JUDICIARY: ACTIVISM UNDER SCRUTINY

Experts expose myth of the treaty 'partnership'

By MIKE ROSS

By solemnly pronouncing the Treaty of Waitangi to be "akin to a partnership" between Maori and the British Crown, activist judges have created a legal fulcrum providing powerful political leverage.

What might otherwise be a moral claim by Maori on taxpayers' largesse becomes a legal claim justified by principles enshrined in the treaty. These principles are undefined.

This lack of definition has seen claims for Maori entitlement blossom: from calls for compensation as solace for past wrongs; to a presumed Maori right of veto over state asset sales and local resource management consents; and now arguments surrounding ethnic control over parts of government spending on health and social services.

Confusion abounds.

The latest issue of the *Otago Law Review* is dedicated to one topic: Certainty and the law. This platform is proving true to the province's calvinist forebears. It has harsh words for those who think unelected judges are more to be trusted than legislators and politicians when it comes to setting rules. Tough criticism is dished out to judges who act as if they were sovereign monarchs exercising the divine right of kings.

Wittingly or unwittingly, it is activist judges who provided ammunition for the power struggle that has erupted within Maoridom – the hierarchical, heredity-based old regime against the urbanised politicised new. It is more than a battle for status between young and old, rural and urban; it is a battle for control of cash spilling from the public purse.

SIR GEOFFREY PALMER: 'Surprised' at results of his platform

LORD COOKE: Widely recognised as the high priest of judicial activism

SIR IVOR RICHARDSON: Appeal Court has now adopted a minimalist approach

The State-Owned Enterprises Act, resource management legislation, even adoption proceedings have all provided fertile platforms for artful reinterpretations of early colonial history as activist judges set out to do what they perceive to be right.

Critics complain this results in some judges not being true to their oath. Rather than doing justice according to the law, crusading judges usurp the role of government, making law on the hoof to achieve social and political aims.

History will identify the latter part of the 20th century as a period of unprecedented judicial activism. Two names predominate; both knights of the realm, one now a peer.

Sir Geoffrey Palmer is identified as the proponent of legislation providing a platform for much of the judicial activism. He now pleads surprise and amazement at the results. Sir Robin Cooke, now Lord Cooke of Thorndon, is widely recognised as the high priest of judicial activism. Lord Cooke sat as a judge for 24 years, 10 years as president of the Court of Appeal.

It is the SOE Act that caused most excitement. Passed in 1986 as part of public sector restructuring by the then Labour government, section 9 inserted what looked like a redundant throw-away line: Nothing in the act was to allow the Crown to act in a manner inconsistent with the principles of the treaty.

Sir Geoffrey Palmer says this was intended to ensure the establishment of SOEs did not frustrate or jeopardise Maori rights. Lord Cooke used this provision to elevate the treaty to the status of a founding constitutional document against which all government actions were to be measured.

The fact no one knows what the "principles of the treaty" are means the treaty industry has become a lawyers' bonanza. Problems are compounded when politicians proceed to enact legislation such as the Resource Management Act 1991, which requires resource management decisions to take into account the "principles of the treaty."

Canterbury University's David Round emphasises trying to extract "principles" from the terms of the treaty is an entirely speculative and imaginative exercise.

For some it justifies Maori sovereignty. For others, autonomy for each iwi. Yet others dismiss the treaty as an historical anachronism.

Members of Parliament are willing to "fess up." They are lost. In his valedictory speech to Parliament, one-time prime minister Mike Moore confessed to having no understanding of what is meant by "principles of the treaty" when passing legislation ordering others to take the treaty into account.

Perhaps it is not surprising that courts and tribunals, required to interpret and apply the law, instead seize the opportunity to make the law.

The Waitangi Tribunal, established as a commission of inquiry to determine historical wrongs, has evolved into a politicised lobbyist.

Judges, swayed by Lord Cooke, have embellished court judgments with their personal views on treaty issues.

Don Dugdale, a member of the Law Commission, explains why judges leap in. There are judges who presume justice coincides with their own personal moral assumptions. And there are judges who enjoy the sheer pleasure of getting their own way.

Mr Round is particularly critical of the way in which Lord Cooke used court judgments as a platform for political speeches.

Having elevated Maori to the status of partners with the Crown, Lord Cooke seemed also to desire to elevate judges to the status of partners with Parliament in running the country, he says.

A new philosophy is now apparent in the Court of Appeal, following the retirement of Lord Cooke.

Under his successor, Sir Ivor Richardson, the court has adopted a minimalist approach – short judgments, direct and to the point, concentrating on the law and keeping out of politics.

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THIS TREATY PARTNERSHIP NONSENSE MUST STOP

On 2 August 2000, the NZ Public Health and Disability Bill was introduced into Parliament. It includes a clause requiring that the Act "be interpreted in a manner that is consistent with the principles of the Treaty of Waitangi".

A day earlier, the Government released a media statement titled: "Health partnership between Maori and Crown". In it, the Minister of Health, Annette King spoke of the Government's commitment to the principles of the Treaty of Waitangi. She said that the Government "accepts that Maori have status as indigenous people and Treaty partners" and that the new health boards would have "an obligatory partnership' to enable mana whenua participation in strategic planning".

There is, however, no treaty requirement that Maori health be given special consideration. And as the following extracts well show, there is absolutely no basis for establishing partnerships for health, or in fact any other matter.

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"Biculturalists, Maori radicals, and some others have often claimed that the Treaty of Waitangi created a partnership between the tribes and the Crown, but this is simply not possible in any meaningful sense. Sovereignty means, by definition, authority to rule, and a "partnership" in which one party has the constitutional right to overrule the other can in no way be considered a true partnership." - **Robin Mitchell**, "The Treaty and the Act", 1990, p 193. Robin also noted that when in 1989, the Labour Government promulgated its five Treaty "principles", there was no mention of partnership.

"In common parlance, 'Treaty partnership' is ill-defined, confused, and misleading - dangerously so in regard to the Crown's obligations to all citizens and the potential for detriment to the majority of New Zealanders. There is an inherent and inescapable connotation of equality between the 'partners' that make the use of the term inappropriate in the full context of the Treaty." - **Bruce Mason**, "The Principle of 'Partnership and the Treaty of Waitangi", PANZ Monograph No.6, 1993 (Revised 1995), p 13. Bruce's comprehensive analysis includes the 1987 SOE 'lands' case - generally recognised as the source of the partnership myth. He does, however, also observe that the Anglican Church's Bicultural Commission had in 1986 concluded that the Treaty 'recognised and established the principle of partnership'.

"Despite what the modern courts or political parties may say, or what the wording of any Act of Parliament might be, the weight of evidence is such that there can be no possibility that the Treaty of Waitangi formed a sovereignty partnership." - **Walter Christie.** "Treaty Issues", 1997, p 13. Walter gives examples to show that in 1840, neither the British nor Maori considered that a constitutional partnership had been formed.

"In particular, the myth is constantly repeated that this judgment ['lands' case] declared that the Crown and Maori are 'partners'. This is simply not the case. ... Any idea of a partnership between the Crown and Maoris puts non-Maori New Zealanders into an inferior position." - **David Round,** "Truth or Treaty?", 1998, p 126 & 127. David also comments on Bruce Mason's analysis. (See above.)

"There can be no possibility that the Treaty of Waitangi formed a sovereignty "partnership." Having signed the Treaty, the chiefs became not "partners" but subjects of the Crown, that is New Zealand citizens, all those descended from the tangata whenua are today entitled to the same rights as non-Maori citizens of this country: no less, and certainly no more." - **Reuben Chapple,** "The Fiction of Maori Sovereignty", The Free Radical, September/October 1998, p 5.

"The Treaty did not include any concept of "joint government" and continued reference to the treaty as a "partnership" is misleading. Maori and the Crown were parties to the treaty, and the treaty created obligations on each similar to those that partners have in a partnership. But it certainly did not create a partnership to govern the country. That function passed to the Crown." - **Sir Douglas Graham,** "Declaration of Sovereignty was superseded by treaty", NZ Herald, 22 February 1999, A13.

"The concept of a partnership has been developed by the New Zealand courts in several important cases. But it has been made clear that the term is not used to equate the treaty relationship with the conventional legal understanding of partnership. This is clear from other references, for example, "a relationship akin to a partnership" or "in the nature of a partnership." These analogies have been used to describe and give emphasis to what is the overriding Treaty principle, namely the reciprocal obligations of the Crown and Maori to act towards each other reasonably and in the utmost good faith." - Hugo Judd, Official Secretary to **Governor-General,** private correspondence, 18 March 1999.

"It is asserted Maori are guaranteed the right to participate as partners in processes. This has been debunked over and over again, but as usual no one pays any attention. In particular, this phrase is trotted out thoughtlessly by academic public lawyers who thereby display

that they have no idea what a partnership is. ... How can one have a special relationship between the people as a whole and one section of it? The essence of a partnership is that partners are liable for each others failings ... and so are entitled to joint control." - **Bernard Robertson**, "End treaty partnership myth for Maori children's sake", National Business Review, 11 June 1999.

"... the old chestnut of Maori as 'partners' with the Crown. There's nothing new here - every government in the past two decades has immersed itself in the warm language of partnership without knowing what it means. ... The hard cold truth, of course, is that in terms of fulfilling any alleged obligations, this partner - the Crown - must revert to real people for its mandate - taxpayers and citizens. And, lo and behold, the Maori treaty partner finds itself on this side of the table as well. ... People like Ms Turia don't have a treaty relationship with an abstract entity called the Crown. In practical terms they have a relationship with a community of tax-paying citizens ... The muddling of partnership and redistribution is a potential flashpoint that the government would be advised to defuse in short order." - **Simon Upton**, "It's time to look at what treaty partnership really means", National Business Review, 14 July 2000.

"Treaty partnership has no genuine historical antecedents before the 1980s. Attempts to pretend otherwise are an anachronistic hoax. In any historical sense dated back to 1840, treaty partnership is a monstrous lie. ... Treaty partnership, Maori sovereignty's even uglier sister, is a recent legal invention of judicial activism. ... The partnership doctrine is extraneous to the Treaty, has no nineteenth-century historical grounding or current democratic mandate ... A self-interested coterie of mendacious bludgers and standover artists has managed to camouflage itself as an earnest good faith bargainer in sovereign partnership with parliament. Outrageous violation of the rights of all New Zealanders by the juridicial fraud of treaty partnership has been inadequately responded to by almost all political parties. Indoctrinated politicians piously mouth the words "treaty partnership" without knowing what they are saying. ... As a recent legal fiction, treaty partnership can and should be uprooted from New Zealand law and politics. Not only is treaty partnership a legal absurdity that has no warrant in the Treaty itself, but it is racially discriminatory. It represents nothing more than the legal formula of an apartheid state." - **Michael Coote**, "Two Big Lies: Maori Sovereignty & Treaty Partnership", The Free Radical, July/August 2000, p 9 - 11.

Compiled by Denis Hampton
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"New Zealand's Constitution in Crisis" by Geoffrey Palmer, 1992

Extracts from Chapter 4: A Maori Constitutional Revolution

Introduction In the period 1984 to 1990, the Labour Government brought in a number of measures in response to its Maori policy. The following extracts from Geoffrey Palmer's book demonstrate his thinking and part in these changes.

... Here more than elsewhere in the book I tell of my own experiences handling Maori issues - what it all means I cannot be sure. I only know what I did and why. ... The New Zealand history I studied did not tell me anything of the history of oppression which had characterised much Maori experience in the nineteenth century. ... Later experience in the United States forced me to probe further into the issue of New Zealand's race relations to try and sort myth from reality. ... By the time I was at Law School in the united States there was a mass of case law on civil rights, of which I had to study. The United States Congress had started to pass the civil rights legislation in the mid-sixties and I studied that as well. ... It was on this background that I drew, and with adaptations used, as the basis for legislation to advance the interests of the Maori minority in New Zealand. ... First it was necessary to give the courts something to interpret. Such was the nature of the approach I brought to both statutory incorporation of the Treaty in statutes, and extension of the Waitangi Tribunal to examine grievances back to 1840. ... Such was the cast of mind I brought to Maori policy in the Labour Government. Unpopular as many of the measures were, and they were unpopular within the government itself, they will endure I believe.

Maori policy occupied a special place in the hearts and minds of Labour Party members because the Maori MPs had all been Labour for many years, and because the Maori community always voted overwhelmingly for the Labour Party. ... I took an interest in the development of Maori policy and saw ways in which I could frame the party's "Open Government" policy to accommodate Maori aspirations. ... Another important feature of the policy was a commitment to extend the jurisdiction of the Waitangi Tribunal back to 1840. ... I had been a law student with the tribunal chairman Judge E T Durie. Reading this finding [Motonui - Waitara Claim] encouraged me to be bold with the Labour Party election policy on the Treaty and the tribunal. ... Indeed the contribution of the tribunal to the Maori constitutional revolution is of prime importance. The development of the principles of the Treaty, applied in contemporary context, provided an intellectual and legal framework which could be relied upon with confidence and adopted by the courts. ... It would be for the government of the day to decide what to do about the recommendations. A body which looked at the evidence fully and fairly, sifted through the history and measured it against the Treaty would give Maori an outlet for their grievances. ...

The person whose instinct, acumen and judgement I came to trust most was Koro Wetere who became Minister of Maori Affairs in the fourth Labour Government. We were able to accomplish a lot together in this area ... I announced the Maori policy as Acting Leader when David Lange was away in Europe, on 2 February 1984. ... It was not the sort of policy which could be shied away from or watered down. It was implemented.

The government had the Treaty as a centrepiece of its Maori policy. ... I discussed the matter with Koro and we got together a cabinet paper which required Departments to take Treaty considerations into account... After substantial consideration of a paper put forward in March, in June 1986 cabinet agreed that all future legislation referred to cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi. ... But one of the most important by-products of the policy was the inclusion in various statutes of references to the Treaty of Waitangi. ... In March 1989 I put forward a cabinet paper seeking permission for a group of officials to prepare a paper setting out the principles upon which the government proposed to act on Treaty issues. ... They were designed to guide the actions of one Treaty partner, the Crown, in its dealing in good faith with the Maori partner. I was satisfied that we achieved this with the statement of the principles. Looking at it with the advantage of hindsight it still seems to me sound.

The Waitangi Tribunal issued an interim report drawing the attention of the government to the consequences of the [SOE] legislation on claims and raising the question whether the bill was contrary to the Treaty. I felt we had to act. ... When the legislation was in the Committee of the Whole I had two amendments drafted in the following terms. One was the following:

> **9.Treaty of Waitangi-** Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[re 1987 case, Maori Council v Attorney-General] The Court of Appeal held that the principles of the Treaty overrode everything else in the Act. ... The judgements contained broad declarations of principle of a type never before made by a New Zealand Court. This was constitutional litigation of a novel and exciting nature. The case established Treaty of Waitangi jurisprudence so firmly and dramatically in the courts of New Zealand that they can now play something of the role of American courts, and that will assist in the protection of the minority to secure them things which the legislature would not award them directly. ... After much heavy negotiation and a lot of legal work the Treaty of Waitangi (State Enterprises) Act 1988 was passed. I thought this a rather elegant legal solution myself and it was endorsed by the Court of Appeal. But I quail still when I think of the amount of work it involved.

The work of Parliament, the courts and the Waitangi Tribunal have all combined to enhance the status of the Treaty to the extent that it can now be regarded as part of the fabric of our constitution. ... From a practical point of view the Treaty cannot now be removed from New Zealand law. ... The balance of power has tilted against the government of the day towards the courts and the tribunal. ... I attempted to entrench the Treaty of Waitangi as part of New Zealand's supreme law in an entrenched Bill of Rights. Had that occurred there would have been no retreat. Despite the failure to pass an entrenched Bill of Rights we have gone nearly as far in the same direction using other means. ... In many ways the changing position of Maori in the New Zealand Constitution has been the most significant constitutional change in recent times. It is a bit muddled, uncertain in parts but it seems to work. ... I still believe the rights in the Treaty of Waitangi should be entrenched as part of a New Zealand Bill of Rights. ... It would be good to tidy up the constitutional position further by giving unambiguous status to the principles of the Treaty of Waitangi. International obligations towards indigenous peoples require New Zealand to be active in protecting Maori interests. We cannot go back.

Comment It can be seen from the above that (Sir) Geoffrey Palmer was the prime person responsible for the predicament New Zealand is now in. He has much to answer for.

Denis Hampton
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