NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 7 • NUMBER 2 • DECEMBER 2009

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Te Whare Wānanga o te Ūpoko o te Ika a Māui

FACULTY OF LAW
Te Kauhanganui Tātai Ture

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2009

The mode of citation of this journal is: (2009) 7 NZJPIL (page)

The previous issue of this journal is volume 7 number 1, June 2009

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Tribal Constitutionalism and Membership Governance in Australia and New Zealand: Emerging Normative Frictions
Kirsty Gover 191

"So Long Lying Idle without a School": *Wi Parata*, *Wallis* and Whitireia, 1848 – 2008
RP Boast 237

The Economic Dimension of Hong Kong's Basic Law: An Analytical Overview
Miron Mushkat and Roda Mushkat 273

Slegs Suid Afrikaners – South Africans only?: A Review and Evaluation of the International Crime of Apartheid
Adriaan Barnard 317

Book Review: *The Treaty of Waitangi in New Zealand's Law and Constitution*
Carwyn Jones 367

What are we to do with the Public Law of Torts?
Geoff McLay 373

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The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline and Westlaw electronic databases.

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Annual subscription rates are NZ$100 (New Zealand) and NZ$130 (overseas). Back issues are available on request. To order in North America contact:

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BOOK REVIEW: *THE TREATY OF WAITANGI IN NEW ZEALAND'S LAW AND CONSTITUTION*

Carwyn Jones*

Book review of Matthew S R Palmer The Treaty of Waitangi in New Zealand's Law and Constitution *(Victoria University Press, Wellington, 2009).*

Over the last 25 years there has been a significant number of books published, not to mention numerous scholarly articles written, which have addressed various aspects of the Treaty of Waitangi. These publications have covered a mix of history, politics, philosophy, and law. However, there have been surprisingly few publications which have attempted a sustained, comprehensive examination of the role of the Treaty at law. The publication of *The Treaty of Waitangi in New Zealand's Law and Constitution* by Matthew Palmer, therefore, makes an immensely important contribution to the study of the legal dimensions of the Treaty. This book is also an insightful piece of legal scholarship. Palmer's understanding of the Treaty in the context of the broader public law landscape is impressive. His practical approach, and the careful organisation and explanation of material, all contribute to a very readable exposition of many complex ideas. However, I find that his lack of engagement with Māori scholarship in this field a little troubling; this is a point I will return to later.

The Treaty of Waitangi in New Zealand's Law and Constitution is focused on the legal dimensions of the Treaty, and in particular, on the role that the Treaty plays in New Zealand's constitution and the exercise of public power. The book is divided into three main parts: Past, Present, and Future. This provides a clean and accessible basic structure upon which Palmer's arguments are laid out logically and coherently.

The first part of the book addresses the meaning and significance of the Treaty in 1840. Palmer considers the likely understanding that the parties would have had of the terms of the Treaty at its

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signing, the extent to which the Treaty was legally recognised and enforced, and the way in which the Treaty affected the exercise of public power in 1840.

The second part, the Present, is, in many ways, the central focus of the book. Three of the book's seven chapters are contained within this part which explores the meaning, legal status, and constitutional place of the Treaty in the present. The first chapter in this part helpfully collates the interpretations of the Treaty given by Parliament, the courts, and the Waitangi Tribunal. The second of these chapters explores the various ways in which the Treaty has legal status or can be enforced within the New Zealand legal system. The final chapter in this part considers the constitutional place of the Treaty and its relationship with key constitutional norms. Palmer concludes that the most significant problem with the Treaty's place in New Zealand law is that there is uncertainty about both the meaning of the Treaty and about which constitutional institution has the power to determine authoritatively that meaning. Palmer sees the latter uncertainty as more problematic than the former and resolving this uncertainty is the primary concern of his proposals for the future, which are set out in the third part of the book.

The third part of the book identifies the central objective of the Treaty as one of building, maintaining, and developing healthy relationships between the Treaty partners. Palmer suggests "cautious", "ambitious" and "realistic" options for reform that would give effect to that objective and address the uncertainty problem. For reasons that need not detain us here, I do not agree with a number of aspects of Palmer's proposals for how to stabilise the Treaty’s place in New Zealand law and constitution. Nevertheless, his suggestions are both thoughtful and thought-provoking. In any case, it seems clear that he is more interested in having a conversation about the future of the Treaty than proving his own proposals are the best or the only way to move forward. Both the thinking and the attitude that underlie these proposals should be applauded.

Another aspect of this work that deserves considerable praise is its clarity and accessibility. The book usefully brings together information that had previously been somewhat scattered and difficult to access. For example, the review of the key statements on Treaty principles made by the Waitangi Tribunal in its various reports is a very helpful resource for anyone trying to understand the content of Treaty principles (at 112-120). As someone who works with issues relating to the Treaty of Waitangi and its legal significance, I have already found this book to be an excellent resource. I anticipate that I will continue to refer to it regularly. Yet, it would also provide an engaging introduction to some of the issues surrounding the Treaty for people who may have little or no background in relation to the Treaty but are interested in finding out more. Palmer explicitly states in the introduction to the book that his intention is to provide a clear and accurate statement of the current legal and constitutional situation with regard to the Treaty that is accessible to a general reader and, therefore, provide a useful foundation for further discussion of these issues (at 17-18). He achieves this aim admirably.

It is of concern that the Māori voice remains somewhat marginalised in Palmer's otherwise excellent exposition. Though there is a great deal more reference to Māori scholarship in this book

than some other legal texts that address the Treaty, there is relatively little in the way of deep engagement with the thinking of Māori scholars. When substantive concepts are debated, critiqued, explained, or de-constructed, Palmer's points of reference come, almost exclusively, from the writings of non-Māori. The result is that the parameters of the discussion about the Treaty are set without any real consideration of the concerns of Māori. The Māori voice is then restricted to expressing a point of view on the matters that others think are important. In other words, Māori scholars are only given space to respond, rather than taking part in Palmer's initial discussion of what the parameters of the debate will or ought to include. For example, Palmer acknowledges the range of different perspectives that exist in relation to the Treaty and its meaning. Māori perspectives are acknowledged in that context, but the substantive discussion of issues, such as the underlying conceptual framework for constitutional accommodation of diversity, then relies exclusively on non-Māori theorists (at 300). Similarly, the central discussion of New Zealand's constitutional norms (identified as representative democracy, parliamentary sovereignty, the rule of law and judicial independence, and New Zealand's unwritten, evolutionary constitution) is constructed entirely by non-Māori scholars (at 282-290). The scholars that Palmer refers to are prominent thinkers in this area and have made important contributions to our understanding of the Treaty. Such work ought to inform the discussion. But so too should the writings of Māori scholars such as Moana Jackson, Ani Mikaere and Whatarangi Winiata be engaged in this discussion.

The Māori voice also seems to be missing from the constitutional dialogue framework that Palmer employs. Constitutional dialogue, in the sense that Palmer uses the term, refers to the interaction between the different branches of government. It is worth noting that the term "constitutional dialogue" can also be used to refer to interactions between constitutions and constitutional cultures, which deliver a more inclusive conceptual framework (see, for example, the work of the prominent Canadian political philosopher James Tully). The model of constitutional dialogue used by Palmer suggests that, by performing their particular constitutional functions, the New Zealand legislative, judicial and executive branches of government engage in a dialogue which, through an iterative process, develops and refines New Zealand's constitutional norms. Further, Palmer says, it is through this process that new meaning has been given to the Treaty over the last 30 years or so. Palmer finds this model of constitutional dialogue helpful in terms of understanding the interactions that give meaning to the constitution, and, consequently, how to go about making changes to the constitution, should changes be deemed desirable. He therefore provides an analysis of the way in which key public institutions engage in a process of constitutional dialogue around the Treaty.

That analysis is, as always, clearly and elegantly explained and the insights provided are extremely helpful. But, within this analysis, there appears to be little scope for the Māori Treaty partner to contribute to the constitutional dialogue about the Treaty. Palmer considers the particular ways in which the sovereign, the Parliament, executive government, the judiciary, the Waitangi Tribunal, human rights mechanisms and local government engage in this process of dialogue to

construct the constitutional meaning and effect of the Treaty (at 244-277). There is a recognition that the Waitangi Tribunal "constitutes a distinctive and different voice to the courts of general jurisdiction" (at 272), and it is certainly important to the constitutional dialogue analysis to recognise this. But the Waitangi Tribunal does not actually articulate a Māori voice. The Waitangi Tribunal has incorporated many aspects of Māori procedure and is better equipped to receive evidence relating to Māori law and history than other legal fora. While this has enabled it to achieve significant credibility amongst Māori, and undoubtedly affects the metaphorical sound of its voice in the constitutional dialogue, this does not change the fact that the Tribunal is part of the apparatus of the state legal system and is not a Māori institution. I should make it clear that Palmer does not claim that the Tribunal is a Māori institution, but the problem is that the Waitangi Tribunal's engagement is as close as we get to a Māori voice within this model of constitutional dialogue in relation to the Treaty.

Some people might argue that this is not, in fact, problematic at all; that the constitutional dialogue model provides a realistic explanation of the operation of public power as it currently is, not as the Treaty suggests it ought to be. Palmer is, after all, careful to explain that his constitutional realist framework in general, and the model of constitutional dialogue in particular, is aimed at understanding the real-life dynamics of the constitution so that we can better understand how to change those dynamics, if such change is determined to be desirable (at 18-21 and 238-244). According to this argument, all Palmer is doing is reflecting the current state of affairs. Once the current situation is clearly understood, we can then enter into an informed debate about whether that state of affairs is appropriate or consistent with the Treaty.

Even so, without a deeper engagement with Māori constitutional voices, it is difficult to fully comprehend the constitutional dynamics surrounding the Treaty. The framework that Palmer employs to explain the constitution seems as though it should recognise this issue. Palmer describes the matters which must be taken into account in order to understand the constitution as follows (at 235):

> The real meaning and effect of the New Zealand constitution depend vitally on what those people who are supposed to abide by it believe it means and how that belief affects their behaviour. Analysing the nature and composition of New Zealand's constitution involves identifying and analysing all those factors which significantly influence the generic exercise of public power in practice. This includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the generic exercise of public power.

Māori might not control the institutions of state or determine how effect should be given to a legislative incorporation of the principles of the Treaty, but that does not mean the Māori voice is peripheral, let alone silent, in relation to the construction of constitutional meaning of the Treaty. Concepts that underlie Māori society, the tikanga associated with whanaungatanga, mana, tapu/noa, utu and manaakitanga, have determined how Māori have engaged with the Treaty and their Treaty partner. These constitutional institutions of the Māori world contribute to the place of the Treaty in

New Zealand's law and constitution just as do the courts of general jurisdiction and Parliament. Sometimes these Māori institutions are recognised by the courts, Parliament, or the executive government, but they are not dependent on such recognition. These institutions operate independently of the state legal system. Yet, there seems to be no place for these Māori institutions to engage in Palmer's model of constitutional dialogue. Palmer does note the institutional influence Māori have in the various branches of government, but the Māori role in the constitutional dialogue about the Treaty is more fundamental than that. It is, after all, Māori understandings of the Treaty, its guarantees and the partnership that it entails, which have shaped Māori conduct in relation to their interactions with the Crown and institutions of the state.

Despite these criticisms, *The Treaty of Waitangi in New Zealand's Law and Constitution* has much to recommend it. It is an intelligent and thoughtful contribution to the legal scholarship relating to the Treaty of Waitangi. I expect it will make an equally important contribution to a wider discussion of the place of the Treaty in New Zealand's constitutional arrangements. Like Palmer, I hope that this book will encourage a public conversation about the role of the Treaty of Waitangi in our law and constitution. It will be vital to the success of such a conversation that both Māori and non-Māori voices are given space, are heard, and are encouraged to engage with each other.