Abstract

The Treaty was a constitutional agreement entered into by Maori, then sovereign of New Zealand, and the British Crown. The purpose of intention of this agreement was to enable both parties – Maori and the Crown – to share public power over Aotearoa, New Zealand. This paper refers to this purpose as the kawanatanga-tino rangatiratanga relationship, or dual sovereignty. This purpose has been derived from the Maori version of the Treaty, according to the Maori legal system which governed New Zealand at the time.

This purpose has not been given effect to, instead our constitution holds the Crown as the sovereign, and Maori are mere subjects of the Crown. This arrangement allowed the Crown to introduce their colonial legal system that enabled them to attain Maori land through war, confiscation and other means throughout the 19th and early 20th centuries. This in turn has created a “cycle of grievance” among our Maori community which keep Maori oppressed, claiming rights from the Crown which can be given, but are often taken away again or breached, depending on the political leanings of the day. The only way we can end this cycle of grievance, and restore legitimacy to our constitution, and restore Maori to their intended constitutional position of sovereign Treaty partner, alongside the Crown.

While this proposal may seem very radical, it is argued that New Zealand has been heading towards dual sovereignty through an “organic” revolution known as the Maori Renaissance that began in the 1970s. This paper will trace this “organic” revolution pointing to three specific institutions as examples of movement towards dual sovereignty: the Waitangi Tribunal, the Treaty Settlements process and the Treaty Principles. It is argued that while these institutions have made some incredible advances for Maori rights, they remain confined by our current constitutional arrangements that recognise the Crown as the only sovereign. This paper argues that what is needed as the next step in this organic revolution, is to step outside of our current constitutional arrangements and give effect to the true intention of the Treaty. This paper thus reflects on the historical context in and the Maori legal system in which the Treaty was signed. This paper then explains how we might be able to achieve this through the courts by invoking the doctrine of the honour of the Crown and adopting Dr Carwyn Jones’ theory of a ‘constitutional korero’. The honour of the Crown is a common-law doctrine that requires the Crown to honour its constitutional obligations. It recognises colonial governments as part of a special nation-to-nation relationship with indigenous peoples and can therefore give effect to the indigenous legal system and world-view that our current institutions cannot do. In this way it can perform as a limit on the Crown and its Parliamentary Supremacy. It is argued that realistically the courts may invoke this doctrine to enforce obligations made by the Crown to iwi through the recent Treaty Claims Settlements legislation. It is argued, however, that in keeping with this organic revolution, an eventual court may one day invoke the doctrine to enforce Article 2 of the Treaty of Waitangi itself and dual sovereignty may be achieved.