August, 2009

The Treaty of Waitangi in New Zealand's Law and Constitution, reviewed by Sir Edmund Thomas

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The Treaty of Waitangi

E W Thomas, Auckland,
reviews Matthew Palmer’s book

At the Annual General Meeting of the Legal Research Foundation held on 28 May this year, Dr Matthew Palmer was awarded the prestigious J F Northey Annual Book Award for his book, The Treaty of Waitangi in New Zealand’s Law and Constitution (Victoria University Press, 2008). The Award was well-deserved.

Palmer’s book is outstanding. Extensive research, first-rate scholarship, breadth and depth of knowledge, perceptive, original thinking, clarity of expression and balanced reasoning are but some of the attributes that come to mind. It follows that I am quick to endorse Palmer’s book as mandatory reading for a wide readership; judges, lawyers, legal academics, constitutionalists, historians, political scientists, policy makers, opinion makers and politicians. I do not, of course, exclude those citizens who wish to form a responsible view about one of the most pressing issues facing this country.

The problem for a reviewer holding such a high opinion of the book under review is to do justice to it within the constraints that a review proscribes. What is said must necessarily be selective and incomplete. Palmer develops a comprehensive thesis and a review is no substitute for reading the book from cover to cover.

Before outlining the work I wish to refer to two particular features which warrant this high praise.

The first is the author’s exceptional knowledge and understanding of the law and constitution, including the judicial process, the legislative process, the workings of executive government and the interrelationship of law and society. Palmer has a remarkable appreciation of the reality of the judicial process and judicial methodology. He apprehends that the various questions which will or may fall for resolution in the courts will ultimately depend on the justice of the particular dispute before them and the court’s perception of the legitimacy of their exercise of public power. To which, one could add – and the composition of the court.

Palmer’s understanding of the constitution is equally perceptive. The constitution expresses and determines who exercises public power and how they exercise it. As he observes, analysing the constitution involves probing under its seductively formal legal clothes to the hard reality of the exercise of public power. Such an analysis embraces a “constitutional culture” of New Zealanders’ collective attitudes that relate to the exercise of that power. They combine to give the country a distinctively ambivalent attitude to its use.

The second feature is Palmer’s pragmatic approach. Realism, the basis of pragmatism, is pursued with rigid discipline so that his perspective of the constitution becomes a perspective of “constitutional realism” embodying all the structures, processes, principles and cultural views that, in reality, affect the exercise of public power. Determining the meaning of the Treaty, focusing on the relationship of the Crown and Maori and pakeha and Maori, and reviewing the legal status and force of the Treaty, all become an indefectible exercise in pragmatism.

A pragmatic perspective which becomes a theme throughout the book is introduced at an early stage. In Palmer’s view, the Treaty is best understood as representing an explicit commitment to the health of the relationships between the Crown, Maori and other New Zealanders. These relationships are at the heart of the Treaty and dictate a relational approach with the emphasis on communication and respect rather than certainty, structures and rights. This relational approach is not a “soft” preference as it does not mean that the substantive mutual obligations and responsibilities of the parties may be disregarded.

Following an initial affirmation of his pragmatic approach, Palmer first examines the Treaty of Waitangi in 1840. He places it in context, or what he calls a complexity of contexts, and demonstrates the key respects in which the Treaty seeks to reconcile the prior occupation by Maori with the subsequent settlement by pakeha. He concludes that pragmatism has ruled New Zealand’s constitution from the beginning.

The balance between sovereignty and rangatiratanga was struck by the realities of the exercise of power at the time. Palmer’s perception is that this pragmatic method of dealing with constitutional issues relating to the Treaty should continue.

Palmer next explores the various interpretations of the Treaty that have been adopted by Parliament, the Waitangi Tribunal, the courts, the executive, and cabinet respectively. In respect of the latter, new ground is broken in that the author has had access to some 104 files of cabinet papers and minutes relating to the Treaty held in the National Archives. This research adds greatly to Treaty scholarship. Palmer’s detailed survey of the interpretations adopted by the different branches and agencies of government clearly defines the areas of agreement and the areas of uncertainty and tension.

With respect to the work of the Waitangi Tribunal, I will interpolate my own praise for the contribution made by Eddie Durie, the Chairperson of the Tribunal from 1981 to 2002. Palmer acknowledges that Durie had a hugely formative and constructive influence on the Tribunal during his 21 years as the chairperson. I would have been inclined to go further and spell out that influence in some detail. Durie’s contribution to the jurisprudence of the Treaty, the evolution of this nation, and the advancement of Maori has been nothing short of monumental and marks him out as a person of exceptional intelligence and talent. Durie’s place in the history of this country is assured.

With the meanings of the Treaty traversed, Palmer examines its legal status and force and its place in the constitution. He confirms that the Treaty is a dominant feature in New Zealand law.
Zealand’s constitutional landscape but points out that its importance is not fully reflected in its current legal status. When applied to particular issues its specific meanings are uncertain and this uncertainty causes significant tension. Not only is there uncertainty about the specific meaning of the Treaty in relation to particular issues but also there is uncertainty as to whose job it is to clarify or resolve that uncertainty. Palmer believes that this inveterate uncertainty is the primary impediment to achieving harmony between the Crown and Maori and pakeha and Maori.

Palmer then considers the future. Reiterating that the key goal is to achieve a healthy relationship between the Crown and Maori and pakeha and Maori, the author considers the merits of the various alternatives to achieve this objective; persisting with the status quo, which is rejected as inadequate to prevent breakdowns in the future; making some minor adjustments, including the possibility of strengthening the function of the Waitangi Tribunal or the ordinary courts, which are disapproved as insufficient to meet the formidable areas of uncertainty that he has identified; restating the meaning of the Treaty, which is dismissed as overly ambitious and likely to do more harm than good to the relationships between the Crown, Maori and other New Zealanders; and, finally, devising a new alternative.

This latter option is the one Palmer finally concludes will best reduce the areas of uncertainty and tension and enable the Treaty to become a positive force for all New Zealanders. He accepts that the current consensus on the general meaning of the Treaty tempered by uncertainty as to the specific meanings in actual situations will be a continuing reality. This uncertainty, Palmer argues, can be mitigated by establishing a specialist court, the Treaty of Waitangi Court, to resolve the uncertainty of specific meanings and the application of the Treaty in particular situations.

It will be convenient to restrict the remainder of this review to one particular topic. Doing so runs the risk that the overall force of Palmer’s thesis will be lost. Space dictates that the risk be confronted. The particular topic will be one which I imagine will be of close interest to judges and lawyers: Palmer’s perception of the potential for the Treaty to be enforced by the courts.

The author’s exhaustive survey of the case law confirms the Treaty’s present status in law. Where legislation requires that regard be had to the principles of the Treaty the statute must be interpreted by the courts in accordance with their perception of those principles. The perceived principles are the underlying mutual obligations and responsibilities which the Treaty places on the parties. Thus, Palmer correctly observes, the “principles” which underlie the Treaty have become more important than its precise terms. They require the Crown and Maori to act towards each other reasonably and with the utmost good faith. Good faith implies reasonableness, loyalty, cooperation and consultation. In a real sense, therefore, the duty of the Crown is not a mere passive duty but one that extends to the active protection of Maori in the use of their lands and waters to the fullest possible extent.

Notwithstanding the judicial rhetoric, however, Palmer finds that the courts’ judgments consistently reflect an unwillingness to make substantive decisions about what the Crown or Maori should do to comply with the Treaty. Decisions often exhibit a balancing exercise or emphasise reciprocal obligations, compromise and the procedural values of reasonableness and good faith. Having regard to the fact that substantive decisions would involve the allocation of resources this judicial reluctance is understandable. But this reluctance does not result in the substantive enforcement of the Treaty. Notwithstanding ill-considered charges of judicial activism, there have been only two decisions since 1990 where the courts have found that the Crown has been in breach of the principles of the Treaty (Ngai Tahuh Maori Trust Board v Director-General of Conservation (“the whalewatching case”) [1995] 3 NZLR 553 (CA), and Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179; [1997] NZFLR 642).

Palmer therefore explores the scope for the law to be clarified and extended so as to give more coherent and consistent effect to the Treaty and the relationship between the Crown and Maori embedded in it. Much of this discourse is worded as if it were a submission to the Supreme Court. At the very least, the author poses the questions that the Court must eventually face.

A prime question is whether the Treaty is a valid and binding treaty at international law. Palmer favours the view that the Treaty is a treaty of protection rather than a treaty of cession of sovereignty. Considering each step in the argument in turn, he reaches the conclusion that it is a valid treaty at international law and that the Supreme Court will reach that opinion. He considers, however, that the Court will also hold that the Treaty is not enforceable in domestic law unless it is expressly incorporated into the law by the legislature. But because the Treaty would be recognised as valid at international law, the Court will, he believes, hold that it is binding on the “honour” of the Crown. While such a finding would not be legally enforceable it would nevertheless have significant political power. Having this political potency would mean that the reality of the status and force of the Treaty would change accordingly.

I am less sanguine than Palmer in predicting the Supreme Court’s decision. The issues are fiendishly complex and allow for sufficient latitude for judicial retrenchment. But, without prejudice to the hope that he is right, the author’s inclusion of the validity of the Treaty in international law in a work on the Treaty is to be applauded.

Palmer records that the courts enforce the Treaty indirectly in that it is invoked as an aid to interpretation. This commonly occurs where the legislature has included a reference to the Treaty in the legislation in issue. Only two cases are cited where the courts have referred to the Treaty as an aid to interpretation where it has not been expressly referred to in the statute before the court. One is Chilwell’s judgment in Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 where the distinguished Judge held that, as there is no doubt that the Treaty is part of the fabric of New Zealand society, it is necessarily part of the context of any legislation that impinges upon its principles. Resort to it therefore accords with the principles of statutory interpretation. The other case, decided ten years later, is Barton-Prescott v Director-General of Social Welfare. Galen and Goddard JJ held that, as the Treaty is designed to have general application, that general application must colour all matters to which it has relevance, whether public or private, and that for the purpose of the interpretation of statutes it will have a direct bearing whether or not the Treaty is referred to in the legislation.
Palmer is correct to point out, however, that the importance of these two judgments should not be overstated. After all, one, or two, or three, or whatever number of times, does not make a summer. Nevertheless, the author’s support for such an approach is indicated by his reference to Professor Burrow’s view that the courts today would do their utmost to avoid interpreting a statute in a sense that is repugnant to the Treaty (See J F Burrows, Statute Law in New Zealand (3rd ed, LexisNexis, 2003) p 345). I agree. As a fundamental constitutional document and the cornerstone of the relationship between the tangata whenua and other New Zealanders it would be perverse to overlook the Treaty whenever it is relevant irrespective that the legislation in issue may not refer to it.

I also consider that it is open to the courts to spell out a presumption in favour of the principles of the Treaty similar to that which has been forged by the courts in respect of human rights. Clear and explicit language should be required before accepting an interpretation that is inconsistent with the Treaty. R v Pora [2001] 2 NZLR 37 (CA) provides an illustration of the courts’ willingness to refashion the judge-made canons of construction in order to protect fundamental rights. The Treaty deserves the same approach. As Palmer observes, in adopting such an approach the judiciary would be doing no more than continuing to assert its authority to develop the rules of statutory interpretation.

Another area of the law where Palmer sees scope for development is that of fiduciary obligations. The question which he raises is whether the courts will be prepared to follow the Supreme Court of Canada’s jurisprudence in utilising the fiduciary concept to describe the nature of the relationship of the government and indigenous peoples. It might have been thought that such a development would emerge from the language of the Court of Appeal in the landmark decision, New Zealand Maori Council v Attorney-General (“the Lands case”) [1987] 1 NZLR 641, especially the dicta of Cooke P at 664, Richardson J at 682 and Casey J at 693. But this has not been the case. The Court of Appeal in New Zealand Maori Council v Attorney-General (“the Radio Assets case”) [1996] 3 NZLR 140 (CA) refused to accept an argument based on legitimate expectations. But in a dissenting judgment I discussed the procedural and substantive benefits that Maori could rely upon in argument. In appropriate circumstances Maori could claim that they had a reasonable expectation that they would be consulted (a procedural benefit), or that the Crown would make a decision which was sufficiently fair that Maori had a legitimate expectation that the Crown will not act contrary to the Treaty .

Turning to consider the Treaty as a relevant consideration in administrative decision-making, Palmer notes that the Treaty can be given indirect enforcement in administrative law. Of particular interest is the doctrine of legitimate expectations. Palmer addresses the question whether, if it is found that Maori has a legitimate expectation that the Crown will or will not do something, the expectation will be enforced by the courts. Certainly, the majority in the New Zealand Maori Council v Attorney-General (“the Radio Assets case”) [1996] 3 NZLR 140 (CA) refused to accept an argument based on legitimate expectations. But in a dissenting judgment I discussed the procedural and substantive benefits that Maori could rely upon in argument. In appropriate circumstances Maori could claim that they had a reasonable expectation that they would be consulted (a procedural benefit), or that the Crown would make a decision which was sufficiently fair that Maori had a legitimate expectation that the Crown will not act contrary to the Treaty .

In each of the cases discussed by Palmer, the courts have had to consider whether a determination of the Treaty can be a legitimate expectation. It is clear that the Treaty can provide a basis for an enforceable right, such as a right to compensation. Therefore, the analysis of the key characteristics of the duty arising from the Treaty is important. The law of fiduciaries, it held, informs the concept along the lines of the Canadian jurisprudence in the context of litigation relating to the Treaty gaining the support of a majority of the Court.

But an obligation of “good faith” permitting each party to act selflessly with undivided loyalty to the interests of the other does not fit comfortably with the relationship established by the Treaty. So, too, the language of exploitation on the part of the fiduciary and vulnerability on the part of the other party is inapt. (See my article, “An Affirmation of the Fiduciary Principle” [1996] NZLJ 405.) But an obligation of “good faith” permitting each party to act self-interestedly while at the same time requiring that party to have regard to the legitimate interests of the other arises logically and naturally out of the Treaty.
Acceptance of one or more of the possible developments dealt with could pave the way for a step which Palmer does not pursue in so many words; that is, that the Treaty is to be regarded as part of the common law of New Zealand. The Treaty is essentially domestic in its application and, as such, there is no reason why it should not be incorporated in the common law. Judges may not like the uncertainty of the principles, but that uncertainty would be little different from the uncertainty inherent in the common law generally. Accepted as part of the common law, the Treaty would have a status and force that did not depend on legislative adoption, and it would be open to the courts to develop its meaning and application irrespective of the wishes of the executive government unless, of course, Parliament dictates otherwise.

An extension of this approach would be to vest tikanga Maori with legal status. As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Maori could readily be absorbed into the common law of this country. Again, there is no reason why the judges should not assimilate its principles in the development of the law generally so as to develop an endemic jurisprudence just as the judges in days gone by assimilated the customs of the times into the growing body of the common law of England. The aim would be to enrich the law by incorporating tikanga as and when appropriate. Maori principles regarding respect for the environment, for example, could have much to offer. But I must stress that this thinking is mine and not Palmer’s. The digression, however, will serve to establish with the reader that Palmer’s views are conservative—at least, relatively so.

Whatever degree of optimism or pessimism as to the future recognition and enforcement of the Treaty is brought to bear, Palmer’s analysis is of immense value in identifying and then enlarging the direct and indirect avenues available to the courts to reinforce its status and force. It is a task, he points out, that since 1993 or thereabouts the courts have chosen not to undertake. They have, he observes, been influenced by the conservatism of legal method and, possibly, the sensitivity of the issues. Thus, the courts have focussed primarily on issues of process rather than substance and, in Palmer’s words, currently appear to be uncertain of their legitimacy in speaking too loudly about the Treaty in constitutional dialogue with Parliament. It is essentially this lack of independent interpretation and enforcement by the courts that has resulted in the Treaty having an incoherent legal status and inconsistent legal force.

Palmer recognises that the constitutional uncertainty of the status and force of the Treaty reflects the underlying tension between majority rule and the protection of minority and indigenous rights. It is primarily for this reason that he believes a positive attempt should be made to stabilise the place of the Treaty in our law and constitution. Such a course, he affirms, would be the most effective means of harmonising the relationships of the Crown and Maori and Pakeha and Maori.

None can gainsay the value and merit of Palmer’s work. It makes an immense contribution to the law, to the constitution, and to Treaty thinking and literature. The book deserves the widest readership. It also merits the open and honest public discussion about the issues, the problems and the possible solutions which Palmer invites—and even enthusiastically encourages.