The Treaty of Waitangi - principles for Crown action

Rt Hon Geoffrey Palmer*

The Rt Hon G W L R Palmer - at that time Deputy Prime Minister, Minister of Justice and Attorney-General - officially opened the AULSA Conference on 7 July 1989 and then delivered the following address. It elaborates on the five principles established as the policy guidelines for dealing with issues relating to the Treaty of Waitangi.

My theme today is the Treaty of Waitangi.

It is well known that New Zealand has a significant Maori population - 12.5 per cent. There are more than 400,000 New Zealanders who can claim some Maori descent. The relations between the races in New Zealand have attracted increasing attention in recent years.

One element of that debate has concerned the place of the Treaty of Waitangi. The document was signed on behalf of the Crown by Captain William Hobson, and other Crown representatives and by over 500 Maori Chiefs of the tangata whenua.

The Treaty has three articles and the English text of the articles is as follows:

Article the First
The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second
Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full 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; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

---

* Prime Minister of New Zealand.

Article the Third
In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

The Treaty is a somewhat opaque document. Its meaning can be the subject of considerable debate. The matter is not assisted by the fact that there are difficult textual variations between the Maori and the English versions.

The place of the Treaty in New Zealand has waxed and waned over the years since it was signed. It has, in recent years, attracted a great deal of scholarship - a small industry has grown up publishing books about it.

In 1975 the New Zealand Parliament passed the Treaty of Waitangi Act. The Long Title said that this was:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the Treaty.

The Tribunal is empowered to make recommendations to the Government following inquiry.

For the first ten years, the Tribunal was empowered to look at claims which arose only after 10 October 1975. But in 1985 the jurisdiction was extended to consider claims back to 6 February 1840, the date the Treaty was signed.

The Tribunal has done some outstanding work. Its reports have been regarded as scholarly and authoritative. That is not surprising. Some of New Zealand's most distinguished lawyers have served on the Tribunal.

The Tribunal has produced a dozen major reports. The Government has taken decisions on quite a number of the recommendations, although there are still a number awaiting attention.

The public impression concerning these facts is confused and uncertain.

On no subject has more nonsense been talked over the last few years than on the subject of the Treaty of Waitangi. Partly that is because it is not clear what the document means. Partly it is because the document is essentially political - and many political arguments about what weight should be given to it have become strident, confused and downright absurd.

Some of the scholarship surrounding the Treaty is highly suspect, fuelled as it is by political motivation rather than detached analysis. And much misleading information has been conveyed by the media.

This has had two effects. It has raised public fears about what the Treaty can bring about. And it has raised Maori expectations about what may be achieved under it for Maori. Both impressions are exaggerated, distorted and unfortunate.

The first casualty in this debate has been the reasonable middle ground. And it is upon this ground that the future of this nation depends - the future does not belong to the extremists on either side.

The Government's State-Owned Enterprises Policy produced a flurry of concern about Treaty issues. As a result of Maori concerns, section 9 of the State Owned Enterprises Act 1986 said "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

The Crown was proposing to transfer vast tracts of land to the state owned enterprises, thus removing the land from Crown ownership. Maori interests brought a case in the Court of Appeal, arguing that the Crown needed to protect Maori interests under the Treaty in that land and that it had not done so.

The Court of Appeal, in one of the most important decisions that any New Zealand court has ever made, said:

> In brief the basic terms of the bargain were that the Queen was to govern and the Maori were to be her subjects; in return, their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated.

The court held that reasonably effective and workable safeguard machinery for Crown claims was required in the administration of the state owned enterprise policy.

As a result of this decision, the Government negotiated with the New Zealand Maori Council to arrive at a solution which would allow the State-Owned Enterprises policy to be implemented and Maori interests to be protected.

That agreement is set out in the Treaty of Waitangi (State Enterprises) Act 1988. Under this Act the Waitangi Tribunal can make a decision which is binding on the Government but only in relation to land which the Government has transferred to a state owned enterprise.

The Court of Appeal case was followed quite quickly by another, this time involving Maori fishing rights. The fishing issue had quite different origins but it came along about the time the land issue was finishing and got mixed up with it in the public mind.

The Fisheries Act 1983 says quite simply: "Nothing in this Act shall affect any Maori fishing rights." It is hardly surprising to find such a provision in New Zealand law. The first fisheries legislation passed in New Zealand, the Fish Protection Act 1877, provided:

> Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

The New Zealand Maori Council relied on the first provision I have cited to bring a case for interim injunctions against the issue of fishing quotas by the Crown. The fishing quotas created property rights in perpetuity.

The issue is presently the subject of legislation before a Parliamentary Select Committee. That legislation has been the subject of long negotiation between the Crown and the Maori in which there has been partial agreement.

I go into this background to explain the Government's position. The Government has had to find, in relation to the Treaty, a place to stand. It has agreed upon a series of principles for Crown action which were announced last Monday by the Prime Minister. These principles are aimed to dispel doubt and remove confusion. What is more important, they will give Government Departments and agencies a clean set of policy guidelines about how to approach Treaty issues.

The statement will provide some certainty to the Crown's approach. It provides a clear articulation of the Crown's responsibilities and a clear delimitation of the Crown's obligations.

These principles will guide the Crown's activity in dealing with issues which arise out of the Treaty of Waitangi in New Zealand.

If people are to fully appreciate the significance of the Treaty, they must understand what role the Crown has to play. We can help to remove doubt, uncertainty and misunderstanding if we can make the Crown's role clear.

There are five principles:

The Principle of Government or Kawanatanga;

The Principle of Self-Management, or Rangatiratanga;

The Principle of Equality;

The Principle of Reasonable Co-operation; and

The Principle of Redress.

The first - the Principle of Government - the Kawanatanga Principle - recognises the Government's right to govern and to make laws. This sovereignty is qualified by the promise to accord an appropriate priority to the Maori interests specified in the Second Article.

Cession of sovereignty is supported by several important sources. The New Zealand Maori Council has observed that "The purpose of the Treaty, therefore, was to secure an exchange of sovereignty for protection of Rangatiratanga"[1].

The only international tribunal to consider the Treaty of Waitangi directly also described the Treaty as ceding sovereignty[2]. This legal gathering may be interested to know that Roscoe Pound sat on that Tribunal in Washington.

And the Waitangi Tribunal has on several occasions stressed the cession of sovereignty.

It has, for instance, observed that the Treaty's purpose and effect was "To provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown ..."[3].

In exchange for sovereignty, priority was given to Maori interests. The tribunal explains it this way:[4]

> That then was the exchange of gifts that the Treaty represents. The gift of the right to make laws and the promise to do so, so as to accord the Maori interest an appropriate priority.

The Court of Appeal has also spoken of the effect of the First Article of the Treaty as a duty of loyalty by the Maori people to the Queen, full acceptance of her government through her responsible Minister, and reasonable co-operation[5].

The exercise of sovereignty subject to the promise to protect a specified Maori interest is nothing novel from a constitutional point of view. New Zealand's legislative sovereignty is subject to many other binding undertakings entered into by treaty, for example in the areas of trade, human rights, transportation and so on.

It was also not novel in 1840 in an historical sense in the light of European colonial practice and international law.

The first principle, then, recognises the cession of sovereignty, the right to govern and make laws in exchange for protection of *rangatiratanga.*

---

1 New Zealand Maori Council Kaupapa Te Wahanga Tuataki: February 1983.

2 *William Webster*, Award of 12 December 1925 of the US Great Britain Arbitral Tribunal reported in FK Nielson (ed) *American and British Claims Arbitration* (GPO Washington, 1926) 537.

3 *Muriwhenua Fishing Report: Report of the Waitangi Tribunal on the Muriwhenua Fishing claim*; June 1988 Waitangi Tribunal, Department of Justice, Wellington, New Zealand (Wai 22).

4 *Report findings and Recommendations of the Waitangi Tribunal on an application by Aila Taylor and on behalf of Te Atiawa Tribe in relation to fishing grounds in the Waitara district* Wai 6 (Waitangi Tribunal, Wellington 1983).

5 *New Zealand Maori Council* v *A-G* [1987] 1 NZLR 664.

The second principle for Crown action addresses the guarantee of protection of *rangatiratanga*. This is the Rangatiratanga Principle - the Principle of Self-Management.

The Second Article of the Treaty guarantees to Iwi Maori the control and enjoyment of those resources, or *taonga*, which it is their wish to retain. The preservation of a resource base, restoration of iwi self-management and the active protection of *taonga*, both material and cultural, are necessary elements of the Crown's policy of recognising *rangatiratanga*.

This is the price the Crown paid for what it obtained in the First Article.

The Court of Appeal has said that:[6]

> The duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

The Waitangi Tribunal has made it clear that the expression *taonga* extends also to language and other cultural treasures. It has also suggested that the Rangatiratanga Principle may call for an assurance by the Crown of the basic endowment of the tribes of land and resources. Such a suggestion is reflected in the Crown's plans for Iwi or tribal self-management and self reliance, which were announced as part of the Government policy last year. The Tribunal has also found that the Maori text of the Treaty 'Conveyed an intention that the Maori would retain full authority over their lands, homes, and things important to them ...'.[7]

The First and Second Articles of the Treaty are both strong statements which necessarily qualify one another. *Kawanatanga* is subject to a promise to protect *rangatiratanga*. *Rangatiratanga* is subject to an acknowledgment of *kawanatanga*.

The working out in practice of the balance between the two articles must depend on a case by case consideration. Clearly, 'te tino Rangatiratanga' will generally take precedence in matters concerning material and cultural resources and *taonga* which have been retained. Equally, however, where there can be clearly demonstrated a danger to all or a general need which can be managed only at the level of national action, the Crown must exercise its powers on behalf of all New Zealand citizens. To take just one example, the control of dangerous substances (such as radioactive material or poisons) could only be effective under a legislative regime which speaks for all citizens and to all situations. It is the right of all New Zealanders that there be effective government or *kawanatanga* in such matters.

---

6 *New Zealand Maori Council* v *A-G* above n 5 per Cooke P, p 664.

7 *Orakei Report: report of the Waitangi Tribunal on the Orakei claim* (Wai 9), The Waitangi Tribunal, Department of Justice, Wellington, New Zealand 1987.

The Court of Appeal has recognised that the Treaty principles do not authorise restrictions on the right of a duty elected government to follow its chosen policy. The Court has indicated that trying to place such restrictions on a government '... would itself be inconsistent with those principles'[8].

It is fundamental to those principles that the parties owe each other co-operation. The Law Commission has identified the fundamental character of this exchange of gifts. It describes the Treaty as one that:[9]

> gave the Crown what it sought: sovereignty and governance over New Zealand. This is a continuing authority and power. What the Maori received in return is likewise ongoing - the continued protection of the rights that the Treaty acknowledged as theirs.

This is the essence of a living document. Conditions or circumstances may change but the spirit of the relationship endures. Continuing authority in exchange for continuing protection.

The Third Principle, the Principle of Equality, recognises the guarantee in the Third Article of the Treaty, of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also.

The Third Article also has an important social significance. It contains an implicit assurance that social rights will be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

The Principle of Equality deals with two aspects of equality.

The first, formal legal equality appears from the terms of Article 3 of the Treaty. That guarantees to Maori the 'rights and privileges of British Subjects'. That equates in the present day to the rights and privileges of New Zealand citizens. The Court of Appeal has accepted[10] that 'the Treaty is a document relating to fundamental rights', that it should be 'interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms'. The effect of this is that 'rights and privileges of British Subjects' must be read to include not only the heritage of a legal tradition going back to Magna Carta but also rights which spring from New Zealand's

---

8 *New Zealand Maori Council* v *A-G*, above n 5, p 666.

9 *The Treaty of Waitangi and Maori Fisheries Mataitai: Nga Tikanga Maori Me Te Tititi o Waitangi* A background Paper, Preliminary Paper No 9 (Law Commission, Wellington, 1989) para 755, p 52.

10 *New Zealand Maori Council* v *A-G*, above n 5, pp 655-656.

international treaty obligations such as the International Covenant on Civil and Political Rights of 1966.

The second aspect of the equality principle takes a wider view. It considers not only legal equality but also the actual enjoyment of social benefits. Where serious and persistent imbalances exist between groups in their actual enjoyment of social benefits such as health, education or housing, then government will consider particular measures to assist in redressing the balance. The International Convention on the Elimination of All Forms of Racial Discrimination, to which New Zealand is a party, expressly recognises that such special measures will not be deemed racial discrimination provided they are not continued after the imbalance is remedied.

The fourth Principle is the Principle of Co-operation. It states that the Treaty is regarded by the Crown as establishing a fair basis for two peoples in one country. Duality and unity are both significant. Duality implies distinctive cultural development and unity implies common purpose and community. The relationship between community and distinctive development is governed by the requirement of co-operation which is an obligation placed on both parties to the Treaty.

The Crown regards the principle of reasonable co-operation as residing at the very centre of the Treaty. Reasonable co-operation can only take place if there is consultation on major issues of common concern and if good faith, balance, and commonsense are shown on all sides. The outcome of reasonable co-operation will be partnership. It is co-operation which signals the difference between the distinctive cultural development guaranteed by the Treaty and that 'apartheid' which has rightly attracted the condemnation of the modern world. Co-operation means shared understanding and common objectives. These will ensure that distinctive cultural development which is welcomed in a thriving society remains consistent with the fundamental integrity of the community.

The final principle, the Principle of Redress, acknowledges the Crown's commitment to ensuring that a process is provided for resolution of grievances arising from the Treaty, be that through the courts, the Waitangi Tribunal or direct negotiation.

Redress where entitlement is established should take a form which considers the practical impact of the measure, and takes into account the need to avoid the creation of fresh injustice. Although the Treaty does not explicitly deal with redress, successive governments have by the enactment and amendment of the Treaty of Waitangi Act 1975, shown they regard redress as a necessary implication of the Treaty. And the Court of Appeal has noted that 'where grievances are established, the State, for its part, is required to take positive steps in reparation'.[11]

---

11 *New Zealand Maori Council* v *A-G*, above n 5 (per Richardson J, p 674).

In considering appropriate measures of redress, the Government must consider factors such as economic and administrative feasibility, the need to spread the cost and the benefits, and the requirement in any democracy that a measure be acceptable to or at least tolerated by, a reasonably broad range of opinion. In assessing those factors the Government is doing no more than applying the Waitangi Tribunal's warning that:[12]

> It is out of keeping with the spirit of the Treaty, ... that the resolution of one injustice should be seen to create another.

In summary then, the Crown has identified five principles which will guide its activity in dealing with issues which arise out of the Treaty of Waitangi:

> The Kawanatanga Principle recognises the right of the Government to govern and to make laws.
>
> The Rangatiratanga Principle recognises the right of iwi to organise as iwi and, under law, to control the resources they own.
>
> The Principle of Equality recognises that all New Zealanders are equal before the law.
>
> The Principle of Reasonable Co-operation recognises that both government and iwi are obliged to accord each other reasonable co-operation on major issues of common concern.

And yet it is quite possible for us to resolve these matters and turn to the positive opportunities such an arrangement creates.

The Principle of Redress acknowledges that the Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur. This principle makes it clear to New Zealanders that the system of grievance resolution will be orderly, fair, and effective. We will take the steps necessary to ensure that justice is done and seen to be done.

I know that as the whole picture of this complex matter becomes clear to New Zealand the country will see that this is an issue that can be dealt with calmly and rationally. Moreover they will see that there are no hidden traps. That this is a process from which we can all emerge winners.

I believe these principles give everyone a clear understanding of the Crown's position.

We have affirmed our commitment to the Treaty.

We have given a clear indication of the means by which we will ensure that the Treaty Principles are honoured.

---

12 *Waiheke Report*, Wai 10 (Waitangi Tribunal, Wellington, 1987) 99.

We have recognised the nature of the power that was given over to the Crown in the Treaty.

We have recognised the extent of the Maori interest which the Crown has promised to protect.

We have assured the people that everyone will be treated fairly.

We have also indicated what the people of this country must do if good sense and reason are to prevail.

The Treaty of Waitangi deals with matters of deep concern to all New Zealanders. People are therefore vitally interested in issues that arise in connection with the Treaty.

One practical illustration of how these principles work occurred this very week. I received a communication from the legislation committee of the New Zealand Maori Council on behalf of a Maori prisoner being held on remand in respect of several serious criminal charges, one of them wounding with a firearm with intent to cause grievous bodily harm. This person denies the right of the criminal justice system to hear his case and claims that the matter should be resolved in accord with Maori custom. To support this claim he began a hunger strike on 14 June this year.

The argument made in the letter to me was that under the Treaty Maori people retained the right to monitor and control the conduct of Maori people through the systems of Maori law. I regard that claim as ill-founded. This is clearly a claim which cannot be met under existing New Zealand law. Not only is it contrary to the principles that all New Zealanders are equal under the law, it strikes at the heart of the rule of law in a democratic system. Such an approach cannot be tolerated.

This is a good example of what the Principle of Equality means under the Principles of Crown Action which have been adopted. I do not mean to suggest that the legal system should not respond to the cultural sensitivities of Maori. Indeed the Principle of Co-operation presupposes that the legal system must be sufficiently flexible to accommodate such differences. It was for that reason that I invited the committee to put forward any particular ideas they may have that would assist the Government in developing a strategy for a culturally sensitive common legal system - a system that demonstrates that one law can accommodate the needs of more than one culture.

The Treaty is a document which was born in a spirit of goodwill, justice and fair play. It is a living document and that spirit lives with it.

New Zealanders are involved at the moment in a somewhat introspective examination of what their heritage means to them. To outsiders the process must

seem somewhat curious. Yet it is not inappropriate in the 150th year after the signing of the Treaty of Waitangi.

We cannot ignore our history, neither can we change it. We must come to terms with it. We are not governed by the dead hand of past events, but neither can we ignore the effects of those events in shaping our attitudes and approaches. For it is these things which have made us what we are. The relationship between the races in New Zealand will not be determined by the Treaty of Waitangi. It will be determined by the attitudes of individuals and by a collective sense of justice, fairness and tolerance.

In the past few years the Treaty has been called in aid too much. It cannot bear all the weight that some seek to place upon it. It is a significant constitutional document. It sets up a framework for addressing some of the important issues between Maori and Pakeha. And in that respect what it offers is distinctly positive. But we are in danger of throwing out the baby with the bathwater in a stream of political and media hype on issues of complexity and delicacy. All branches of government have a part to play in resolving these issues - central, regional and local government, the courts, Parliament, and the Waitangi Tribunal. But there are no magical solutions and there can be no grand design. The issues must be worked through carefully, one by one, with patience and tolerance on both sides.

What matters most in all of this is the innate sense of justice and fair play. The debate in recent years has flushed out a number of issues which have been buried not far beneath the surface of New Zealand society.

By facing up to these issues we will be the stronger. But we must all keep a sense of proportion. What it all means in the end is quite simple. Chief Judge Durie, who presides over the Waitangi Tribunal, summed up best the essence of the Treaty: "The gift of the right to make laws and the promise to do so, so as to accord the Maori interest an appropriate priority".