
**THE TREATY OF WAITANGI - WHERE TO
FROM HERE? LOOKING BACK TO MOVE
FORWARD**

**Rt Hon Sir Geoffrey Palmer
Presentation to the Te Papa Treaty of Waitangi
Debate Series**

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Introduction

E nga iwi o te motu, tena koutou, tena koutou, tena koutou katoa

- 1 The problem with a presentation of this sort is to know where to start. So much has been said by so many for so long. The Treaty of Waitangi has spawned a vast scholarly industry of great variety. It is a literature of some distinction and it is unique to New Zealand.¹ It is hard to know which Treaty prism to look through in order to distil insights of any value. Treaty of Waitangi jurisprudence as it has developed in New Zealand by now has become a big field of near Byzantine complexity. And that is just the law as it is. Debates on what the law ought to be seem to me in political terms to have become unmanageable. The politics of the Treaty has become a battlefield upon which people have become increasingly reluctant to tread.

- 2 It is not necessarily helpful to refer to my own political experience in the Treaty field. Although there were a lot of important Treaty policy measures created by the Fourth Labour Government, in political terms it was another country. There was no MMP and MMP has transformed both the political and constitutional landscapes in New Zealand in ways that remain in many quarters little understood. In its latest iteration MMP has given us a Maori party represented in Parliament. While it is too early to divine what effects this may have on the Treaty and its place in New Zealand society, it is bound to have some.

The Policy Place we are at

- 3 To arrive at a balanced appreciation of where New Zealand is now located in relation to the Treaty of Waitangi it is necessary to see where we have come from in public policy terms and where we might go next. I shall share with you now the conclusion I reach from this analysis. Clearly we cannot go back, even if we knew what going back means. We cannot, or so it seems to me, pretend the

¹ Michael Belgrave, Merata Kawharu and David Williams (ed) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, South Melbourne, 2005) is the most recent book and it contains some excellent contributions. I have also found delightful: JGA Pocock *The Discovery of Islands*, (Cambridge University Press, Cambridge, 2005).

Treaty does not exist, ignore it and remove all traces of it from the New Zealand statute book. Not even the most muscular solutions that have been offered in recent times go so far. Neither can we re-write our own history. Our history is our history; we can argue about what happened and what it means. But New Zealand as one of the world's oldest continuous democracies has a long history of dealing with the Maori people. How New Zealand performed as a state in respect to its indigenous peoples is a matter of public record.

- 4 But what we should do now in policy terms is another issue. I am struck by the impression that while we cannot go back, there is no widespread will to go forward either. We are suspended in a place from which there is neither advance nor retreat readily available. This may be no bad thing looked at in the larger view. There has always been an ebb and flow in the attitudes towards the Treaty in New Zealand. It started life here as something of a sacred compact, only to be dismissed 37 years later as a "simple nullity"; much later came the phrase that the "Treaty is a fraud"; then that the Treaty is the Maori Magna Carta. We should remember, however, the Treaty is only part of the framework for Maori-Crown relations and for Maori-Pakeha relations.

- 5 The great modern advances for the Treaty began in 1975 with the establishment of the Waitangi Tribunal, a decade later its jurisdiction was widened to deal with claims back to 1840. References to the Treaty in legislation began to be made followed by block busting litigation in the State-Owned Enterprises case of 1987,² where the Treaty began to be enforced in the courts, but only because it was referred to by Parliament in legislation. Then were added direct negotiations with the Crown concerning Treaty grievances and the Maori Fisheries Settlements. Then there were the policies of devolving responsibility in the social areas to Maori organisations and measures to protect Te Reo Maori. These were, in their day, massive advances in protecting the interests of Maori under the Treaty. All this happened under first-past-the-post Parliaments and there was a significant measure of accord among the two main political parties of those days as to the essential components of the policy.

² *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

6 That is not to say the policy was popular. Within the Cabinets and Caucuses of both National and Labour the policies were tremendously controversial for the basic reason that significant elements of the population were downright opposed to all these developments or uneasy about them. I wrote in 1992 when fresh from Treaty endeavours in Government:

“Disguised prejudice is never far from the surface in New Zealand, whenever there is debate on Maori matters. There is a dark and unpleasant underside to the New Zealand psyche when questions of race are confronted. These things I learned only by exposure to the issues at the sharp end. For much of the time the truth is disguised under the egalitarian exterior of New Zealanders.”³

7 I went on to say that there was also much that was admirable in New Zealand race relations and that New Zealand has been much more successful in this regard than many other societies. I thought then and I still think now that the most serious challenge New Zealand faces is to avoid having a permanent underclass defined by race.

8 In the peculiar constitutional framework of New Zealand the protection for minorities against the tyranny of the majority is not well developed. My theory in making the policy changes for which I had some responsibility was to attempt to honour the undertakings of the Treaty and to develop a modern policy framework. I thought this would promote a sense of justice among Maori and give them an increased stake in society. Such an effort would act as an insurance against marginalization and majority tyranny. A lot was achieved in the decade 1985-1996 and most of it was controversial. But now in 2006 the level of controversy is so high that it seems further steps are at an end, at least for the time being.

9 The implicit bipartisan approach that used to characterise these issues has been shattered. It was inevitable this would occur in a democracy, especially an MMP democracy with all significant viewpoints represented in the political marketplace. However, it is better to have these attitudes out there in the open rather than hidden. Closet assumptions are never a firm foundation for progress.

³ Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 74. This is part of a chapter entitled “A Maori Constitutional Revolution” that gives my views at greater length on Treaty issues in the fourth Labour Government.

The Current Legal Position

- 10 In important respects the Treaty is half in and half out of the legal system. Whether it is part of New Zealand's domestic law and can be enforced in the courts depends upon whether it has been incorporated in statute.⁴ The constitutionally important judgments in the Court of Appeal and the Privy Council in the 1980s and 1990s were built on the legal foundation that section 9 of the State-owned enterprises Act 1986 incorporated the Treaty by enacting the words "Nothing in this Act shall permit the Crown to act in a manner that inconsistent with the principles of the Treaty of Waitangi."
- 11 Whether that theory of the matter will remain settled law if the matter is argued in the new New Zealand Supreme Court must be open to conjecture. Remember also that the Supreme Court Act 2003, section 13, provides that in granting leave to appeal "a significant issue relating to the Treaty of Waitangi is a matter of general or public importance". Furthermore, one of the purposes of that Act is "to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions".
- 12 More than thirty statutes have been passed by the New Zealand Parliament that incorporate the Treaty in some form or other, but these do give rise to interpretative difficulties due to the vague and ambiguous meanings of the Treaty provisions themselves, even before encountering the differences between the English and Maori versions of the Treaty. This problem has led to calls for Parliament to be explicit in working out in precise terms how it wants to protect Maori interests in legislative schemes rather than using a general formula similar to section 9.⁵ There are some notable statutes where that was done: the Resource Management Act 1991, the New Zealand Public Health and Disability Act 2000 and the Local Government Act 2002.
- 13 There can be little doubt that the manner in which the Treaty has been handled in legislation gave scope to New Zealand courts to interpret statutes where it had

⁴ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

⁵ Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.

been incorporated in a broad and generous way and so protect Maori interests, but it is far from clear that the courts would have done so without legislation. The courts can hardly be criticized for the stance they have taken, given the purpose the Treaty had in the first place. Yet Treaty jurisprudence and Bill of Rights jurisprudence have both given rise to the impression held in some quarters that the courts are ‘activist’ and involved in some political and ideological frolic of their own in deciding cases, a view I reject.

- 14 Reference to the Treaty may well be part of orthodox legal theory in New Zealand for the purposes of statutory interpretation. Justice Chilwell in a case in 1987 said:⁶

“There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation to have resort to extrinsic material.”

- 15 The Treaty of Waitangi Act 1975 established the Waitangi Tribunal to hear grievances about alleged breaches of the Treaty by the government and make recommendations about them. The chair of the Tribunal is the Chief Judge of the Maori Land Court. In 1985 the Tribunal’s jurisdiction was extended by statute back to 1840, the date the Treaty was entered into. As a result any Maori may claim that he or she (or a group to which he or she belongs) has been prejudicially affected by any legislation, regulation, policy or practice, or act of the Crown

⁶ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. See also *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184: “We are of the view that since the Treaty of Waitangi was 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 purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute. We also take the view that the familial organisation of one of the peoples a party to the treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly we take the view that all Acts dealing with the status, future and control of children, are to be integrated as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the treaty was intended to preserve and protect. ... Since we are satisfied that the wording of the Acts with relevance to this proceeding is such that there is no conflict with treaty principles, indeed there are a number of provisions which directly incorporate those principles and there is certainly nothing contrary to that in the Guardianship Act itself, we are not therefore confronted with and do not comment on the situation which might arise where a statutory provision was seen to be in conflict with the Treaty of Waitangi or related principles”.

since February 6, 1840. This allowed the Tribunal to hear claims on historical grievances concerning government actions in the nineteenth century. The Tribunal can examine “omissions” of the Crown as well as positive acts. Further the Government established a process for direct negotiations with Maori over Treaty grievances. Sometimes, although not always, this follows a report from the Tribunal finding the facts and whether what occurred was consistent with the Treaty. In a narrow range of circumstances, the Tribunal has power to make binding decisions and order the resumption by Maori of State-owned Enterprises land or land that formerly had that status.⁷ It is a matter of record that a significant number of claims for historic grievances have been dealt with and more are in the process of being dealt with. These are important milestones in remedying injustice.

- 16 The Treaty was designed to protect Maori and give the Crown the right to govern. As the Tribunal said as long ago as 1983, the Treaty gave “the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants.”⁸ Lord Cooke of the 1987 lands case said “It was held unanimously by a Court of five judges, each delivering a separate judgment, that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards the other.”⁹

Aboriginal Customary Rights: A Complicating Factor

- 17 The legal doctrine of aboriginal rights that so consumed New Zealand in the foreshore and seabed saga is not strictly speaking part of the Treaty of Waitangi debate at all. The legal rights that the Court of Appeal has suggested could conceivably be found to exist on further examination, derive not from the Treaty of Waitangi but from the New Zealand common law.¹⁰ This is a fact that I doubt

⁷ Treaty of Waitangi (State Enterprises) Act 1988.

⁸ Waitangi Tribunal, *Motunui-Waitara Claim Report*: Wai 6 (2 ed. Waitangi Tribunal, Wellington, 1989) 55.

⁹ *Te Runanga o Whare Kauri Rekohu v Attorney-General* 2 [1993] NZLR 301 at 305.

¹⁰ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

whether one New Zealander in a thousand understood during the months of controversy that followed that decision. Indeed, I was one of the counsel in the case and I followed events subsequent to the decision with close interest. The public debate was conspicuous in my view for the fact that while the rhetoric was hot, very few participants on either side of the debate had any real idea of what they were talking about, and perhaps this is not surprising given the complexity of the issues.

- 18 The doctrine of aboriginal or customary right is one of the most indeterminate doctrines of the common law. But it came to New Zealand early. In 1847 what is now the equivalent of the High Court, sitting with two Judges, decided that the Queen is the only source of title to land in New Zealand. The judgments do contain reference to the pre-emptive rights of the Crown contained in the Treaty of Waitangi but this was not the legal source of the rule. The Crown held the land subject to the encumbrance of native land rights based on customary usage. This was legal restriction on the title of the Crown as the ultimate land owner. As Justice Chapman said in 1847:¹¹

“Whatever may be the opinion of jurists as to the strength and weaknesses of Native title, whatsoever may have been the past vague notions of the natives of this country whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.”

- 19 So the law of New Zealand on the matter was established very early in our colonial history and its effect was clearly to protect Maori interests.
- 20 This was the same set of legal principles that came to be applied by the High Court of Australia in *Mabo v Queensland*,¹² a case that caused massive upheavals of public opinion in Australia and a large and complicated legislative response to try and sort it out. Aboriginal title in New Zealand can be extinguished by legislation and Sir John Salmond in the early twentieth century as Solicitor-

¹¹ *R v Symonds* (1847) NZPCC 387.

¹² *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

General spent much time and energy trying to sort out the legal issues and did render the doctrine unenforceable in the courts for many purposes by the Native Land Act 1909, section 84. But the doctrine was held by the New Zealand High Court to apply to fishing rights in 1986, where the court held that a Maori relying on customary Maori fishing rights did not commit an offence by taking undersized paua.¹³ There was no express legislation setting aside customary Maori fishing rights, indeed they were expressly preserved by section 88(2) of the Fisheries Act 1983. There was no legislation setting such rights aside for the foreshore and seabed, the Court of Appeal decided in 2002 in the *Ngati Apa* case.

- 21 This decision produced the most difficult policy issue that any judicial decision in my lifetime has caused for any Government. The process of developing legislation on it was long drawn out and divisive and the result, as enacted, is not free from difficulty.¹⁴ It contributed a lot in my view to the unfavourable atmosphere that pervades Treaty issues now, even though the case itself did not involve the Treaty of Waitangi.

What is to be Done?

- 22 The place where we are now is better than the one we were in during the 1980s. Maori are taking advantage of the new opportunities that have become available to them. The policies have added to the capacity of Maori to take positive measures about health, education and commercial development. The Hui Taumata held in 2005 illustrated the undoubted fact that there have been many positive developments within Maoridom. It seems to me that Maori are moving away from focusing on past injustice and are actively pursuing fresh opportunities, not looking to Government to bring “the results we must achieve”.¹⁵

¹³ *Te Weehi v Regional Fisheries Officer* [1986] 1NZLR 680.

¹⁴ Foreshore and Seabed Act 2004. For an in-depth look at the legal developments and the legislation see Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005).

¹⁵ Sir Paul Reeves “Mihi and Message from the Convenor” (Hui Taumata, April 2005) <<http://www.huitaumata.maori.nz>> (last accessed 31 January 2006).

- 23 So the issue becomes, given where we are, what is to be done? If I may be permitted to address the issue as a law reformer in the New Zealand Law Commission I would say, at present, nothing. Once the historical grievances are out of the way and there has been a period of consultation and reflection, New Zealand will be in a better position to decide upon the next steps we need to take to bring not only constitutional and legal clarity to the position of the Treaty, but also the economic, social and cultural position of both Maori and Pakeha. After a pause we will be able to assess how the resources in health, education and from settlement assets and the policies of devolution have worked in practice. The Treaty is not now, never has been, and never will be a silver bullet to solve everyone's problems.
- 24 These issues do move in cycles in New Zealand, and another cycle of change will come on Treaty issues but it is not here yet. The way forward lies in the development of ideas and policy options outside the political and government environment. Some further activity within the universities and civil society generally is required. When a sufficient body of work has been done and some serious debate has been conducted about it, new approaches may arise. But they are not possible now. And neither am I sure what those new approaches should be. But they will come in time. I am encouraged that my son, who has had considerable practical experience on these issues as Deputy Secretary of Justice, is writing a book that will provide a re-assessment. The scholarly community has much to contribute in this area.
- 25 The position of the Treaty of Waitangi in New Zealand's constitutional framework is perhaps the most difficult issue of all. Any revision of New Zealand's constitutional arrangements will require the place of the Treaty to be settled and the prospect of securing anything approaching consensus on it appears to be remote. Neither is the current legal position clear. It is generally accepted on most sides that the Treaty of Waitangi has constitutional importance and is part of this country's constitutional arrangements. But there is major disagreement on its precise role and the nature and extent of its importance. Its formal legal status may be less important than its influence on the way governmental power is exercised in New Zealand.

- 26 The Cabinet Manual 2001 requires Cabinet papers to confirm compliance with Treaty principles in relation to Bills for introduction and bids for inclusion in the legislative programme. Papers to secure approval for government bills are required to report on the consistency of what is proposed with the Treaty. Lord Cooke said in a 1990 extra-judicial utterance of the Treaty “It is simply the most important document in New Zealand’s history.”¹⁶ But the proper legal and constitutional roles of the Treaty remain to be decided.
- 27 The Royal Commission on Electoral law recommended as long ago as 1986 that “Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Maori people about the definition and protection of the rights of the Maori people and the recognition of their constitutional position under the Treaty of Waitangi.”¹⁷ That remains a sound recommendation. It was echoed in the extraordinarily cautious report before the 2005 general election of the Constitutional Arrangements Select Committee. This recommended that “There should be specific processes for facilitating discussion within Maori communities on constitutional issues.”¹⁸ Sooner or later these things will have to happen. But before they do we need some firmer analysis of the possible policy options and approaches available. It will take some years to generate those and then slide the issues back into the system of Government. At present I can see no clear direction in which to guide Government policy.
- 28 In the end I am an optimist about the Treaty and its place now and in the future. We are a long way from 1840 now. But we have accomplished much and while there is more to be done I am confident developments will take place in the fullness of time, perhaps in ways we do not yet discern. Issues between Maori and Pakeha will endure in New Zealand, including issues concerning the Treaty. The New Zealand sense of national identity is uniquely defined by a contribution from Maori. Tolerance and a generosity of spirit remains a predominant part of the make-up of New Zealanders.

¹⁶ Sir Robin Cooke “Introduction” (1990-1991) 14 NZULR 1.

¹⁷ Royal Commission on the Electoral System “Towards a Better Democracy” [1986-87] IX AJHR H.3 112.

¹⁸ Constitutional Arrangements Committee “Inquiry to Review New Zealand’s Existing Constitutional Arrangements” [2005] AJHR I. 24A 5.

- 29 In the end our political system will find ways of binding us together on Treaty issues, not driving us apart. But the time is not now - we need a pause for reflection, analysis and reconsideration. We do not want, as Lord Cooke put it to the inquiry into New Zealand's constitutional arrangements last year, "discord and confusion".¹⁹ The issues will not go away and they will have to be faced up to and dealt with in the future. As the expatriate historian Professor John Pocock recently put it "New Zealanders, somewhat against their inclinations, have come upon interesting times; it is to be hoped they survive them".²⁰
- 30 My message should not be misunderstood. While big policy steps are not possible at the present time, we are presented with the positive challenge to develop new paradigms and approaches. This will allow us to face the issues that it is New Zealand's destiny to handle with enlightenment.

¹⁹ Constitutional Arrangements Committee, above n 18 at 17.

²⁰ JGA Pocock, above n 1 at 228.