Transition from tradition to modernity

Colin James to Maori Law Review constitutional symposium
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My simple view of the Treaty of Waitangi and the constitution was crystallised at an Institute of Policy Studies conference in 2000 (*see Colin James, ed, Building the Constitution (Institute of Policy Studies, Wellington, 2000)*: serious discussion on the constitution runs quickly into the Treaty; conversely, serious discussion of the Treaty runs quickly into the constitution. Where the Treaty fits — or doesn't fit — in the constitution defines both the constitution and the Treaty and this nation.

For those wedded to one-people-one-nation notions the Treaty is the "simple nullity" of the 1877 ruling in *Wi Parata* which subordinated the Treaty to statute: the Treaty is an historical artefact. For such people, the Treaty now confers unearned advantage on Maori. Actually, while the Treaty was a simple nullity and parked with the rats, settlers and descendants stripped tribal assets and devalued the culture, bequeathing intergenerational disadvantage which is now a mounting economic and social cost. At the other pole some Maori assert that the Treaty is the constitution and iwi are still sovereign. Actually, the Treaty legitimised (in British eyes) the imposition of a British constitution and government, with supposed safeguards for tribal interests but extinguishing pre-existing iwi sovereignty. The foggy wording of article 1 has encouraged some to argue that sovereignty was not extinguished. But the Kohimarama hui of chiefs in 1860 accepted it had: de facto trumped de jure, which is usually the case in international interaction. Britain had the bigger (though arguably not the better) army.

Over the past 40 years the facts have been moving in the opposite direction: legislation has recognised the Treaty in various ways, including promoting partial redress of past infractions of the Treaty, requiring consultation of mana whenua, recognising te reo as an official language and recognising some enduring pre-Treaty rights. There is co-governance of the Waikato river, which adjusts the functions and powers of the Waikato regional council. The Whanganui river is to be made a legal personality, with one trustee appointed by the "Crown" and one by iwi. The courts took notice of this change of tone and have contributed to the evolution of Treaty jurisprudence, not least in the 1987 *Maori Council* case. This adds up to constitutional change, affecting the way power is assigned, distributed and exercised..

In short, the Treaty is in the constitution. And it has been changing the constitution.

So de facto has again been trumping de jure. Much has changed in practice as in law. The two cultures now have equal formal status even if not equal weight in daily life. A monocultural society has become bicultural, not absolutely but to an extent scarcely imaginable 40 years ago. That is an Aotearoan invention and maybe an exportable one.

Has it come time to translate de facto into de jure? Can it be done? And, if so, what might be done, when and over what timeframe?

I will leave to others the whether-what-when debate. The options range from: a special act which would be justiciable, that is, a supreme law; through a special act which is superior in much the way the Bill of Rights Act has become; to changes in the Constitution Act by way of a preamble, a justiciable section or a bill-of-rights-type section. Matthew Palmer has argued for a Treaty of Waitangi Court to "rule with binding force on specific cases of contemporary dispute as to whether the Crown and Maori are abiding by the relational meaning of the of the Treaty of Waitangi" (Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's law and constitution* (Victoria University Press, Wellington, 2008), p363).

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I don't think Parliament or the general public are ready for this sort of change nor will be this decade. The Maori party's ambition to entrench the Maori seats is a guide. The National party in principle still opposes the seats though it did remove that from its election policy in 2011 in recognition that the Maori party is delivering it Maori votes by proxy. National has learnt from its interaction with the iwi leaders forums and may be less likely to revert to an overt abolitionist stance when its Maori party link disintegrates. But that experience is unlikely to lead it to active support of the seats. Act wants abolition. New Zealand First says that, "while New Zealand First supports the proposition of a single franchise, the decision to abolish the Maori seats is a decision for the people to make, having examined the significant increase in representation numbers of MPs with Maori background under MMP".

But, still largely out of sight, something bigger is going on. Maori are in transition and that transition will have social, economic, political — and constitutional — effects.

One transition is social. I focus particularly on the emergence of an educated professional and managerial middle class increasingly drawn from beyond the ranks of the high-born and leading whanau. Some confine their Maoriness wholly or principally to ethnic lineage: that is, they are global, or at least national, citizens first and Maori second or not at all. They may be on the iwi roll, they may have ownership rights in a trust but they are not active in iwi, hapu or marae affairs. They have more of a stake in the future than in remedying the past.

This exodus from te ao Maori is visible in two other ways: initially, emigration to the cities in search of work as "brown pakeha"; and, more recently, emigration to Australia and beyond. Lower-class Maori can thus escape what they see as a burden or a constraint of being Maori or escape from prejudicial assumptions in the classroom or workplace and in dealings with police.

The second transition, which is connected with the first, is growing Maori commercial weight. This is of three main sorts: investments by iwi, enabled by Treaty settlements; successful trust enterprises, some of them large even if mostly under the mainstream radar; and, on a smaller scale, enterprises that happen to be owned and/or run by people who are ethnically Maori. This weight is starting to be noticed and not just by local business interests, the government and local authorities. Chinese state and other enterprises find two meeting places with Maori: a preference for long-term investment over the quarterly reporting that scourges "western" capitalism and distorts company management; and access to natural resources in which iwi have an interest or over which they have control.

Sir Tipene O'Regan, the great innovating Ngai Tahu negotiator, used to say that mana and money sound very similar. The monetary settlement of an historical claim for a Treaty breach symbolises the restoration of mana. By analogy, as Maori at the iwi, trust and individual levels get more money, their mana will grow. That will affect how this country is governed and how power is distributed.

That leads to the third transition: from prosecuting historical grievances to constructive development.

There is a mistaken belief, or hope, in some circles that when Chris Finlayson signs off the last of his prodigious, multitudinous, inventive, hectic historical settlements, the country can in some sense "move on". Not so fast: there remain many contemporary issues to be resolved, not least those concerned with WAI262. There is much work still for the Waitangi Tribunal and the Office of Treaty Negotiations. The Treaty will not again be quietly re-secreted in the historical artefact bottom drawer. It will remain a living constitutional instrument. It will continue for some time yet to adjust the cultural and power arrangements in this evolving nation.

Nevertheless, for iwi and for Maori, with the redress of historical wrongs, partial as the redress is, the past can at last become the past. The mana of iwi/hapu and of ancestors, diminished, damaged or devastated by government action, inaction, incomprehension, insolence and unconcern at private actions and pushed out of mind and sight for a century and a-half, has been, if not fully restored, at least memorialised and reflected in official apologies and token payments. The mana of individuals displaced after 1840 into a deeply foreign majority world which demanded they and their descendants whiten up has been recognised in acknowledging the place of Maori culture here and that gives a basis for rebuilding self-worth, without which a full life cannot be made.

Put that together with the social and economic transitions: Maori and their institutions are in transition from tradition to modernity.

In one major sense that was what the Treaty was about in 1840: access to modern global technology and goods. But the asset stripping and deculturation put that on hold. Some Maori made it through the British cultural door, which squeezed out their Maoriness. Many didn't and found themselves in the lower socioeconomic strata, with associated poverty of education, health, income and self-worth. Leaders had to hold together what was left of their iwi/hapu. With the past acknowledged, they can restart the broken 1840 journey to modernity.

In the post-historical-settlement era tradition will be important. But it will not be as a reclamation of rights. That reclamation, while in progress, could not allow tradition to evolve in response to changing conditions, as would have been the case without the colonial imposition and as it has been in wider New Zealand. Tradition will henceforth be the valuing of heritage and history, which every person needs to be whole and the Treaty is a critical insurance against the loss of tradition of that kind. But it is a living Treaty, insuring a living tradition.

And the focus in that modern, living, Treaty will be much less article 2 than article 3 (and, of course, not at all article 1).

In my reading article 3 in the modern context confers full citizenship on all citizens. For that citizenship to be fully exercised impediments must be removed to the extent that is practicable. That includes impediments to cognitive development and education, to good health and to access to work and the impediments of physical and mental and cultural disadvantage. Maori and the ex-British (and ex-Chinese and ex-Pasifika and all the others) are of course unequal in heritage and history, for the simple reason that those heritages and histories are different. But the inequalities of heritage and history are not, or should not be, impediments to full citizenship.

That was the Treaty's role in 1840 and it is the Treaty's next role. It is as a guarantor for all people of certain rights, as intended in 1840. It is in that sense an underlying bill of rights.

And that, in my simple way of seeing things, is where the Treaty now sits in the constitution.

It is, first, the founding document of constitutional government, through article 1. That is not seriously contestable now.

It is, second, through article 2, the guarantor of certain rights to iwi and hapu of control of their properties and taonga and of a place in the control of some national and local resources. There is much to discuss and resolve yet in that sphere, though much has been resolved and what exactly is yet to be resolved will continue to evolve. That remains important but it is now not critical, as it was 30 years ago and for 140 years before that.

Most important, the Treaty is, third, through article 3, a guarantor of wider rights of full

citizenship, both to Maori and those who are not Maori. That requires attention to cultural and other inequalities, in some cases through article 2-type initiatives (for example, whanau ora) and to the impacts of history on the capacity for citizenship.

Is that Treaty reducible to a simple act of Parliament or special section in the Constitution Act? Yes, as the Bill of Rights Act has been, though there are risks in introducing social, as distinct from civil, rights into legislation and those risks suggest care in how that additional step is taken. Article 2 can work as superior law, perhaps even (though I personally doubt it) as justiciable superior law. But article 3 probably cannot for all the reasons that have kept social rights out of the Bill of Rights.

Our society constantly evolves. That is so for Maori of all classes and dispositions and I have argued that there is now a major transition under way from tradition to modernity. If the Treaty is to stay modern, then the right path is probably more of our usual muddle-through, which has always characterised our constitutional evolution. In the past 30 years muddle-through has deeply changed the Treaty's role so that it is both in the constitution and changing the constitution. Over the next 30 years muddle-through will change it some more and maybe a lot more.