Playing the Tiriti of Waitangi: The Drama of Maori and the Crown

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All the world's a stage
And all the men and women merely players
They have their exits and their entrances,
And one man in his time plays many parts ...[1]

I. Introduction

This essay will explore the relationship between Maori and the Crown in Aotearoa-New Zealand through the metaphor of the play. Specifically, I will consider the script of the play as provided by te Tiriti o Waitangi/the Treaty of Waitangi;[2] the actors, their roles and the ways in which they have been characterised; the props they have used in the various scenes and acts of the play, which encompasses mechanisms and resources of a legal, institutional, financial, cultural and personal nature, and the scenery or backdrop against which the action takes place, namely the pre-colonial, colonial and post-colonial setting, both national and international. Finally, I will discuss the relationship in terms of an interpretation or production, considering how it might be directed, who will direct it and what that direction entails. I have chosen to present the essay this way because it strikes me that conceptualising the Maori-Crown relationship and its history through this metaphor affords some interesting insights into its nature and also invests its future with an element of imagination. Imagination is, in my opinion, an essential pre-requisite to reconfiguring and advancing the relationship.

I should point out that the decision to "tell" this essay in terms of a drama necessarily means it is a personal response and the register it employs is not perhaps in keeping with that of an archetypal academic essay. However, I am compelled to present it in this way not for lack of engaging with the literature on the subject, but because, in reading commentaries, I have consistently encountered the language, imagery and preoccupations of the dramatist such that, rather than imposing the metaphor on the relationship, it seemed to announce itself as an appropriate, indeed useful framework for understanding the subject.

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1 Shakespeare *As You Like It* 2.7, 139-142.

2 Hereafter "the TOW". The Treaty of Waitangi/Te Tiriti o Waitangi was an agreement signed between many of the Maori chieftains and the British Crown in 1840.

II. The Script – The Treaty of Waitangi/ Te Tiriti o Waitangi

We begin with a consideration of the play's script the "TOW". Those who say the Maori-Crown relationship should begin and end with the TOW usually rely on one of three approaches to the document. These are the intentional, the textual and what I will call the interpretive approach.[3] I will deal with the third in the final section of this essay. Let us look now at the first two approaches.

The intentional approach is that, in engaging in Treaty jurisprudence, the primary task, indeed duty, is first to recover and then to realise the intentions of its signatories. In order for the document to mean anything, it requires a "meaner" or, in the case of TOW, two. The task of realising the original signatories' intentions is figured either as a moral duty to them, as tipuna (ancestors), or as the self-evident and necessary goal of any act of interpretation. Tunks, for example, writing in relation to constitutional change in Aotearoa-New Zealand, comments that such change may be regarded as an opportunity for Maori rather than a threat "if it gives effect to the exchange accepted by our tipuna in the Maori Treaty text."[4] Implicit in the reference to tipuna here is the commitment to realising in any contemporary constitutional arrangements their intentions at the time of entering into the TOW. It is a personal commitment: the intentional approach is concerned with the person behind the document, with authorship and the author.

By contrast, the textual approach is concerned with the text itself. Not only is it not possible to recover intentions from the departed authors, but it would not be desirable even if it were. Human beings come and go; words live on. To allow the TOW to speak to the present, all we need to do is read the document itself. The script says loud and clear that taonga (treasures), for example, were to be protected. Crown actions which undermine that protection are therefore in breach of the TOW text. One need not go beyond the words to find the guarantees on which to base a claim, but must only prove the thing in question falls within the meaning of taonga.[5]

Both the intentional and the textual approaches, however, are confounded by the duality of the TOW. Whether one considers the contemporary situation in Aotearoa-New Zealand from the point of view of intention recovery or textual imperatives, the co-authorship and bi-lingual nature of the document and its conditions of production dictate that any modern reception of it will be complicated. The TOW script prescribed a relationship that it does not, perhaps cannot, now describe. The dialogue initially scripted was scrapped for a Crown

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3 The ideas of intentionalism and textualism are discussed frequently in the United States in the context of their debate on the Constitution. See, for example, Lyons, "Constitutional Interpretation and Original Meaning" 4 *Social Philosophy and Policy* 75.

4 Tunks "Mana Tiriti" in Trainor (ed) *Republicanism in New Zealand* (1996) 113, 118.

5 It is not, of course, suggested that proving this is a simple matter.

monologue – can it now be revived in its original form? Might it not need some editing? Most importantly, if this is to be the case, who will be the author of the modern edition? Dawson puts the issue thus: "In situations of conflict over language, a key question concerning the use of sovereignty is, whose classifications are to be sanctioned by law? Who does the classifying?"[6]

The questions of authoritative classifications and of authorship commonly arise in the context of constitutional debate. Despite the history of TOW jurisprudence, there is an enduring belief in the relationship between authorship of constitutional texts and authorship of destiny. For this reason, Maori have been adamant that any constitutional changes should be the product of systematic, widespread and effective consultation.[7] Durie, for example, suggests that two constitutional commissions should be established to frame the constitutional debate and give it some focus, culminating in a referendum which delivers a 75% majority on both the Maori and the general electoral rolls.[8] Wickliffe, also, advocates an extended dialogue before any decisions are made, specifically that "the Crown should fund a series of hui [meetings] whereby Maori can arrive at some consensus on the issue."[9]

A constitutional amendment which was drafted and passed after an extended dialogue between the TOW partners and which reflected the substance of that dialogue could be counted as truly co-authored text. Such an achievement would stand in juxtaposition to the TOW's own conditions of production, which, according to the accounts of Ranginui Walker,[10] were anything but systematic. There is a real and justified possibility that the TOW drafter, Henry Williams, took an active part in the deception, the results of which we are still suffering, by mistranslating "sovereignty" as kawanatanga/governance in Article I instead of "mana" or "rangatiratanga" – there should be no such opportunity for linguistic sleight-of-hand in a modern-day amendment, at least if the change is to have legitimacy.[11] The process by which we prepare to "write the future" of our country should not be tainted, or we risk tainting the product with it.

The role of the Courts in fixing or transforming the relationship between the Maori and the Crown deserves some attention; for if the goal in changing the constitutional arrangements is a question of writing the future, as I have suggested, it must be acknowledged that, for better or worse, the authorship of the past has been largely a judicial undertaking. I referred to this above in terms of

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6 Dawson, *The Treaty of Waitangi and the Control of Language* Institute of Policy Studies, Wellington (2001).

7 Most recently, the argument has been made in relation to the proposal, to abolish the Privy Council and establish an autochthonous Supreme Court.

8 Durie "A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa" in James (ed) *Building the Constitution* Institute of Policy Studies, Wellington (2000) 414, 423.

9 Wickliffe "Multiculturalism and the Constitution — Lessons from Another Country: Fiji" in James (ed), supra note 8, 244, 246.

10 Walker "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* Oxford University Press, Auckland (1989) 263-78.

11 Tunks has argued that constitutional change requires the consent of Maori if it is to have legitimacy "in the eyes of Maori": Supra note 4, 118. I would add that legitimacy "in the eyes of Pakeha" also requires it.

a dialogue-become-monologue. The silencing of the second TOW voice, that of Maori, was done via judicial pronouncement. The change in the mainstream view of the TOW as originally scripted from "a simple nullity"[12] to "an agreement ... of the greatest constitutional importance to New Zealand"[13] has arguably been driven by the judiciary.

Is this a usurpation of authorship and, with it, authority? Perhaps, but there is little doubt that the judiciary will continue to be charged with partial responsibility for telling and re-telling the Treaty tale. How might the limits of this function be set? What other factors can influence and facilitate the resurrection of the lost dialogue, both inside and outside the theatre of the Courtroom? These issues need to be explored, for the goings-on in the Courtroom – a play within the play – have ramifications not only for what we, as actors, do, but also for what we are.

The judicial coinage that has received considerable attention, in part for the way in which it may reconfigure decision-making processes, is that of the "principles of the Treaty". The change in focus from the TOW text to the "principles" has been characterised variously as a "cop-out" or a necessarily realistic and "practical" compromise in the contemporary political environment. Their inclusion in the Treaty of Waitangi Bill 1974 attracted some scepticism. In a submission echoing the questions posed by Dawson,[14] Nga Tamatoa asked: "If this Bill is, in fact, designed to provide for the observance and confirmation of the principles of the Treaty then we must ask 'which, and whose principles?'"[15]

That question gives rise to another: how malleable are the principles in comparison to the TOW script? As Kelsey notes, early references to the principles seemed to employ them interchangeably with the "spirit" or "provisions" or "text" of the TOW.[16] Later, attempts were made by the New Zealand Maori Council to derive "implicit principles" from the explicit ones provided by the Articles of the TOW.[17] Such attempts were rejected by the Court of Appeal in favour of a set of principles which denied tino rangatiratanga and affirmed parliamentary sovereignty, clearly a derivation from the English text. On this basis, it is arguable that the principles can be manipulated in an act of interpretation into just about anything? If this is so, how principled is a "principles approach" in terms of textual or authorial fidelity? Are the principles of the Treaty "the antithesis of the Treaty itself"?[18] Does the approach leave the actors in a position where, in the absence of the TOW script, everything must be improvised?

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12 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 78.

13 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) 516.

14 See text accompanying note 6 supra.

15 Nga Tamatoa *Submission on the Treaty of Waitangi Bill* (1974) [emphasis added].

16 "Treaty Ideology in the 1980s" in *Rogernomics and the Treaty of Waitangi* (PhD Thesis, University of Auckland, 1991), 720, 721.

17 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673 (HC and CA).

18 This is a formulation suggested by Kelsey, supra note 16 at 730.

III. The Actors and the Directors – The Crown and Maori

If improvisation is the order of the day, it is not a process entirely without direction. The principles, however they are derived, have been held to set precedents of a sort, have accustomed the TOW actors to defining their roles in particular ways and to delivering particular kinds of performances. Principles derived from the English script, in accordance with the colonialist model around the world, have positioned the TOW actors in terms of a familiar dichotomy, in Wickliffe's words, in "a paradigm of dominance and subordination".[19] This is chiefly evident in the notion of sovereignty, in that it requires the subjection of Maori, placing them in a passive role in the hands of an active state. The dichotomous relationship may also be characterised as dominant-submissive or master-slave. Whatever the particular formulation, the function of it is to deny the autonomy of Maori – they are not there to act, but only to be acted upon, not to communicate or speak with authority, but to receive, not to define, but to be defined.

The difficulty with this conception of the TOW actors' relationship is that it makes the characters essential. It requires role consistency "from go to whoa" (whenever "whoa" is) and will not allow for character development. Even with the dispossession of land and language that has occurred since the signing, there is ample evidence to suggest that Maori will not be dispossessed of self. A character silenced into ultimate and enduring submission is telling of the tragedy of colonialism. But there is more to this tale than colonialism.

The "more" is supplied by the Maori text of the TOW. Where the English text posits a Crown monologue under a single director, the Maori text proposes a co-directed dialogue. It envisages that two directions may be taken concurrently, that two paths can be traversed. A single sovereign state, on this view, is not a foregone conclusion: "the capacity of states for shared sovereignty should not be discounted."[20] Attempts to discount such a possibility are based, according to one commentator, on the "fiction of the state's indivisible, that is unshareable sovereignty."[21]

The TOW, at least the Maori text, provides two directors for this play we are living through. But these are not, of course, the only sources of direction. Increasingly, international bodies and agreements are influencing, in some cases undermining, the authority of the national directors. The United Nations is one example of such a body, though its resolutions and instruments are not binding

19 Wickliffe, supra note 15, 244.

20 Durie, *Te Mana, Te Kawanatanga – The Politics of Maori Self-Determination* Oxford University Press, Auckland, (1998) 12.

21 Supra note 4 at 131 [emphasis added].

until incorporated into domestic law. Further examples include the General Agreement on Tariffs and Trade and the World Trade Organisation, of which New Zealand is a member.[22]

Some have suggested that the Privy Council also acts as an external "check" on the exercise of Crown power. This argument has been put by Maori specifically in opposition to the proposed abolition of the Privy Council.[23] However, there is some doubt as to its cogency: the Privy Council, as an institution of the British Crown, can only offer solutions which adjudicate on New Zealand domestic law. Tunks, who is not convinced of the value of retaining the Privy Council, remarks that "[i]t is not and never was a forum where the fundamental practices of the Crown and the legal system may be challenged by Maori."[24] As a director, the Privy Council hails from the same school as the New Zealand Courts and its method is similarly monocultural: "[j]ustice can only be delivered [by the Privy Council] in terms of the Queen's justice".[25] Furthermore, continued appeals to the Privy Council compound "the age-old problem of Maori being forced to seek redress through the Court system of [their] colonisers and in doing so, giving rise to the incorrect assumption that [they] accept colonial rule."[26] The Privy Council is no less susceptible than the New Zealand Courts to the "law's function of legitimating itself, its makers and the capitalist values of the Western world which form the bases of what is now called 'global culture'."[27]

One international instrument that warrants particular attention is the Declaration on the Rights of Indigenous Peoples, drafted by the United Nations Working Group on Indigenous Populations. As yet, the contents of the Declaration have not been finalised. Moreover, it is not clear what benefit becoming a signatory to the final version will bring to New Zealand Maori. The queries raised in relation to it concern the status of the TOW script as against the international instrument. Which will hold more sway? Could the international document be invoked to usurp the direction ordered by the TOW in the event of a clash? Most importantly, how will the Declaration address the issue of self-determination? Will Article III, one of those on which agreement has so far not been reached, be written to affirm the right to "external" self-determination, which would accord with rangatiratanga (chiefly authority) and imply a secession from the post-colonial state in order to establish an independent indigenous nation-state? Or will it merely offer "internal" self-determination within the framework of a unified state?

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22 The interaction between these international bodies/agreements, national governments and indigenous peoples is a topic of some controversy. However, it is not within the scope of this essay to do more than flag their importance.

23 Numerous submissions on the Supreme Court Bill contained this argument. See, for example, Maryann Mere Mangu *Submission to the Justice and Electoral Select Committee on the Supreme Court Bill 2003* (26 May 2003).

24 Supra note 4 at 126.

25 Ibid 129.

26 Ibid 124.

27 Ibid 129.

If the latter is the case, which it likely will be, what real value will the Declaration have in terms of offering alternative direction to/for TOW players? Would not internal self-determination amount to little more than is currently guaranteed under the TOW? There is concern that an international instrument which is inadequate in its treatment of the question of self-determination will be used, despite or because of this inadequacy, as a substitute for rather than as a supplement to the TOW. The perceived step forward of ratifying such an instrument would in fact be a step back: it would do internationally what would be done at the national level by the introduction of a written constitution which entrenched TOW discourse in its current state, namely in terms of "the principles".

IV. The Props – Propping Up the Status Quo?

The international bodies and instruments discussed above are not just sources of direction – they are props: mechanisms, tools or resources that can be invoked to advance the action of the play. Of course, the TOW players also have domestic props at their disposal. These might be political, personal, cultural, financial or governmental/institutional. One such institutional prop is the Waitangi Tribunal, established in 1975 to hear and make recommendations on claims arising from the TOW. Insofar as it addresses Maori grievances, the Waitangi Tribunal may be seen as a prop which facilitates action in Maori interests, in other words, which enables Maori to be institutionally active. However, the non-binding nature of Waitangi Tribunal recommendations dictates that the action contemplated is intrinsically limited, controlled and subordinate to the invocation of other institutional props. Its subordinate status to that of the Courts parallels the status of Maori in the Crown conception of their relationship.

The degree to which characters may advance the state of play, or play of the state, is at least partially dependent on the resources on which they can draw. We have seen one example of an institutional prop/resource already in the Waitangi Tribunal. The Courts also act as an institutional prop. As was noted[28] in relation to the Privy Council, however, while the Courts are theoretically culturally blind and available to everyone, there is some scepticism as to how or whether this works in practice. Obviously, financial matters serve as a barrier to access to the type of justice doled out by the judiciary. But the concerns about this institutional prop go beyond the financial; essentially they seek an acknowledgment that the institutional is inextricably bound up with the cultural. It follows from this admission that a people whose culture is not reflected in the institutions of the nation are less likely to utilise institutional resources to advance their interests. The flipside of this is suggested by Durie, who writes that:[29]

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28 See text accompanying notes 23-28 supra.
29 Supra note 20 at 7.

> Maori people could realise greater levels of economics self sufficiency, improved social well-being and less dependency on the State if they took advantage of their own distinctive social institutions such as iwi (tribe) and hapu (sub-tribe) and actively developed their own tribal resources.

I can offer a personal anecdote in support of this proposition. I am employed part-time as a reporter for the *Select Committee News*, an independent publication subscribed to by government departments and corporates. The job involves sitting in on select committee hearings and subsequently writing up a report on the contents of the oral submissions. Recently, I attended one of the hearings of the Justice and Electoral Committee on the Supreme Court Bill. At that hearing a submission was made by a kuia (elder) from Northland, who, speaking in Maori with a translator, made explicit reference to her extreme discomfort in that forum.[30] Neither the venue nor the protocols of the committee were congruent with those of her culture. The attendance of the select committee at a hui (meeting) on the marae of her iwi , as per an invitation that had been extended but not taken up, would be more conducive to her people's participation in the debate, a debate which is widely recognised to be of some constitutional significance.

This woman's account alerted me to something I had noticed at earlier meetings – the politics of listening and of speaking. Some submitters were clearly more comfortable with and adept at handling this institutional prop/process than others. They were familiar with the scene, sometimes knew the committee members personally, were accompanied by legal counsel, were all costumed in suits. They spoke the same language, were listened to within a shared frame of reference, were reading, we might say, from the same script.

The select committee, of course, is part of a different branch of government from the Courts. But there is no reason why an acknowledgment that our institutions are culturally constructed and constituted should not apply equally to the legislative or, indeed, executive branches of government. To grant a broad application is essentially to say that in coming to a problem we are all coming from somewhere. It is to recognise that, while our responses and behaviour may not be set, we are always already on set, always acting against a backdrop, and against a series of previous backdrops.

V. The Scenery/Backdrop – Historicity

This is the recognition of ancestry and history. Making our entrance in the post-colonial act of the play, it is easy to forget the scenes and scenery of the pre-colonial and colonial past. Exemplary actors and directors guard against this possibility, tracking recurrent themes and motifs, noting consistency in order that the shape of contrasting development may be discerned and further envisaged.

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30 Merereina Uruamo *Submission to the Justice and Electoral Select Committee on the Supreme Court Bill 2003* (26 May 2003).

An informed actor knows she is formed by her environment and that of her forebears. In terms of the law, she knows that the common law and the institutions of government in New Zealand pre-date colonialism are not universal but are particular, are a product of that place, of whence the tauiwi came. She knows the methods, the ways and means of colonialism, the history of legislated dispossession of land and language, the confiscation of culture, the evolution of the struggle and of the contemporary mindset. She scrutinises that mindset, her own era and actions with the perspective of history. "If the move from a monarchy to a republic is perceived as a radical measure, then as an event it pales into insignificance alongside the shift from tribal governance to colonial rule."[31]

VI. Interpreting/Producing the Play — the "Interpretive Approach"

Knowing all this, the informed actor, like the directors who guide her, sees that post-colonialism is in some respects simply a state of mind, since the structures and attitudes which characterise colonisation endure the onset of the post-colonial era. In interpreting her post-colonial role, she sees that the development she can play out in one version of the play is of the subversion of traditional roles of both Maori and the Crown. It is an objection to and rejection of the way those roles have been formerly played. For Maori, as Durie notes, it is about "rejecting any notion of passive assimilation into national or international conglomerates".[32] It requires a new approach to dispossession, namely that we ask ourselves what do we want to dispossess ourselves of? It is a re-visitation, a revision, a rewriting of the colonial monologue. It is both revisionist and pre-visionist – it is about having a different vision, imagining and realising an alternative.

The alternative is a co-production. It is both the product of imagination and productive of imagination. In that respect it is self-generating rather than self-destructive. It is not just a hybrid of tauiwi and Maori cultures, but is something transformed. It is what the land inspires in and requires of us. It is our response to the privilege we share of living in this Pacific jewel, on this emerald set in sapphire.

There is nothing to suggest co-production is impossible. The process has been undertaken in Fiji, and a variety of it is being contemplated by Scotland. Wickliffe suggests that "all we need to begin the process is goodwill and commitment."[33] As I suggested at the beginning of this paper, I would suggest imagination is also a necessary pre-requisite. Imagination can allow us to be critical of our existing script, roles and props, in order to overhaul and reinvent them. Some of our institutional props, through wear and tear, clearly need to be

31 Supra note 8.
32 Supra note 20 at 4.
33 Supra note 9 at 246.

replaced or upgraded. The Waitangi Tribunal, for example, needs more bite. Our script needs the reinvigoration that comes with meaningful dialogue. The historical theme of dominance and subordination needs to be transcended by one of partnership which is more than rhetorical: it must be at once political, legal and spiritual. The players need to acknowledge that they are both in supporting roles, have the courage to trust one another and act "out of their skin".

VII. Conclusion

The aim of this essay has been to present the relationship between Maori and the Crown through the metaphor of the play. Through the use of the categories of script, actors, directors, props and backdrop, I have tried to organise and critique the various aspects of that relationship. These are not, of course, the only categories. It occurs to me, for example, that the role of ushers in guiding the audience to a particular view of the play has parallels with the task of educators in nurturing one take or another on the Maori-Crown relationship and the history of Aotearoa-New Zealand. The politics of listening and hearing, which I mentioned in relation to select committees, go hand-in-hand with the politics of seeing. What we see depends on where we are seated, or where we stand, if we can't afford a seat. It also depends on the light in which the action is presented to us – the function of lighting and sound in the TOW play offer some further interesting parallels. In the final analysis, wearing our various hats, we are at once the directors, the actors, the script, the props, the backdrop, the audience, the ushers and the technicians of this, our play, our country. Now that it is our turn to play our parts, the question remaining is, how will we make our scene?