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What Place does the Treaty have in New Zealand's constitutional arrangements?

Matthew S.R. Palmer

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Finding a Place for the Treaty
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Welcome and thank you, in advance, for listening and then for engaging.

Constitutional Advisory Panel

The government has set up an independent Constitutional Advisory Panel to stimulate public interest and awareness of New Zealand's constitutional arrangements. This should not be a dry academic exercise. Constitutional arrangements symbolise and express the fundamentals of who we think we are as a nation. Whose views do we privilege and disregard? Who make the decisions that matter, and how?

Our constitutional arrangements determine how public power is exercised in New Zealand and who exercises it. This stuff matters in reality; it inflames passions. It affects us all, every day, in the most significant things that we do. But we don't tend to appreciate that - partly because lawyers and other commentators use abstract terms that don't relate to ordinary life. And, as a small step away from that, instead of using the word "constitution" in my remarks, I will refer to the rules for exercising power – by which I mean the public power of government.

The Advisory Panel will be active in engaging with all New Zealanders during the first half of this year. They are due to report to the Deputy Prime Minister and Minister of Maori Affairs so that they can report to Cabinet by the end of the year on whether any further consideration of particular issues is desirable.

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[1] These notes have been corrected against delivery. A recorded version is available at http://www.radionz.co.nz/national/programmes/thetreatydebates/audio/2544555/treaty-debate-1-2013-finding-a-place-for-the-treaty

There have been suggestions that this is not a serious exercise; that it proceeds from a political compromise. But most changes to the rules for exercising power do. Initial reactions do not indicate longer-term significance, as the Royal Commission on Electoral Reform could tell us. Whatever the initial reception of the Panel's findings, they should give us a sense of where New Zealanders are "at" regarding whether and what changes should be made to the rules for exercising power.

The Treaty of Waitangi

I believe that the most significant question about the rules for exercising power in New Zealand is how they relate to the Treaty of Waitangi. This is the controversial elephant in the constitutional room. And it is explicit in the government's Terms of Reference as Carwyn mentioned. The government is to be commended for its willingness to examine the place of the Treaty. Its leadership will be judged on what it does with the Panel's report.

Tonight I want to stimulate debate by expressing my own views on how the rules for exercising power in New Zealand should deal with the Treaty of Waitangi. You can read more about my views in a book I published a few years ago (for a very reasonable price).[2]

To summarise, tonight I will argue that:

1. The Treaty should be fully and clearly in New Zealand's law.
2. Consequently, the Waitangi Tribunal's ability to consider contemporary allegations of breaches of the Treaty should be abolished. That would be the role of the courts. The Tribunal would remain to tidy up the diminishing claims of historical breaches.
3. This would *not* mean that the courts would decide on who gets what between Maori and the Crown – that would still be left to political negotiation and compromise as it is now.
4. The Courts would ensure that both the Crown and Maori play fair – that they follow fair process - of acting reasonably and in good faith towards each other, consulting with each other, and compromising where appropriate.

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[2] Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

5. Lastly I would not make the Treaty higher law, so that other laws could be struck down if inconsistent with it – *unless* there is a package of higher law, including the Bill of Rights, to protect our civil and political rights and freedoms, and maybe also principles of democracy and the rule of law.

So, in explaining the reasons for my views there are two points that I think are key. The first point is about what the Treaty means. The second is about its current place in New Zealand law.

The Treaty is Mainly about Fair Process in Managing Relationships

It is fashionable to say that no one knows what the Treaty means, or that everyone thinks that it means something different. And there is something in this – no doubt Maori and the Crown had different expectations in 1840 of what the Treaty would mean in the future and have different expectations today of what it should mean today. But it is quite wrong in my view to say that no one knows what it means when the Treaty is referred to in law today. The official institutions of New Zealand government, in particular the courts, have a coherent, and in my view sensible, view of what the Treaty means. That view is reflected in laws passed by Parliament, recommendations of the Waitangi Tribunal and in Cabinet decisions, and has been confirmed in court judgments as the law.

The law confirmed by the courts is a forward looking interpretation that focuses on the *one* thing that *is* clear about what was meant in 1840. Whatever else may have been intended, the Crown and those rangatira who signed the Treaty meant to acknowledge that they would have an ongoing relationship. That that is still so seems to me to be unarguable today. Maori are not going anywhere. Neither are the rest of us (despite a few defectors from time to time to Australia). Neither is the New Zealand government going to disappear in a puff of smoke, however much some of us, (or you) may wish it would.

The question is not whether Maori, the Crown and other New Zealanders should have a relationship – we must. The question is how healthy we want those relationships to be, and how we want them reflected in the rules for the exercise of power.

And this, to me, is the ultimate answer to the question of what problem the Treaty of Waitangi is trying to solve today. We need to get on with each other, peacefully – and most importantly in my view Maori, and the Crown (or its republican successor) which represents us all, need to get on together; resolving disputes peacefully rather than violently. The Treaty of Waitangi today, I think, represents a historical and ongoing commitment to that.

The importance of it should not be minimized. Societies work best – in terms of economic productivity, social cohesion, general wellbeing - when the existence of a strong indigenous minority culture is recognised and affirmed rather than suppressed, repressed, or oppressed. The civil conflicts in societies overseas which are most intractable and violent are those in which an indigenous or other minority group is oppressed to the point of armed rebellion. New Zealand has avoided that, since the nineteenth century.

Personally, I believe that recognition of Maori under the Treaty of Waitangi has, and must continue to, provide a crucial legal safety value by which Maori resistance to actual, perceived or potential oppression has been and should be channeled and resolved, justly, by peaceful means. That is no easy challenge – just look at the history of other societies with fundamentally divisions over cultural/ethnic or religious lines: Israel, Ireland, South Africa, Fiji to take a few. Pakeha New Zealanders tend to be proud of our government's record, at least our more recent record, of treatment of indigenous peoples compared with other nations. The Treaty expresses the commitment to make that real.

When this meaning of the Treaty, as about relationships, is expressed in law (as it has been) the effect is to stabilise how the relationships are managed – for the courts to be an independent referee, guarding against offside play. The alternative is ongoing political activism and protest with no legitimate means of resolution: a rugby game without a referee.

The essence of the New Zealand courts' interpretation of the meaning of the principles of the Treaty focuses on process –fair process. And, incidentally, there is

no particular magic in the term "the principles" of the Treaty. The Privy Council (then New Zealand's highest court) said in 1993 that the principles are simply "the underlying mutual obligations and responsibilities which the Treaty places on the parties". It is quite clear that the principles of the Treaty, according to the New Zealand courts, require both the Crown and Maori to act in good faith and reasonably towards each other, with loyalty, in cooperation, consulting with each other, and compromising where appropriate.

It's no surprise that the Courts were attracted to this view of the Treaty. The focus on process fits with what the courts do routinely. This is what they do whenever someone challenges the government by way of a judicial review – the Courts look at the process followed by the decision-maker: whether it was fair and reasonable; whether all relevant considerations were taken into account; whether there was bias; whether legitimate expectations were unjustifiably frustrated.

Where Parliament has put the Treaty into law, that is what the courts do in Treaty cases too – did the government think about whether there was a Maori interest at stake in its decision, did the government consult with Maori over the decision and take their views into account? In Treaty cases, as with other judicial review cases, courts do not like making substantive decisions themselves – they focus primarily on whether the process was fair.

Only in a few areas, as with other judicial review cases, does the concern for process merge into substance. And I think it is reasonable that, were the very existence of Maori as Maori threatened, that the Treaty of Waitangi would provide substantive safeguards. As John Key said on Monday in Antartica, "Maori culture is enshrined in who we are as New Zealanders." Which is why the survival of Maori language and Maori land has been found by both the courts and Parliament to be an essential guarantee of the Treaty. Otherwise, the courts' focus is procedural. The substantive outcome of decision-making involving the Treaty is largely left to be worked out politically through the relationships between the Crown and Maori. And that is also, in my view, as it should be.

I think that fair play is a core New Zealand value. And I think we are mature enough to live with the courts deciding when the government and Maori are playing fair with each other rather than the government, and the political kneejerks all governments are subject to, deciding that.

So this is my first point: the meaning that the New Zealand courts give the Treaty of Waitangi focuses largely on process – fair process that upholds the potential for healthy relationships between the Crown, Maori and other New Zealanders. No one needs to be afraid of that being the law, in my view, – unless they are against fair process being independently required of this most important set of relationships in New Zealand.

The Treaty is already in New Zealand's Law – Incoherently

My second key point is that the Treaty of Waitangi is already in New Zealand law. Since 1987 Parliament under all governments has included references to the Treaty in various laws. This is what has given the courts the ability to interpret the Treaty and its principles.

But the result, in my view, is incoherent. The Treaty is half in and half out of our law. The Treaty is referred to in some laws and not in others. There are bare references to the Treaty in some Acts – preventing a decision-maker from acting in a manner inconsistent with the principles of the Treaty as in the State-Owned Enterprises Act. This clause gave us the original 1987 Court of Appeal decision and will be the subject of argument in the Supreme Court later this month in relation to asset sales. But other statutory formulations are different:

- three Acts require that decision-makers give effect to the principles of the Treaty of Waitangi;
- one other requires decision-makers to ensure full and balanced account is taken of the principles;
- another requires particular recognition to be given;
- three require the principles to be taken into account;
- three require decision-makers to have regard to the principles;
- and another to acknowledge the principles.

Who knows what these differences in formulation in our law mean! I think that the more recent formulations are better – where Parliament specifically considers what the Treaty means in relation to a particular Act, and says that. But even then such certainty is limited to the particular subject area of that statute. These distinctions and differences are fine fodder (and money) for lawyers. But not much good if we value certainty in the law.

I think it is time that we provide clarity, consistency and certainty by putting the Treaty into law in the same coherent way across the statute book. The Treaty should be incorporated into ordinary law for interpretation by the courts as a matter of course. As the conservative institutions that they are, the courts would draw on the last 25 years of case law to do that – to enforce, independently, fair play in the process of the relationships between the Crown and Maori. This, in my view, would advance the rule of law.

And if that is done, I also think the case for the Waitangi Tribunal's jurisdiction to hear contemporary grievances disappears. The ordinary Courts can do that. If they need specialist expertise, that can be provided for. And the Tribunal can continue to report on the remaining historical claims – which it is in the course of wrapping up its reports on, and which the government is resolving through its intensive programme of negotiations.

The Treaty as Higher Law

Finally, before I conclude, a note about "higher law" which people tend to think about in relation to constitutional changes.

Ordinary law cannot be inconsistent with "higher law"; if it is, it is struck down by the courts. New Zealand has no higher law at the moment.[3] All our laws are equal.

I *don't* think that the Treaty of Waitangi should be made a higher law when other laws are not. Higher law, if we have it, should comprise *all* the fundamental

[3] The oral delivery mis-stated "ordinary" for "higher" in this sentence.

principles about the exercise of power which New Zealand values most – principles so fundamental that we think that even the laws passed by Parliament itself should have to be measured against them.

But I *do* think New Zealand, now, can and should have a package of higher laws. I would give that status to the Bill of Rights Act. And to the Treaty of Waitangi but only with the Bill of Rights Act. Both of these laws have been the subject of extensive judicial consideration over the past 25 years. We know what we are getting with both, and they are fundamental to the exercise of power in New Zealand in a way that other laws are not.

I would also propose considering two other legal principles as candidates for higher law status – representative democracy and the rule of law. But these principles would need road testing – to be interpreted by the courts for a period, as the Bill of Rights and Treaty have been, before we can decide whether what the courts would do with them would be acceptable as higher law.

Conclusion

To conclude I propose that we should put the Treaty of Waitangi properly and coherently into law – to enable the independent courts to judge when dealings between the Crown and Maori are fair, rather than the government doing that.

I have tried to show in this address that the Pakeha majority (at least majority for now) has nothing to fear from such a step. Neither do Maori. Only politicians in government might find themselves somewhat more constrained in playing fast and loose. The courts have confirmed a process view of the Treaty that stresses fair play and reasonableness. We ought in my view, by now, to be able to commit to that in our ordinary law.

As a nation I think we would have much to gain. I think we would gain a sense of stability and confidence in the management of these most crucial of relationships in our country. We would reinforce our national sense of fair play that understands and respects the role of the independent referee in keeping a game going. And we would

once again affirm that the founding document of our nation, that recognises the importance of getting on together, is a symbol of peace rather than force, of fairness rather than oppression, and of hope rather than fear.

Thank you.