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A comparison between existing Treaty principles and the Principles of the Treaty of Waitangi Bill 2024

I Introduction

The debated status of the Treaty of Waitangi and Te Tiriti o Waitangi (the Treaty) within New Zealand's constitutional framework has persisted since 1840. National debate has culminated in recent years with the Principles of the Treaty of Waitangi Bill (the Bill).¹ This essay will compare the existing Treaty principles developed by the Waitangi Tribunal (the Tribunal) with the principles set out in the Bill. The comparison will reveal the striking inconsistencies between these two interpretations of the Treaty principles. This essay will also challenge the justification for the Bill and expose its vulnerability.

Part II provides an overview of the operation of Treaty principles and its interplay with the Waitangi Tribunal and the Bill. Part III analyses the Waitangi Tribunal's interpretation of Treaty principles, whilst Part IV analyses the Bill's interpretation. The Treaty principles analysed are partnership, protection and equal rights. A comparison of these interpretations will be offered in Part V. Finally, Part VI explores the policy rationales for the Bill and conveys broader implications.

II Overview of the Treaty Principles

A Reconciling the Documents

The Treaty of Waitangi and Te Tiriti o Waitangi are the founding documents of New Zealand, establishing our constitutional arrangements.² The documents allocate coercive power between

¹ Principles of the Treaty of Waitangi Bill 2024 (94-1).

² Kevin Hille, Carwyn Jones and Damen Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at 9.

Māori and the Crown.³ However, these two documents fundamentally conflict.⁴ The Treaty of Waitangi Act first introduced the concept of Treaty principles.⁵ In contemporary times, the concept and application of the Treaty principles have been the main attempt to reconcile the documents. The principles should reflect the spirit of the Treaty.⁶

B Function of the Waitangi Tribunal

The Waitangi Tribunal has played a significant role in developing the Treaty principles. The Tribunal has the jurisdiction to hear Māori claims and determine whether the Crown breached Treaty principles.⁷ Currently, the principles are not defined in legislation. Accordingly, the Tribunal has contributed significantly to Treaty principle jurisprudence.

C Proposed Function of the Treaty Principles Bill

The proposed function of the Bill is to provide an exhaustive list of Treaty principles.⁸ The Bill does not affect the principles used to settle historical Treaty claims.⁹ However, the Bill will be used to interpret legislation.¹⁰ Consequently, the Bill will nullify and replace the current Treaty principle jurisprudence employed when interpreting legislation.

III Waitangi Tribunal Interpretation

A Partnership

³ Matthew Palmer “The Treaty of Waitangi in Legislation” [2001] NZLJ 207 at 207.

⁴ Ani Mikaere *Colonising Myths – Māori Realities He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 73.

⁵ Treaty of Waitangi Act 1975.

⁶ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands case*] at 663.

⁷ Treaty of Waitangi Act, s 6.

⁸ Principles of the Treaty of Waitangi Bill, cl 3.

⁹ Clause 8.

¹⁰ Clause 7.

The Waitangi Tribunal has heavily developed the partnership Treaty principle. One of the first reports that implied a partnership referred to the Treaty as establishing a social contract.¹¹ The Tribunal has since expanded upon much of the discourse in the Court of Appeal, which confirmed that the Treaty symbolises a partnership between Māori and the Crown.¹² According to the Tribunal, partnership resulted from the cession of governance to the Crown on the condition that Māori retained tino rangatiratanga.¹³ The concept of tino rangatiratanga is commonly understood as Māori sovereignty”.¹⁴ Partnership requires both parties to act reasonably towards each other and in good faith.¹⁵ The Tribunal view the foundational aspect of partnership as the honour of the Crown.¹⁶

1 Consultation

The Waitangi Tribunal maintains that the nature of the partnership between the Crown and Māori deems consultation essential.¹⁷ In order to uphold tino rangatiratanga, consultation should take place for all matters Māori regard as important.¹⁸ The degree of consultation required can vary depending on how important the matter is to Māori.¹⁹ The Tribunal views consultation as an essential part of the partnership.

2 Redress

The Waitangi Tribunal has referenced an obligation to redress.²⁰ The Crown must redress when they fail to act in good faith and protect Māori interests as a Treaty partner. Redress allows the

¹¹ Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) at 52.

¹² *Lands case*, above n 6, at 664.

¹³ Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 269.

¹⁴ Mikaere, above n 4, at 51.

¹⁵ Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 390.

¹⁶ Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, 1991) vol 3 at 838.

¹⁷ Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, Wai 150, 1990) at 42.

¹⁸ *The Ngai Tahu Report*, above n 16, at 1053.

¹⁹ Waitangi Tribunal *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at 10.

²⁰ Waitangi Tribunal *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2024) at 98.

Crown to restore their honour.²¹ The obligation to redress derives from the rights Māori have under the Treaty rather than the rights of all citizens against the state.²²

B Protection

The Waitangi Tribunal declared that the Treaty gives rise to the principle of active protection.²³ If the Crown neglects to protect legitimate Māori interests, this constitutes a breach of the protection principle.²⁴ Active protection arose from the partnership arrangement in which the Crown obtained the right to govern on the condition of protecting tino rangatiratanga.²⁵ The Tribunal has discussed how protection extends to people, property, tribal status and allows the same benefits as the British.²⁶

C Equal Rights

The Waitangi Tribunal stated that the principle of equity arises from the granting of citizenship rights to Māori.²⁷ Equity guarantees freedom from discrimination to all.²⁸ The Tribunal confirmed that the Crown must act positively to guarantee equity.²⁹ Therefore, ensuring equity can require allocating resources based on current inequities.³⁰

IV Treaty Principles Bill Interpretation

A Partnership

²¹ Waitangi Tribunal *The Tarawera Forest Report* (Wai 411, 2003) at 29.

²² *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness*, above n 20, at 98.

²³ Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at 70.

²⁴ Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 191.

²⁵ *The Ngai Tahu Sea Fisheries Report*, above n 13, at 270.

²⁶ Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 191.

²⁷ Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at 62.

²⁸ Waitangi Tribunal *Hauora Report* (Wai 2575, 2023) at 34.

²⁹ *The Napier Hospital and Health Services Report*, above n 27, at 62.

³⁰ *Hauora Report*, above n 28, at 35.

Principle one of the Bill appears to replace the partnership Treaty principle. The Bill states the exclusive power of the Executive to govern and Parliament to legislate.³¹ These powers are qualified to be in the best interests of everyone in line with the rule of law and democracy. The principle simply restates the well-established branches of government and ignores Māori as a treaty partner.

B Protection

Principle two of the Bill directly correlates to the protection Treaty principle. The Bill provides that the Crown must protect Māori rights under the Treaty.³² . This protection is qualified as Māori rights will not be protected if they differ from the rights of everyone unless a Treaty settlement provides for them. The qualification renders the Bill futile in protecting Māori rights.

C Equal Rights

Principle three of the Bill directly references equal rights. The Bill provides that everyone is equal before the law.³³ Equality under the Bill provides equal protection, benefit and enjoyment of the same rights.

V Compare and Contrast

A Partnership versus Government

The Waitangi Tribunal promotes the principle of partnership compared to the Bill, which reduces this to the principle of government. The Tribunal considers that a partnership arises because the Crown's right to governance is qualified by the Māori right to tino rangatiratanga.³⁴ In contrast, the Bill significantly demotes the partnership principle to convey the singular side of government. The Bill solely asserts the rights of the Executive to govern and Parliament to

³¹ Principles of the Treaty of Waitangi Bill, cl 6.

³² Principles of the Treaty of Waitangi Bill, cl 6.

³³ Clause 6.

³⁴ *The Ngai Tahu Sea Fisheries Report*, above n 13, at 269.

legislate.³⁵ There is no mention of Māori retaining tino rangatiratanga. Most importantly, the Bill disregards that the Crown ever had a partnership with Māori. Ultimately, the Crown's right to govern under the Bill is unqualified. There is a significant difference between these two interpretations. The Tribunal promotes a partnership between two parties, and the Bill provides for complete Crown sovereignty.

B Active Protection versus Qualified Protection

The Waitangi Tribunal upholds the standard of active protection compared to the Bill, which reduces this to qualified protection. The Tribunal has declared that the Crown must positively act to protect Māori interests.³⁶ In contrast, the Bill provides that if Māori interests differ from the interests of everyone, the Crown will only protect those with a relevant Treaty settlement.³⁷ The qualified protection set out in the Bill affords more power to Parliament as they only have to protect rights which they essentially agree to protect. Consequently, the Bill removes the current standard of active protection. The different interpretations of protection provide for varying standards of Crown responsibility. The Bill will reduce the Crown's obligations to protect Māori interests.

C Equity versus Equality

The Waitangi Tribunal upholds the principle of equity compared to the Bill that conveys the principle of equality. Whilst often used interchangeably, equity and equality have distinct meanings. Equity better understands individual needs as divergent and promotes better outcomes for those marginalised groups.³⁸ Equality ensures everyone receives the same treatment. Therefore, equity and equality address completely different issues. The Bill changes the nature and lessens the standard of the Crown's obligations by promoting equality.

VI Policy Rationales

³⁵ Clause 6.

³⁶ *Report of the Waitangi Tribunal on the Orakei Claim*, above n 24, at 191.

³⁷ Principles of the Treaty of Waitangi Bill, cl 6.

³⁸ Martha Minow "Equality vs. Equity" (2021) 1 Am. J.L. Equal 167 at 180.

This essay will now turn to a more insightful discussion of three policy rationales argued in favour of the Bill. The discussion will explore whether these are justifiable and the broader implications of the rationale. The policy rationales discussed are certainty, promoting a national conversation and equality.

A Certainty

The general policy statement provides that one objective of the Bill is creating certainty.³⁹ A key feature of New Zealand's constitution is parliamentary supremacy.⁴⁰ Legislation is therefore paramount and is often understood to promote certainty.⁴¹ However, there are compelling arguments that displace the certainty policy rationale. Firstly, the Bill has a strong potential to lead to uncertainty. Secondly, there are greater constitutional implications that may render certainty undesirable.

1 Potential to provide uncertainty

The Bill could generate uncertainty regarding the status of the current Treaty principles. The Treaty principles development mainly commenced in 1975.⁴² This accumulates to decades of jurisprudence. Accordingly, the Tribunal contend that there is already certainty in Treaty principles.⁴³ As established in Part V, the principles in the Bill radically differ from those developed by the Waitangi Tribunal. The Bill could cause uncertainty by completely overturning Treaty principle jurisprudence.

The Bill also generates uncertainty concerning the jurisdiction of the Waitangi Tribunal. The Tribunal was established with the exclusive authority to determine the meaning of the Treaty.⁴⁴ Therefore, the Bill undermines the role of the Tribunal and does not address its altered

³⁹ Principles of the Treaty of Waitangi Bill.

⁴⁰ Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at 72.

⁴¹ Palmer, above n 3, at 207.

⁴² Hille, Jones and Ward, above n 2, at 12.

⁴³ Waitangi Tribunal, *Ngā Mātāpono/The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia* (Wai 3300, 2024) at 128.

⁴⁴ The Treaty of Waitangi Act, s 5.

jurisdiction. Furthermore, the Bill will not apply to historical Treaty claims.⁴⁵ The Tribunal must apply two distinct understandings of Treaty principles dependent on the context. Allowing two contrasting approaches to the principles undermines certainty.

2 Constitutional implications

The Bill has significant constitutional implications that suggest certainty is not desirable. The Treaty is constitutionally significant and should be interpreted generously with regard to changing circumstances. New Zealand has an unwritten constitution that allows for this flexibility.⁴⁶ Legislating the Treaty principles would create a strict and unilateral interpretation of the Treaty incompatible with our constitutional arrangements.

The Treaty and te Tiriti fundamentally conflict. The Treaty principles are an attempt to reconcile the documents. Mikaere argues that the documents are irreconcilable.⁴⁷ Contrastingly, Ned Fletcher maintains that the two documents are reconcilable.⁴⁸ Fletcher's perspective is relatively recent scholarship but is important to highlight the different perceptions on the relationship between the Treaty and te Tiriti.⁴⁹ Mikaere is more convincing and rightly draws on the relevance of He Whakaputanga.⁵⁰ Following Mikaere's argument, legislating an exhaustive list of Treaty principles that accurately reflect the documents is unattainable. The spirit of the Treaty is more important than the literal text.⁵¹ Therefore, even if the Bill allows for certainty, it is ultimately undesirable.

B National Conversation

The general policy statement provides a further objective of the Bill is to promote a national conversation surrounding the principles and New Zealand's constitution.⁵² The introduction of

⁴⁵ Principles of the Treaty of Waitangi Bill, cl 8.

⁴⁶ Palmer, above n 3, at 207.

⁴⁷ Mikaere, above n 4, at 73.

⁴⁸ Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022).

⁴⁹ Fletcher, above n 48.

⁵⁰ Mikaere, above n 4, at 74.

⁵¹ Palmer, above n 3, at 208.

⁵² Principles of the Treaty of Waitangi Bill.

this controversial Bill did stimulate a national conversation. However, the policy rationale fails to justify the further division caused and the blatant breach of the partnership principle accompanying the Bill.

1 Further division

Firstly, facilitating a national conversation through this Bill has led to unjustifiable societal division. There were approximately 300,000 public submissions, with 90% opposing the Bill.⁵³ One evident theme in opposition to the Bill was how it would cause division and a rift in social cohesion that could be irreversible.⁵⁴ A similar challenge to Treaty principle jurisprudence occurred in 2005 with a proposal to delete statutory references to Treaty principles.⁵⁵ The argument relied on then was similar in that the Treaty allows Māori preferential treatment. McHugh states that claiming Māori have preferential treatment under the Treaty is erroneous and strategic.⁵⁶ The Bill and its endorsement imply that New Zealand citizens do not have equality, which triggers hysteria and division. The national conversation rationale falls short as what has eventuated is more comparable to a national divide.

2 Breaching the partnership principle

Secondly, the Bill is in blatant breach of the well-established partnership principle. A significant concern in submissions opposing the Bill was that the development process failed to consider Māori as a Treaty partner. The partnership principle requires the Crown to consult with Māori on matters that are important to them.⁵⁷ Interpretation of the Treaty is an important matter and should allow for the perspective of both Treaty partners.⁵⁸ Despite this established principle,

⁵³ Ministry of Justice *Departmental Report: Principles of the Treaty of Waitangi Bill* (12 March 2025) at 4.

⁵⁴ *Departmental Report: Principles of the Treaty of Waitangi Bill*, above n 53, at 18.

⁵⁵ Principles of the Treaty of Waitangi Deletion Bill 2005 (247-1).

⁵⁶ PG McHugh “‘Treaty Principles’: Constitutional Relations inside a Conservation Jurisprudence” (2008) 39(1) VUWLR 39 at 43.

⁵⁷ *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, above n 17, at 42.

⁵⁸ *Maui L Hudson and Khyla Russell* “The Treaty of Waitangi and Research Ethics in Aotearoa” (2009) 6(1) JBI 61 at 62.

there was no effective consultation throughout the development of the Bill.⁵⁹ Introducing this Bill was a unilateral decision of the Crown that they did not have the authority to do. National conversation can hardly constitute a legitimate policy rationale when initiated illegitimately.

C Equality

The concept of equality is consistently relied on to rationalise the Bill. There is no strength in the equality policy rationale. Firstly, our current law already provides for equality. Secondly, the Bill would have broader implications by promoting equality.

1 Current law on equality

Our current legislation guarantees equality in New Zealand. The Human Rights Act prohibits discrimination.⁶⁰ Similarly, the New Zealand Bill of Rights Act affirms everyone's rights, including freedom from discrimination.⁶¹ These statutes already address equality. Additionally, the Treaty is a partnership and inherently cannot provide superior rights for Māori.⁶² Therefore, the notion that this Bill will ensure equality is futile.

2 Broader implications of equality

The Bill would create broader implications for Māori through its assurance of equality. As discussed in Part V, there is a significant difference in equality and equity. The Waitangi Tribunal expressed how formal equality, which the Bill promotes, will not guarantee equitable outcomes.⁶³ When dissimilar people receive the same treatment, this can result in further injustice.⁶⁴ The Bill is likely to entrench adverse Māori outcomes. It is common in the legal

⁵⁹ *Ngā Mātāpono/The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia*, above n 43, at 175.

⁶⁰ Human Rights Act 1993, s 21.

⁶¹ New Zealand Bill of Rights Act 1990, s 19.

⁶² Hille, Jones and Ward, above n 2, at 23.

⁶³ *Ngā Mātāpono/The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia*, above n 43, at 114.

⁶⁴ Pat Hohepa and David V Williams *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (Law Commission, Wellington, 1996) at 9.

system to weaponise the concept of equality to maintain racial inequities.⁶⁵ The Bill is disguised as promoting equality but operates to extinguish Māori rights to equity and rights as a Treaty partner.

VII Conclusion

The Treaty of Waitangi remains vulnerable within New Zealand’s constitutional and legal framework. This essay has conveyed the stark differences between the Treaty principles interpreted by the Waitangi Tribunal and the Principles of the Treaty of Waitangi Bill. The Bill’s interpretation and policy rationales have been challenged and largely refuted. The Treaty of Waitangi will likely remain controversial in New Zealand’s history with diverging interpretations. Our recent defeat of the Bill reminds us of the importance of our history and strength as tangata whenua. As Hana-Rāwhiti recently said, “We had two choices: to live or to die. We chose to live.”⁶⁶

⁶⁵ Dylan Asafo and Litia Tuiburelevu “Critical Race Theory and the Law in New Zealand” (2022) 12 Counterfutures 93 at 111.

⁶⁶ (10 April 2025) 783 NZPD (Principles of the Treaty of Waitangi Bill – Second Reading, Hana-Rāwhiti Maipi-Clarke).