau.

The concept of utu also operated at an economic level, dictating the value of exchange. This concept of utu in the economic sphere will be referred to again when discussing koha.

(b) Tika (etiquette)

In most organised societies behaviour is subject to social control. This broad principle is also applicable to Maori society. Public opinion acts as a control which can be manifest or latent. Whether in the distribution of goods, behaviour in communal life, or conduct outside the confines of the tribe, etiquette and the observance of strict customs were and remain essential elements of Maori life.

A transaction of resources, whether for economic or political reasons, was based on the understanding that to give or to repay was necessary to retain the balance of the initial act. However, a repayment had to be more than equivalent; it had to exceed the original act if the donor's mana was to increase. The reasons for this were twofold. First, repayment in excess kept open the course of dealings, ensuring the relationship of mutual benefit continued as long as the parties desired. Second, as well as being considered *tikanga*, generosity was a virtue of great distinction.

An excellent example of this system can be illustrated by a *paremata* (reciprocal tribal feast) given by Te Wherowhero, the ariki of all Tainui tribes, in May 1844 at Remuera.[17] In attendance at the feast were the Ngati Haua of Matamata, who were former enemies of Te Wherowhero. Ngati Haua, who had given a feast for the Tainui tribes the year before, had to submit to a receipt of goods and gifts on a scale they could not hope to repay in the future. Furthermore, Te Wherowhero forced upon the Ngati Haua the attendance of the most distinguished and important Pakeha in the land, Robert Fitzroy, the newly appointed Governor to New Zealand. By so doing Te Wherowhero had repaid the earlier feast, redeeming his own reputation, and gained a position of social ascendancy over his former enemies by securing the attendance of the new Governor. With this achievement Te Wherowhero had increased his mana and the mana of his people.

3. Koha (Features of the Gift Exchange)

Each gift had the appearance of being conducted out of simple generosity.

17 This occasion is noted in *The Oxford History of New Zealand* supra at note 10, at 140. The feast consisted of 11,000 baskets of potatoes, 100 large pigs, 9,000 sharks, and large quantities of flour, sugar, rice, and tobacco. A shed was constructed nearly 400 yards long, covered with Witney blankets and with 1000 more blankets inside as presents. The feast lasted nearly a week.

However, koha involved an obligation to give when an appropriate occasion arose. Such occasions included the end of a war, a breach of tapu, and a *tangi* (mourning).[18] Furthermore, in accordance with tikanga Maori the recipient was placed not only under a corresponding obligation to receive, but also under an obligation to repay, which if possible had to be in excess of what utu demanded.

(a) Obligation to give

The desire for mana was, and remains, a strong force in Maori society. Economic, political, and military competitiveness were essential in obtaining mana. One manner of competitive display was achieved by the giving of goods to others. The donor's mana increased by a display of generosity and by the magnitude of the gift. The practice of generosity was greatly admired and encouraged by proverbs, tales, and the advice of elders.[19] Failing to make a gift on an appropriate occasion would result in a violation of etiquette and a loss of mana.[20]

Often gifts were made in contemplation of what would be returned in payment. Therefore, at a base level, the gift exchange process could also result in acquiring something of practical utility. If a gift was made with the intention of receiving a particular object, then a tacit understanding between the parties ensured inappropriate gifts were not given. A common method was by making an oblique or indirect reference to a particular possession.[21]

(b) Obligation to receive

Only rarely were gifts refused. To do so would be disrespectful and cause damage to the mana of the gift giver. If this occurred, there would be a claim for utu from the aggrieved party. If the insult were of a grave nature, utu may have been in the form of armed conflict. Furthermore, refusal to accept a gift would signify fear of having to repay the gift in the future and mana would be lost.

(c) Obligation to repay

The obligation to repay was not articulated by the donor, but rather acknowledged by the donee as owing. For Maori, the obligation to repay is embedded in

18 Firth, supra at note 13, at 400-402.
19 Ibid, 422.
20 Best, *The Maori* (1924) 389.
21 Firth, supra at note 13, at 411-412.

the understanding of *hau*. Hau may be explained as follows:[22]

> Now, you have something valuable which you give to me. We have no agreement about payment. Now, I give it to someone else, and, a long time passes, and that man thinks he has the valuable, he should give some repayment to me, and so he does so. Now, that valuable which was given to me, that is the *hau* of the valuable which was given to me before....

Every item whether animal, vegetable, or mineral possesses hau. Though quite distinct, hau of goods and people are intertwined. By gifting possessions, a person was actually giving away part of his or her essence. So even though possession was ceded, the giver still maintained a portion of ownership to the good. For example, if a donor gave the recipient physical possession of a cherished garment, that garment retained the spiritual life force of the donor. Therefore, it never completely became the recipient's.

Consequently, a return of generosity had to be made to the donor to replace that which he or she had lost. In this process the parties became bonded in a relationship founded in the utmost good faith. As a result, the gift exchange has been said to be an interchange of personalities or "a bonding between persons".[23] For example:[24]

> When a person dies some of the relatives at a distance come to *kawe nga mate*, bring their affliction. On such occasions the bereaved are the recipients of *taonga* (valued heirlooms) such as garments, greenstone articles, etc. At a subsequent time, on a death occurring among the people of the donors, the process is reversed, and the *taonga* are returned. Hence during a period of generations, heirlooms pass many times between related people. To keep the same indefinitely is a grave mark of disrespect to ancient custom, and disrespect to the relatives, leading to ill-will in many ways.

III: IMPLICATIONS OF A MAORI UNDERSTANDING OF AGREEMENT: LAND TRANSACTIONS

To the Maori, land is more than an economic resource exploited for its value. Land also provides the spiritual link tying Maori to their people and their ancestry. This spiritual relationship with the land stems from the myth of humankind deriving from the union of *Papa-tu-a-nuku* (earth mother) and *Rangi-nui-e-tu-nei* (sky father).

Land was a separate entity possessing its own hau and *mauri* (life force). It was

22 Gathercole, "*Hau*, *Mauri* and *Utu*: A Re-examination" *Mankind* 11 (1978) 334. See also Firth supra at note 13, at 279 where he explains the relationship hau possesses with the *mauri* (life force). "It is clear each bears a dual meaning varying with the context, and each refers to certain concepts which the other does not quite cover. Thus the *mauri* is the activity that moves within us; a person may say that his *mauri* has been startled (oho), though he would not use the expression in regard to his *hau*. This latter is more akin to his personality."

23 Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (1954) 10.

24 Firth, supra at note 13, at 415-416, quoting Mr George Graham in a memorandum to the author.

believed that over time the Maori people and their land became one. The Maori system of community co-operation in cultivation and sharing the natural resources of their territory inhibited any trend towards individualism and individual ownership of land.[25] The individual possessed an undivided share in the common ownership but could not be said to own any particular portion in perpetuity. The individual had use of particular portions and neighbours respected the allotment as their own was respected. As a result, alienation could only be performed by communal decision established through public debate on the marae. This is important when considering title, possession, and exchange from a Maori perspective.

Tuku (release) and *hoko* (exchange) were words of common appearance in the land deeds of several key transactions in the Muriwhenua.[26] It is submitted that Maori before 1840 did not have a word which meant a full and permanent extinguishment of all rights for consideration amounting to a sale.[27] From an understanding of hau, such a concept could not exist. Gifts of land were often made prior to 1840 to entice Europeans to settle in the lands of particular iwi. These agreements marked the establishment of a relationship between the parties, rather than the extinguishment of one party's rights in respect of the land. Europeans were treated as settler guests and allies in the expectation of establishing a continuing relationship of reciprocity.[28]

The process took shape in the manner of gift exchange. Maori gifted land to Pakeha. Pakeha were expected to reciprocate goods, technology, or educational facilities. Each party was tied to the other in terms of contractual obligations. If the service was not forthcoming, or if loyalties shifted, Maori regarded the relationship to be at an end and the land to revert back to the control of the iwi.[29]

It is submitted that the number of claims before the Waitangi Tribunal today is a result of the different views of Maori and Pakeha of agreements relating to land.

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25 Firth, supra at note 13, at 362.

26 Salmond, "Submission for Waitangi Tribunal - Muriwhenua Land Claim", para 1.00. The transactions include the 1834 and 1840 Kerekere (CMS) transactions and the 1839 and 1840 Oruru (or Ford) transactions.

27 See Wyatt, *The Old Land Claims and the Concept of 'Sale': A Case Study*, unpublished thesis, University of Auckland (1991) p66-67.

28 Ibid, 108-109; Salmond, supra at note 26, at para 4.1 describes the land transfer to Pakeha settlers as similar to the case of "tribes who wished to settle". They "were expected to give loyalty, assistance and regular offerings of food to host groups, in return they were protected from outside attack, and could be evicted if they abused or neglected the obligations inherent in the arrangement".

29 Wyatt, supra at note 27, at 108-109.

IV: IMPLICATIONS OF A MAORI UNDERSTANDING OF AGREEMENT: THE TREATY OF WAITANGI

1. The Treaty of Waitangi

Te Tiriti o Waitangi (the Treaty of Waitangi or "the Treaty") was signed in 1840 by William Hobson representing the British Crown, and by over 500 Maori chiefs.[30] To the English, the Treaty recorded the cession of New Zealand's sovereignty to Britain and gave the Crown the exclusive right of pre-emption of such land that Maori wished to sell. In return, Maori were promised by Article 2:

> [F]ull 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.

The Treaty also promised Maori the full rights and privileges of British subjects under Article 3.

However, because of the differences between the English and the Maori texts, the inherent tension between *kawanatanga* (governorship) and *tino rangatiratanga* (absolute self-determination) and the many breaches of the Treaty by the Crown, the Treaty has been described by one commentator as a "morally dubious document".[31] Whatever the interpretation, it is clear that historically, the Treaty has had limited significance for the judiciary of New Zealand. Viscount Simon stated in *Te Heuheu Tukino v Aotea District Maori Land Board*[32] that "[i]t is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law".[33]

This general principle was reaffirmed some 20 years later by the Court of Appeal in *In Re the Bed of the Wanganui River*[34] where Turner J stated:[35]

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30 Significantly, three leading ariki did not sign the Treaty of Waitangi: Te Wherowhero of Tainui, Te Heuheu of Tuwharetoa, and Te Kani Takirau of Ngati Porou.

31 Walker, "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1989) 263; see also Kelsey, *A Question of Honour? - Labour and the Treaty* (1990) 213: "The divergence between the Waitangi Tribunal and Pakeha courts' attitudes to the Treaty was exposing the latter to accusations of institutional racism".

32 [1941] NZLR 590, 597 (PC).

33 Ibid, 596-597.

34 [1962] NZLR 600.

35 Ibid, 623.

> Upon the signing of the Treaty, the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi itself.

In the last ten years, however, the Treaty has arguably been treated by the courts with a new sensitivity.[36] In *Huakina Development Trust v Waikato Valley Authority*,[37] Chilwell J expressed the view that:[38]

> [T]he authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society.

Even more surprising was the Court of Appeal's unprecedented decision in *New Zealand Maori Council v Attorney-General*.[39] Four judges stated that the signatories to the Treaty in essence entered into a partnership and that the principles of the Treaty required the Pakeha and Maori Treaty partners to "act towards each other reasonably and with the utmost good faith".[40] These findings were particularly satisfying for many Maori who had always regarded the Treaty of Waitangi as an agreement of honour, entered into in good faith by both parties.[41]

This shift in the judicial position indicates that the parameters of the Treaty's application are not fixed. Courts have altered the application of the Treaty in a number of cases to reflect the political, social, and economic climate of New Zealand society. While it is clear the Treaty of Waitangi is far from a "nullity",[42] the orthodox view is still that rights conferred by the Treaty cannot be enforced through the courts except to the extent that they are incorporated into domestic

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36 Kelsey, supra at note 31, at 213.

37 [1987] 2 NZLR 188.

38 Ibid, 210.

39 [1987] 1 NZLR 641.

40 Ibid, 667.

41 In 1882, a deputation of chiefs led by Paora Tuhaere of Ngati Whatua "journeyed to England to petition the Queen for redress under the Treaty of Waitangi for the wrongs perpetrated by the settler Government. Their petition cited the injustice to Wiremu Kingi at Waitara, the unwarranted invasion of Waikato, the attendant land confiscations, and unjust invasion of Parihaka". Walker, supra at note 31, at 273. A second deputation was led by King Tawhiao in 1884, and finally a third in 1914 by King Te Rata of the Tainui Confederation. Another deputation was organised by the prophet leader Ratana. This deputation, however, was obstructed by the New Zealand High Commission and did not get an audience with the King or even the British Prime Minister. For a more detailed account see Walker, supra at note 31, at 272-274.

42 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72, 78.

law.[43] Therefore, the assertion that the Treaty gives rise to contractual obligations is generally regarded as untenable.[44]

On one view, however, the Treaty had effect in municipal law by creating contractual obligations upon the Crown and Maori signatories in furtherance of the policy contained in the Letters Patent issued under the Royal Seal.[45] The argument is based on numerous Canadian cases which identify the nature of contractual obligations between the British and a number of Indian tribes.

2. The Canadian Contractual Obligation Approach

The general approach of Canadian courts has been to found Native Indian hunting and fishing rights upon the doctrine of Aboriginal Title. However, several judges have viewed these rights as originating from various treaties between the Crown and a particular tribe.[46]

Historical records indicate that the Indians greatly trusted the Crown's negotiators.[47] The Canadian courts have held that any ambiguity in the terms of a treaty should be interpreted in order to uphold the honour of the Crown and the rights of the signatory tribes.[48] Moreover, the courts have stated that any evidence by conduct or otherwise as to how the parties understood the terms of the treaty is of assistance in giving content to the term or terms of the treaty. This approach to treaty interpretation is similar to that which Maori have argued should apply to the Treaty of Waitangi. Furthermore, that the North American treaties involved the ceding of vast tracts of land makes these them analogous to the Treaty of Waitangi.

The starting point for discussion of Canadian case law involving treaties is the Privy Council decision in *Attorney-General For the Dominion of Canada v Attorney-General for Ontario*[49] ("the *Indian Annuities* case"). In this case the Crown had entered into a treaty to extinguish aboriginal title by the voluntary cession of the native Indians. The treaty provided for the payment of annuities to the signatory Indians and stated that the transfer of rights to the Crown would be "subject to any trusts existing in respect thereof".[50]

The Privy Council held that the treaty would have created enforceable contractual obligations if the Crown was constitutionally able to expend public funds

43 Supra at note 32, at 596-597; this view was repeated by McKay J in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 591 (CA) which is the most recent expression of the orthodox view.

44 Brookfield, "The New Zealand Constitution: The Search for Legitimacy" in Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 1, 20 n44.

45 McHugh, "Maori Fishing Rights and the North American Indian" (1985) 6 Otago L Rev 62, 81-82; see also McHugh, *Maori Land Laws of New Zealand* (1983) 16.

46 Ibid (1985), 74-75.

47 Supra at note 45 (1985), at 80.

48 Ibid.

49 [1897] AC 199.

50 As cited, ibid, 200.

without authorisation from the legislature. Since the Crown was unable to do so, the promise was nothing more than a personal obligation assumed by the governor.

The Alberta Court of Appeal in *R v Wesley* [51] interpreted the *Indian Annuities* case as establishing that Indian treaties were binding on the Crown in the form of a contractual obligation. McGillivray JA stated:[52]

> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate ....

More recently, in *The Town of Hay River v The Queen*,[53] the contractual nature of treaties was examined. Mahoney J stated that treaties between the Crown and Indian tribes fell somewhere between full international treaties and local contracts. Such agreements, being governed by principles derived from both areas, "impose and confer continuing obligations and rights on the successors of the Indians who entered into it ... as well as on Her Majesty in right of Canada".[54]

3. Application of the Canadian Approach to the Treaty of Waitangi

There are a number of difficulties in applying the Canadian contractual approach to the Treaty of Waitangi. Particular objections are that Maori did not possess the body politic enabling them to enter into such an agreement, and that if the treaty is a form of contract, the non-signatories possess no rights against the Crown. A more fundamental objection is that the Canadian treaty cases which could be used for support were treaties between the Crown and native subjects. In New Zealand however, the Treaty was between the Crown and non-subjects, making the situation more directly analogous to an international treaty.

McHugh argues that this objection may not be valid if one accepts the contention that British sovereignty had been exercised over New Zealand before the Treaty was signed on 6 February 1840:[55]

> One might note, in particular, the English Laws Act 1854 (New Zealand) which provided that the laws of England as existing on January 14 1840 shall 'so far as applicable to the circumstances of the said colony of New Zealand, be deemed and to have been taken to have been in force therein on and after that day'. It could be said that this Act required local courts to presume British sovereignty to date from January 14, several weeks prior to the signing of the Treaty of Waitangi.

51 [1932] 2 WWR 337.
52 Ibid, 351.
53 [1979] 2 CNLR 101.
54 Ibid, 104.
55 Supra at note 45 (1985), at 81.

If British sovereignty pre-dated the Treaty then it cannot be said that the Treaty was an act of State to which no judicial recognition can be given.[56] If this is so, then the Treaty, according to the Canadian approach, is a special contract between Crown and subject.

4. The Treaty of Waitangi from an Understanding of Maori Agreements

> I told them all to listen with care, explaining clause by clause to the chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the treaty, that it was an act of love towards them on the part of the Queen, who desired to secure to them their property, rights and privileges.[57]

Before signing the Treaty it was clear that there was uncertainty among both Maori and Pakeha as to its meaning.[58] After the Treaty was signed it was further evident that the obligations which Maori believed the Treaty to represent were not going to be honoured by Pakeha. Maori, in protest, began a number of assaults directed at the infrastructure created by the Treaty. These protests ranged from armed rebellion to deputations seeking an audience with the Queen; from judicial review to passive resistance. This effectively means:[59]

> [T]he Treaty of Waitangi for most Maori remained an institution of political manipulation whose validity rested only on whatever interpretation the settler government gave to it at any given time. This state of affairs has gradually led to the hardening in the stance of many Maori who are now moving away from dignity and decorum of the deputation method to those of protest, demonstrations and marches.

Disenchantment with the Treaty continues today with claims for *te tino rangatiratanga o te iwi Maori* - the absolute authority of the Maori people collectively over their lives and their resources.

The debate prior to the signing of the Treaty of Waitangi occupied a great deal of time. As a result of the importance of oral skills in *te ao Maori* (the Maori world), Maori participants may not have paid great attention to the written document. Their attention would have concentrated upon the ideas and arguments expressed orally in the debate, and much faith would have been based on Pakeha representations made.[60]

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56 It is a cardinal principal of English constitutional law that there can be no act of state by the Crown against its own subjects. See *Walker v Baird* [1892] AC 496 (PC).

57 Orange, *The Treaty of Waitangi* (1987) 45 - an account of the discussion prior to the signing of the Treaty of Waitangi in the words of Henry Williams.

58 Ibid, 48-57.

59 Kelsey, supra at note 31, at 22, quoting Bishop Manuhuia Bennett in his foreword to *He Korero Mo Waitangi* (Runanga Ki Waitangi, 1985).

60 Waitangi Tribunal, *Report on the Kaituna River Claim* (Wai 4 2nd ed 1989) 13.

The signing of the Treaty can be viewed as an example of the koha process. Maori were aware that the number of Pakeha in their lands would continue to grow. Many recognised that to maintain their power and mana in the face of a technologically superior iwi would require a relationship between Maori and this new iwi. Many Maori believed that signing the Treaty would bind the parties together in a relationship of mutual benefit. This action of great generosity would also increase the mana of the Maori people, as Pakeha would always remember that their presence in this land was a result of the gift from Maori.

Maori provided Pakeha with the gift of the right to settle in Aotearoa (New Zealand) and administer the Pakeha settlers. In return, Maori expected gifts to be reciprocated and accordingly, the Crown made a number of promises. Maori transferred the hau of their lands into the possession of the settlers, but it was never the belief of Maori that they had ceded mana of their lands to the Crown. For Maori, there could never be a full and permanent extinguishment of rights over land. Maori believe that the mauri, or hau, of the land remains part of them. The mauri ties Pakeha and Maori together in a relationship of trust. Each perceived breach of the Treaty serves only to drive a wedge between the parties. The grievances of many Maori exist because their gift to the Pakeha of the right to settle and administer has never been reciprocated by the observance of the Crown's own promises. Breaches of the Treaty diminish the document's mana and this can only be stopped when the Crown addresses the grievances of claimants.

V: CONCLUSION

When a student of law first begins to study contract law, he or she is instructed in the essential elements of a contract. Generally, a valid contact will arise where there are two or more parties to an agreement supported with consideration and an intent to create legal relations. The common law has developed to distinguish a bare gratuitous promise which is unenforceable from a contract which the law will enforce.

One aim of contract law, in a Pakeha sense, is the minimisation of risk in relation to the future conduct of parties. Other societies have created their own systems to determine what distinguishes a contractual undertaking from other expressions. It is submitted that traditional Maori society had culturally defined guidelines dictating the presence of promises recognised by the community as binding. Tika operated as a social force imposing an obligation on parties to act or refrain from acting towards others in a particular manner.

The philosophy underlying koha may be described as a traditional Maori concept of agreement resulting in reciprocal obligations on the parties. The giving of gifts was a means of creating social links between fragmented groups, while the gifts themselves were tokens of the enduring relationship. While the relationship remained on foot the parties were obliged to conduct themselves in a manner of good faith to ensure the ongoing relationship of mutual benefit.

At a base level, the reasons for creating such links were economically induced. However, it is also submitted that often the major motivation was the forging of political alliances. In a time when social and economic survival depended on military strength, the pathway of reciprocities would be kept open for as long as possible or desired, in accordance with the tribe's overall objectives.

Land was often made subject to the process of gift exchange. However, such situations were largely limited to special occasions. During the early period of colonisation, land passed from Maori into the possession of Pakeha settlers. While Maori parted with possession of their land, it was inconceivable that these transfers were complete changes in ownership. If the settlers breached the inherent obligations within the arrangement, Maori would demand the return of the land, or in legal terms, enter into possession and determine the relationship.

Understanding Maori attitudes to land in the context of agreements is essential when examining present Waitangi Tribunal claims and listening to Maori and Pakeha who seek the Crown's adherence to the promises in the Treaty of Waitangi. Certainly, while many legal academics state that the Treaty has no legal force until recognised by statute, Maori see the Treaty as an honourable and binding agreement of mutual understanding, good faith, and reciprocal obligation. The approach of the Canadian courts indicates that a number of treaties entered into between the Crown and natives are contractually binding. Arguably, the same result could be achieved if our courts took a new approach to the Treaty of Waitangi's application.

As the 21st century approaches one may hope that the Treaty of Waitangi will be enforced in the manner in which it was first intended. In the words of Paora Te Ahura in 1857:[61] "[t]he [Maori] King on his piece, the [English] Queen on her piece, and God over both and love binding them to each other".

61 Paora Te Ahura, Rangiriri meeting, *New Zealander*, 6 June 1857, as quoted by Durie, "The Treaty in Maori History" in Renwick (ed), *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (1991) 156, 166.