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Reconstituting the Constitution

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Chapter 10
The Status and Nature of the Treaty of Waitangi

Joe Williams

E aku rangatira tena koutou katoa. Tene tātou e hui nei i raro i te tuanui o tenei whare ātaahua, whare runanga, whare whakawhitiwhiti kōrero. He nohanga hoki no ngā ariki Māori i o rātou na wa, tae atu ki te Kīngi Maori ano hoki. Kei te orooro tonu o ratou reo i roto nei. Kei te iri tonu o ratou kapu. Otira, he honore nui moku ki te tu i roto nei, ki mua i a koutou.

My chiefs, greetings. I offer my respects as we gather beneath the ridgepole of this beautiful house of deliberation and debate. It was in its time, the seat of my most noble ancestors, even the Māori King himself. Their voices echo still. Their words still hand from its rafters. It is therefore a great privilege to be asked to address you here, in this place.[1]

10.1 Introduction

I have been given two questions: do we need a written constitution? And should it include the Treaty if the answer to the first question is "yes"? I am going to evade those questions. Not for any cunning reason. I think they are the wrong questions.

I want to start with Palmer the realist; that is, Matthew. That is not to suggest that his father Geoffrey is a fantasist. But as you know Matthew Palmer has written a book, which is the latest definitive statement on the status of the Treaty, and it contains some suggestions for the way forward. I want to at least start there before offering you some of my own thoughts.

[1] This essay was first presented as a speech in the Legislative Chamber, Parliament Buildings, Wellington. [Unless this information is contained elsewhere].

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His observations were, first that the crucial rights of Māori in New Zealand in 2010 are the participatory rights contained in the Māori seats in Parliament. As matters stand he is surely right about that. He says the meaning of the Treaty is highly contested, and there is no effective definer of last resort about what is inside that document. There is a great deal of debate and disagreement. He says the status of the Treaty is inconsistent, unstable and incoherent – those are his phrases. Here is a quote of his from that book that I want to use to leap off with the rest of my analysis. He says:

> There are treaties in Canada and the US between the Crown or Government and indigenous peoples. There are also areas where there are no treaties, such as Australia. The same issues arise. Law reflects the underlying reality of social, economic, cultural and political conflicts between indigenous peoples and governments. These conflicts bubble up through a nation's legal system, to be resolved under one legal heading or another. . . . The dynamics of the underlying disputes are determined primarily by matters of raw politics and power – especially the proportion of the population constituted by the indigenous peoples – as well as the nature of the constitutional culture that is developed from history, geography and legal evolution in relation to the indigenous people. The legal labels – such as the Treaty of Waitangi or aboriginal title – acquire political and symbolic meaning and, sometimes, legal power.[2]

He concludes that the essential question here is the quality of the relationship between the indigenous people and the state. There is a cause and effect here. A quality relationship produces certain results. A dysfunctional relationship inevitably produces the opposite results. He says that the Treaty is really all about relationships.

Yes. "Yes" for a number of reasons. "Yes" particularly because this idea of relationship-based arrangements as to power is a quintessentially Māori idea. The central motivating idea in Māori culture in my view is this thing called "whanaungatanga"; the idea and ideal of kinship. The entire power construct in traditional Māori society, the relationship with the environment, relationships between humans, between humans and the non-human, are all described, categorised, understood, in terms of this Māori conception of kinship.

So his idea has a certain cultural attraction in it. The idea is that this document is about relationships, and in Māori cultural terms primarily about kinship.

10.2 Partnership and the Treaty of Waitangi

So the real question here is not what we should do with the Treaty of Waitangi, but – if you will excuse me for adapting an "Obama-ism" – "how do we perfect our partnership?" Because it is only by doing that, that we will give ourselves permission to address the two questions that I have been asked to talk to you about.

[2] Palmer (2008), p. 302.

My view is, similar to Matthew's but I think with an even more realistic bent to it, that the Treaty of Waitangi today, into the future and in the past, is really and has been a cork bobbing on the currents of the way in which our history has unravelled and the future evolves, deals with, and confronts the relationship between settler and native.

10.2.1 Partnership in the Past

Let us take a quick snapshot in history. From the 1930s through to the 1960s, the relationship shifted from the old Article 2 Treaty-based relationship, to one primarily defined by way of class and poverty. It was no accident that that coincided with the arrival of the first Labour government and our emergence from the rigours of the depression. The Treaty, if it was relevant at all in those days, was a Treaty about Article 3: that is equal rights. Our issues as Māori were the issues of migrants; this is migrants from the villages to the cities. The challenges of the time were of our integration into those urban environments where access would be given to the great Kiwi dream.

There were some Treaty settlements in those days, under the aegis in the latter years of Fraser, a personal mission of his, and before him just prior to the 1930s, Coates. But the relationship was an Article 3 relationship and it was about disparity not indigeneity.

From the 1970s through to the 1990s the class and poverty consensus around how to address the Māori question broke down, as we are all aware. A sharp increase in the Māori population (10% of the national population by the 1980s) some external drivers (the civil rights movement in the States); the major preoccupation in the West after the Second World War with questions of race; the environmental movement; the restructuring and partial collapse of government business in our industrial centres; and the loss of privileged access to the United Kingdom for our agricultural products all meant the old consensus could no longer be sustained. There was no longer sufficient power in the vacuum cleaner to mop up the Māori labour-force which quickly became the victim of that restructuring; the arrival of an urban and radicalised second generation city-dweller Māori cohort; and of course the 1981 Springbok tour.

These took us back to some of the ideas that were pre-1930s. What I would call the return to the conception of Māori/State relations around the idea of "original sin". A "rangatiratanga" focus, an "Iwi-ism" focus, a return to the bedrock exchange on that day of the 6th February 1840, and a relative dropping of the Article 3 way of looking at things that had been the position prior to that. A return to the indigeneity promises of Article 2.

So the relationship I would characterise around the idea of original sin (and we are still in that phase), is a relationship that you might describe as a settler-native relationship. We are not the only ones in that phase; the Australians, the Canadians and to a lesser extent the Americans are also in that phase.

10.2.2 Partnership in the Present Day

Over the last 10 years, again demographic shift has been a big characteristic; Māori are now 15% of the population: 600,000 and rising. I understand from the statisticians that 21% of the school-age population, and 28% of the new-borns claim Māori ethnicity. I know that is a complicated proposition but it is undeniable that this is powerfully flavouring how we relate to each other. Disparity, present as a definer in the 1930s through to the 1960s, remains a major issue for us as New Zealand has slipped down and then got stuck in the bottom half of the OECD. We are now the third or fourth most unequal country in the West, and that is largely because of the circumstances of the Māori cohort. The social cost of that is significant. Māori criminality is a major social issue, and I must confess having been a High Court Judge now for two years, I witness that slow motion grinding train-wreck play out before me on a daily basis in my work. Frankly, it appals me – but that is another story.

But, settlements proceed, even if their robustness is still to be tested. Peace breaks out at Waitangi and has done consistently now for some time. New Zealand becomes more Pacific and more Māori by the hour. We sing our anthem in two languages now; a small matter, a token matter you might say, but who said we should? When did that start happening? I checked on Wikipedia; no answer there. I looked at the Internal Affairs website; no answer there. And the reason is there is no answer to that question. We did it ourselves. No government, no official, not even an academic said "why don't we start singing the Māori anthem – first?" If you listen to the way that is being sung at large sporting events, again tokenistic and symbolistic, the volume in the Māori version that used to be half the English version is now 90% of the English version. And in time it will outstrip the English version.

There are 168,000 speakers of Māori in this country (a minor miracle in itself) – 30,000 of them are not Māori. That is a real miracle. Thirty-five per cent of New Zealanders support compulsory Māori language education. If you cut the sample off at the age of 35 and asked the question again you would probably get a majority.

Our form of art as a country, our songs, our music, are becoming quintessentially Pacific and Aotearoa based. The young New Zealanders' love of Dub Reggae, and of landscape-based/environmentally-based music, has now become the way Kiwi music is seen offshore, particularly in Australia. Māori television is rating magnificently; two-thirds of its audience is not Māori. When our last Māori Queen passed away, 100,000 people or so, perhaps more, attended her tangi; the largest gathering of Māori people in the history of the race. That is a significant indicator in terms of the cohesion of the Māori community. But just as significant was the way in which that event captured the imagination of Pākehā and other New Zealanders too, and made us all feel we had a piece of that magnificent woman and her life.

These things would have been unimaginable a generation ago. A Tuwhare poem popped into my head when I was drafting this address: "My canoe teeters on reefs of

inconclusive argument". Which way is this thing going to go? We are still in the zone of a relationship that you would characterise as settler-native. We are still not reaching for the Māori kinship metaphor. We have still not yet perfected our partnership.

John Ralston Saul, a progressive thinker from Canada and also the husband of the former Governor-General, so in a particularly strong position to observe social change, was angsting about these very same questions in respect of his vast country in a book called *A Fair Country: Telling Truths About Canada*. He says these things, and I am going to read them to you because they resonate:

> We are a Metis (mixed blood) nation. At the core of our difficulties is our incapacity to accept who we are. There may be many explanations for this but the first is that we have shrink-wrapped ourselves into a very particular description of our civilisation and how it came to be.[3]

He is speaking there about Europe. He continues:

> We've wrapped ourselves so tight within that description that it's become a straight-jacket that expresses the history of another people; a history that would have produced a very different civilisation than the one we have in Canada. We are a people of Aboriginal inspiration organized around a concept of peace, fairness and good government. That is what lies at the heart of our story, at the heart of Canadian mythology whether we are Francophone or Anglophone. If we can embrace a language that expresses that story, we will feel a great release. We will discover a remarkable power to act and to do so in such a way that we will feel we are at last true to our selves. The single greatest failure of the Canadian experiment so far has been our inability to normalise, that is to internalise consciously, the first nations (that is the native Canadians) as the single founding pillar of our civilisation.[4]

There is much more where that came from. This is where we are heading, and in my view we are well ahead of the Canadians on these developments. For in Canada it is still the cutting-edge thinkers expressing these ideas. Here, our children are.

10.2.3 Partnership in the Future

The future then. Well the demographic; it has been a driver in the first phase and the second phase and it will be a powerful driver into the future. We will be of course far more diverse, with a much stronger Asian presence and we confront the possibility that Asians may outnumber Māori in the future; a major question of policy for Māori and for the country. Within the next 20–30 years there will be 750,000 Māori, progressing towards a million by the middle of the century. They must be the engine room of the economy.

[3] Saul (2008), p. xii.

[4] Ibid, p. xii.

By the middle of the century at least some statisticians are predicting a Polynesian majority. That is Māori and Pacific Islanders together re-Polynesian-ising Aotearoa. And, of course, in that generation a powerful Iwi presence – economically and legally, particularly as a result of the Treaty settlements that are giving iwi a direct role in environmental management and conservation management, and perhaps even in issues of cultural management in the future. And, perhaps even a role in addressing social disparity questions where iwi themselves are delivering governmental services in genuine partnership with the State rather than as mere agents. This scenario, if it comes to pass, will see Māori identity, just as Ralston Saul expresses it in respect of his country, as a core – perhaps *the core* aspect of national identity and culture; of the way in which we position ourselves globally; and the way in which we run our economy.

10.3 Conclusion

If we get there we will have moved beyond an original sin-based relationship. The settler-native paradigm in my view will have outlived its usefulness to both sides. And we will conceive of each other as Māori and Pakeha in the first instance, the founding cultures of our newly perfected partnership. We will build a grander narrative, based on land and sea inevitably because they so shape our behaviour here, and on embracing – not just tolerating but embracing – difference. And we will be ready for the kinship metaphor. We will be ready to say that we have perfected our partnership, and the status of the Treaty of Waitangi can be confronted.

We do not just drift to that point. There are so many reefs either side of that narrow passage, particularly in the area of that disparity that I, and many of you, confront on a daily basis. If we are going to get to that point, in perfecting our partnership, it will require leadership to build and direct those currents that toss the Treaty, in the right direction. That is why this conference is so important, because that leadership must come from the top, the sides and the bottom.

Tena koutou katoa.

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Part 5
The Future of Electoral Law

Jonathan Boston

Electoral systems lie at the heart of the democratic process. They provide the vital link between voters' preferences and the institutions of representative government. They embody the rules through which political competition is conducted. Electoral system design is thus crucially important. Not surprisingly, therefore, electoral law remains one of the most controversial areas of constitutional discourse across the democratic world.

New Zealand is no exception. For many decades there has been vigorous debate over many key features of the country's electoral law. With little doubt the most controversial issue has been the system of representation, and in particular whether New Zealand should embrace a proportional or majoritarian system. For much of the twentieth century, a majoritarian system (that is, a simple plurality system) was the favoured approach. But following the recommendations of a Royal Commission in the mid 1980s, New Zealanders voted in 1993 to adopt a Mixed Member Proportional (MMP) electoral system. This was introduced in 1996, and the sixth election under MMP will be held in November 2011. But MMP remains strongly contested. Accordingly, the National-led government has agreed to hold a referendum at the time of the 2011 general election on whether MMP should be retained or replaced (and, if the latter, which of several other electoral systems is the most preferred). If voters choose to replace MMP, there will be a second referendum in 2014 in which the current electoral system will be pitted against the most favoured alternative system. If a majority of voters choose to support the retention of MMP in late 2011, then attention is likely to focus on ways in which MMP might be modified in order to address some specific concerns. One of these is magnitude of the threshold which parties need to cross in order to secure seats in Parliament via the party vote. It is currently five per cent, which is relatively high by international standards. Another concern lies in the fact that this threshold does not apply if a party wins at least one constituency seat. Many regard this rule as unfair and potentially destabilising.

The first three chapters in Part 5 discuss various aspects of electoral law reform. In Chap. 11, the Minister of Justice (Hon Simon Power) reviews recent changes in New Zealand's constitutional arrangements and outlines the various changes being

instituted by the National-led government. These include the repeal of the Electoral Finance Act, the establishment of a new Electoral Commission (which will assume the responsibilities of the Chief Electoral Office, the existing Electoral Commission and the Chief Registrar of Electors), and the holding of at least one (and possibly two) referenda on the future of MMP. He also foreshadows the government's plans to undertake a wider review of constitutional matters, including the controversial issue of separate Māori representation. The initial details of this review are outlined in the Appendix at the end of this volume.

In Chap. 12 Charles Chauvel, the Labour Party's spokesperson on electoral matters, discusses the reasons why New Zealand adopted the MMP electoral system in the mid 1990s and assesses whether the new arrangements have delivered their hoped-for benefits – especially in terms of a fairer system of representation and an improved policy process. In his view, MMP has unquestionably resulted in a more representative Parliament, with a much higher proportion of women and much better representation of ethnic minorities. He also argues that MMP has enhanced public trust and confidence in the country's political system, improved the level of inter-party consultation, strengthened the select committee system in Parliament, and slowed the legislative process. Whether these claimed virtues provide sufficient grounds for voters to support the retention of MMP in the forthcoming referendum remains to be seen.

Philip Joseph, in Chap. 13, tackles four critical electoral issues: the retention of separate Māori seats, the future of MMP, the idea of a fixed parliamentary term, and the length of the term of Parliament. In keeping with Charles Chauvel, Professor Joseph favours the retention of MMP. While acknowledging certain imperfections, he argues that proportional representation has "energised national politics, increased the contestability of political decision-making, and enhanced the representational diversity of Parliament". Against this, he proposes the abolition of the current regime of separate Māori representation and advocates a four-year fixed term. He fully recognises, however, that neither of these changes is likely. In the case of Māori representation, the matter remains too divisive politically for early action. In relation to the term of Parliament, New Zealanders have already rejected a four-year term in referenda on two occasions, and there is currently little political interest in the concept of a fixed term.

In the final chapter in Part 5, Caroline Morris addresses a very different set of issues, namely how to minimise misbehaviour by MPs and what to do when such misbehaviour is detected. The context for this discussion is a series of recent scandals in Britain and New Zealand involving the misuse of parliamentary and ministerial expenses. In the case of Britain, the expenses scandal in 2009 resulted not merely in many MPs choosing not to contest the 2010 general election, but also prosecutions for fraud. The chapter assesses various forms of "soft" and "hard" regulation, in particular the promulgation of stronger codes of conduct, greater reliance on parliamentary privilege (including suspension and expulsion), the establishment of an independent external regulator, and the use of a device known as the recall election. Under a recall, voters in a constituency can force a by-election under certain conditions (for example, where their MP has engaged in

serious wrongdoing and where a sufficient number of voters have signed a petition). The author argues that there is no perfect system for addressing misconduct by parliamentarians. Nevertheless, such misconduct needs to be taken seriously. Her preference is for a mix of methods for monitoring and sanctioning unacceptable behaviour, including both internal parliamentary controls and external oversight. This strongly suggests the need for further reform in New Zealand where Parliament continues to rely solely on internal processes, namely codes of conduct and parliamentary privilege.

Chapter 11
The Future of Electoral Law

Simon Power

This is a transcript of the Minister's speech to the Reconstituting the Constitution Conference held at Parliament in September 2010.

11.1 Introduction

When I came to Parliament in 1999 I would not say it was an electoral crisis, but as part of the vote being counted in Rangitikei in that year, a ballot box went missing, and you might recall that then the new government was about to come into power, and Richard Prebble (I think it was) decided that ACT would require a judicial recount of the entire electorate, to hold up the sitting of the new Parliament under the then Labour-led government. On election night I remember clearly having a majority of 63 votes, but by the time I got to Parliament I had a majority of 289. Now you might think that was slim, but there were three who had slimmer majorities than I did in that Parliament so I felt relatively comfortable heading into the 2002 election.

So ever since that moment I have had a bit of an interest in electoral law, and I want to thank you for inviting me to speak today on the future of electoral law.

Hon Simon Power is Minister of Justice, Minister for Consumer Affairs, Minister of Commerce, Minister Responsible for the Law Commission, Associate Minister of Finance, and Deputy Leader of the House. Member of Parliament for Rangitikei since 1999.

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