Where to from Here?

Rt Hon Sir Geoffrey Palmer*

I INTRODUCTION

The week the nation trembled due to the events at Waitangi is a wonderful week to talk about where we should go next. We have come a long way in 155 years. But what this week must have told us, if it tells us anything, is that we have a long way to go yet.

Treaty business will never be finished. Remember the Treaty always speaks. Our problem is that its voice has been muffled.

As a *former* politician speaking on a panel after a number of *practising* politicians, I wonder a bit about what my role is. The only political truth I know of about Maori issues in the New Zealand body politic is that there is no political advantage in them.

Politicians may from time to time think that there is. And from time to time some populist rabble-rousing may succeed in exciting a disguised prejudice which is never far from the surface in New Zealand, whenever there is debate on Maori matters. There is an unpleasant underside to the New Zealand psyche when questions of race are confronted. For much of the time, the truth is disguised under the egalitarian exterior of New Zealanders. Nonetheless, we have achieved a fair measure of tolerance here. But the situation is fragile. In the long run, heat and the attempt to court political advantage from Maori issues will do no one any good. Yet political decisions have to be made. But they are not easy. Think about the statement I am about to make:[1]

> Like the miner's canary, the *Maori* marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of *Maori,* even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

These words were first spoken by Felix S Cohen, a great jurisprudential scholar and commentator on Federal Indian law in the United States forty years ago. I have substituted the word "Maori" where he wrote "Indian". The difficult problems involved in resolving the Maori issues in New Zealand does touch the nature of our democracy and impinges powerfully on our constitutional development. There is no doubt that progress on these issues has reached a critical juncture. But before we despair, think of how far we have come.

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1 FS Cohen "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy" (1953) 62 Yale LJ 348, 390.

II WHERE ARE WE NOW?

The position and status of the Treaty of Waitangi has ebbed and flowed throughout the 155 years since it was signed. But in many ways it made more progress in the last decade than it did in the previous century. The new developments began with the creation of the Waitangi Tribunal. But we only have to recall some of the events since then to realise how the world has changed here in New Zealand. Consider the list of developments:

(a) Providing the Waitangi Tribunal with power to examine claims back to 1840 and the performance of that body in spreading enlightenment.

(b) Section 9 of the State-owned Enterprises Act and the great constitutional case of the *New Zealand Maori Council* v *Attorney-General*[2] in 1987. A number of other important cases followed.

(c) The adoption in 1989 of principles for Crown action on the Treaty of Waitangi. (These were not universally admired.)

(d) The Treaty of Waitangi (State Enterprises) Act 1988, the Crown Forests Assets Act 1989, and the establishment of the Crown Forests Rental Trust.

(e) Numerous references in recent statutes to the Treaty.

(f) The establishment of direct negotiations for the settlement of Treaty claims with the Crown.

(g) The establishment of the Maori Language Commission.

(h) The negotiations about Maori fish culminating in the Sealords arrangements that make over large resources to Maori.

(i) The passage of the Te Ture Whenua Maori Act in 1993.

(j) The Tainui Heads of Agreement.

After a great deal of activity in the area of the Treaty rights, where do Maori now stand in New Zealand's constitutional arrangements? 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. It is not easy to be dogmatic about what this means. Indeed, like all good constitutional concepts, it can be interpreted at several levels with overlays of substantial ambiguity.

Yet the Treaty is still not part of the supreme law of New Zealand, and unless it is incorporated in statute, it may not be judicially enforced. That is the present

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2 [1987] 1 NZLR 641.

conventional legal understanding. It is possible the Court of Appeal may decide to give the Treaty greater legal authority, but I would judge that prospect as less than fifty-fifty.

The changing position of Maori in the New Zealand constitution, however, has been perhaps the most significant constitutional change in recent times. It has been a bit muddled; it has been uncertain in parts; but it has seemed to have worked up to this point, and it appeared to have the confidence of both sides. Now, however, we have the fiscal envelope and we are told that the existence of this new development imperils the likelihood of future progress.

III WHERE ARE WE GOING?

As fair as I can follow the public debate, there are two primary features of the fiscal envelope that Maori object to. The first is that the resources devoted to settling the claims are to be capped at $1 billion. The second is that there was no consultation with Maori about the features as a package prior to its announcement by the Government. There are many other features to this set of Government initiatives, some of which will be quite valuable to Maori claimants and I hope that the baby is not thrown out with the bath water in the course of this debate. Many of the features of the package represent quite a lot of hard effort in the Government system to work through the issues and arrive at significantly better policy positions than that which went before.

And the reaction to the fiscal envelope and the protests at Waitangi have now brought forth a torrent of debate about Maori constitutional issues which threatens to get out of control. We are told that there should be a Maori Parliament or a Maori Upper House as part of the constitutional reforms of Government. Other analysts say that there should be sovereignty for Maori. Absolute sovereignty over the affairs of Maori was the claim I saw this week. I have no idea in practical terms what that means. Other calls have been made for the establishment of a new body representing Maori. But I doubt that new structures will achieve much, unless the Treaty is given deeper authority.

To my way of thinking the new wave of suggestions being mentioned are a distraction, and a dangerous one, from the main business. Surely the main business must be, as it always had been, to make progress under the Treaty of Waitangi to ensure that Maori grievances are addressed and that justice is done. Certainly we must look forward as Chief Judge Durie said yesterday. But let us keep the focus on the Treaty.

I find the idea that we are to have a Maori Upper House now when we have had no upper house of any description since 1950 is not in the realm of the possible, even if it were desirable.

Further, the idea that sovereignty should be given to Maori at a time when the notions of sovereignty are collapsing all over the world seems to me to be ludicrous. Once upon a time, we thought the New Zealand Government was sovereign. We hardly think that now. Far from being the indivisible omnipresent concept that Hobbes made it in *Leviathan*, sovereignty is more like a piece of chewing gum. It can be stretched and pulled in many directions to do almost anything. Sovereignty is not a word that is

useful and it ought to be banished from political debate. The notion that sovereignty for Maori comes from the Treaty of Waitangi is highly controversial and requires reading one provision of the Treaty up and another one down.

Self-determination, as I see it, is a different issue, and a much more manageable one. It is a concept with a rapidly developing international pedigree.

I do also think the representational issues that face the claims settlement process are serious. They always have been. I thought we made a start towards addressing those with the Runanga Iwi Act 1990. This Act provided legal structures for iwi which would have allowed Maori and the Crown to interact with one another with greater ease and greater accountability. I count the repeal of that Act as the most serious set-back to rational Treaty policy that has occurred in recent years.

IV CONCLUSION

For my own part, I would think we would be better to concentrate on the very real complexities involved in getting to grips with the Treaty rather than marching off in some other direction to the beat of false drums. Indeed, in my view, the constitutional change that is most likely to be beneficial and acceptable is to make the Treaty part of a basic constitutional document in New Zealand which is part of our higher law. That way more arguments about its range and quality will be capable of being dealt with by established institutions, particularly the courts. Unless we do that we can escape for much longer facing up to the task of ascertaining what the Treaty means.

The problems we face at present stem from having addressed the same issues for too long without having produced a sufficient number of tangible results. There has been a tide of rising expectations among Maori that have yet to be met.

I have a personal interest in this debate. I had quite a lot to do with getting the Treaty vehicle back on the road earlier this decade, and it has not arrived at its destination yet. We would be better in my view to devote time and energy to see that it does, rather than start new journeys in more ramshackle contraptions.