NETWORK Waitangi OTAUTAHI

Network Waitangi Otautahi (NWO) invites you to hear **Morgan Godfery** speak about:

The Treaty of Waitangi in our National Life

- Where does the Treaty stand in Aotearoa New Zealand's national life?
- Is it a rat-eaten relic, no more relevant to our everyday lives than the Suffrage Petition or He Whakaputanga, the 1835 Declaration of Independence?

When: Thursday 12 October, after the NWO AGM at 7.30pm
Where: WEA Centre, 59 Gloucester Street, Christchurch

In this talk Morgan will consider the Treaty as a constitution and explain how we might put the Treaty at the heart of our national life.

Morgan Godfery *Te Pahipoto, Lalomanu* is a Wellington-based writer who specialises in Māori issues and politics. He is the editor of The Interregnum: Rethinking New Zealand (BWB, 2016).

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Address by Morgan Godfery to NWO AGM:

Tena koutou katoa,

Ngā mihi tuatahi ki a Ngai Tahu whānui, ki ngā maunga whakahirahira e tūtū mai nei, me te moana e pōkarekare nei, e whakatau nei i a tātau katoa, tēnā koutou.
Me mihi anō hoki ki ō tātau tini mate, i ō tātau marae maha, e noho honohono nei rātau i roto i te wairua tapu. Nō reira haere ngā mate, haere, haere, haere atu rā.
Me mihi anō ki a koe te rangatira Katherine Peet, koutou, ko Network Waitangi Otautahi, tēnei te mihi ki a koutou. Nā koutou te kaupapa nei i āwhina, i tautoko, nō reira tēnā koutou.
Ki a koutou ngā mātāwaka, ngā karangatanga iwi kei kōnei, ngā maunga whakahī kua huihui mai nei, tēnā koutou. Tēnei te mihi atu ki a koutou katoa e whakapau kaha nei ki te whakatinana i ngā moemoeā ō tātau mātua tīpuna, nō reira tēnā koutou, tēnā koutou, tēnā tātau katoa.

On my way down here I was thinking: “yes, finally, a talk where no one is going to ask me about politics and the election.” No Winston Peters. No Bill English. No Jacinda Ardern.

But the more I thought about it I realised: you cannot talk about the Treaty of Waitangi without talking about politics. Not necessarily party politics, but politics of the far more important kind. That’s politics and power. Whenever we talk about the Treaty, and

especially the Treaty relationship, we are talking about power and power relations. Whether that's the relationship between Maori and tauiwi, the relationship between sovereignty and tino rangatiratanga, or the relationship between those who wield power and those who are subject to it.

And thinking about it on the flight here another thing hit me. Not about politics and power, but this time about party politics. During this campaign how much talk did you hear about the Treaty? Did any politician discuss its role in our national life? Did any politician promise to do more, or in Winston Peter's case promise to do less, with the Treaty? From where I stood, as a commentator on radio and television, there was broadcast silence.

We heard murmurs from Winston Peters, but otherwise nothing. No bold plans, no new interpretations, barely even lip service to what we can all agree is this country's founding document. Where were the Treaty champions, or even the Treaty haters? Did you know neither National nor Labour campaigned on any Treaty policies this election?

And this is part of what I want to address tonight. In this silence, how do New Zealanders understand the Treaty, and what might we do to reshape their understanding and the Treaty's place in our national life? Now what I propose to do is talk for another thirty minutes or so. From there I hope we have another thirty minutes or so of interactions and questions and the like. I'm assuming this is a well-informed audience, so I'm taking a lot of things as read, for example I assume most people here are familiar with terms like kawanatanga. But if I've assumed too much please do feel free to ask during question time to explain something that may not have been clear.

Now, maybe I'm stating the obvious here, but there seem to be two accounts of the Treaty in this country. These two popular accounts seem to consist of two jointly asserted and mutually exclusive "facts." Under the first account the Treaty is a rat-eaten relic, "a praiseworthy device for amusing and pacifying savages," as the New Zealand Company once put it. Under this account the Treaty is an honourable document, but it should remain in the storage rooms at Archives New Zealand. Ancient promises are irrelevant in modern times. Think of this as the Winston Peters position.

But the second account declares that we must dutifully comply with the "principles of the Treaty of Waitangi." The English and Maori texts work at cross-purposes and rather than privileging one understanding over another we should adhere to a new understanding all together. The Crown agrees to adhere to principles like active protection, so long as Maori accept its sovereignty. This isn't so much a principled position as it is a compromised position. Think it as the major party position. The bargain both National and Labour make with Maori.

Now which account you prefer depends on whether you want to deny or affirm Maori rights. If it's the former then the claim must be that the Treaty creates no rights. Its ancient promises mean nothing in modern times. But if you prefer the latter then the claim must be that the Treaty creates some rights – its ancient promises still hold in modern times – just not what the Māori text says. Ever since the land march of the

1970s, the occupations of the 1980s and the court cases of the 1990s, these two positions have been jostling for prominence in our national life.

Advocates for that first account include Winston Peters, the bloke who would remove all references to the Treaty in legislation, and then there some who are even more extreme, like David Round, who say the Treaty we all agree is the country's founding document is not, in fact, the proper Treaty. The proper Treaty is the Littlewood Treaty. Or something like that. There are also groups like Hobson's Pledge who duck in and out of the national conversation, never contributing anything that memorable or useful.

And then in competition with those views are the views of the public service, the judiciary and the media. We should honour the Treaty, they say, but that means adhering to its principles. Finding coherence between the competing meanings in the English language and Maori language texts is impractical, hence why we have these principles to aspire to. As Lord Cooke of Thorndon put it, "the Treaty creates an enduring [relationship], akin to a partnership, where each party [accepts] a positive duty to act in good faith, fairly, reasonably and honourably towards the other." This is like a statement of purpose for the public service, even if they may not always live up to it.

But neither account ever seems to prevail in our national life. Sometimes the country seems to prefer optimism, especially in the wake of historical Treaty settlements. Whenever iwi settle with the Crown, like, say, Tuhoe, a little voice in the national psyche says it's safe to start moving on. Both Treaty partners are square, or almost square. Yet in other years the country seems to opt for scepticism. Look no further than Don Brash's Orewa Speech or Helen Clark's Foreshore and Seabed Act. That little voice in the national psyche says maybe things are not as good as they seem, perhaps one Treaty partner – the Maori partner – is getting a little too confident and the other partner – the Crown – should remind her mate just who's in charge.

In some ways this competition is how things should be. No account should prevail. Politics is about competing understandings of the world, and those understandings change over time. Sometimes we go back, other times we go forward, and maybe even to the side. But I want to propose another reason for why neither account prevails. That reason is because we understand and implement the Treaty all wrong. Fewer and fewer people seem to agree with the likes of Winston Peters or David Round, and that's a good thing. Yet fewer and fewer people also seem to agree with the likes of Lord Cooke, or at least fewer and fewer Maori do.

This seems obvious, but it's worth repeating for the record: the words of the Treaty promise more than its principles allow. The partnership principle is no substitute for tino rangatiratanga, and principles like active protection might even work against tino rangatiratanga, positioning Maori as the passive beneficiaries of Crown protection. This isn't to deny the good that has come out of the principles and the policies that flow from them like, say, Treaty settlements. But as Moana Jackson points outs - treaties aren't settled, treaties are honoured. The Treaty principles alone cannot reverse almost two centuries of inequality between Pakeha and Maori. Only power sharing can do that.

This is how I understand the Treaty. This is my position. Now I'm a political ideologue for sure, but I like to think this position is neither left nor right, but out in front. Well, perhaps this isn't strictly true. This position isn't necessarily out in front because it has been the position of many Maori for more than a century. It's only now that a good deal of Pakeha are catching up. For years people like Moana Jackson have said the Treaty creates two sites of power. One site of power for the Crown, the kawanatanga, and one site of power for Maori, for rangatiratanga.

The Independent Working Group on Constitutional Transformation, of which Jackson was one of the driving forces, suggests constitutional transformation along these lines. The Group argues, in line with the wording of the Maori text of the Treaty, that the agreement between Maori and the Crown creates one new site of power and affirms one old site of power. The Treaty creates a kawanatanga power for the Crown and it affirms the rangatiratanga power for Maori. Affirms because when settlers arrived Maori were already exercising their rangatiratanga power.

Now this is how two sites of power might look in a constitution: one assembly for tauiwi, one assembly for Maori and another assembly where both partners meet to determine shared issues, to determine Aotearoa New Zealand issues. The Working Group suggests other options too, but what every proposal has in common is what they call two separate spheres: one sphere for the Crown, that's for tauiwi, and another sphere for Maori.

Of course, this is the kind of thought most New Zealanders would recoil from. Separatism! Racism! Maori privilege! Because what two or three separate sites of power or separate spheres means is two separate systems. Not only would it mean Ngai Tahu runs its own, say, social services, but also its own education system, perhaps modelled on kura kauapapa, and maybe even its own justice system which could be modelled on the proposals in Moana Jackson's groundbreaking report on a Maori justice system in the 1980s.

Now none of this is to say New Zealanders would live apart from each other. We'd still live next door, we'd still work in the same places, we'd still marry, the only difference is this would happen within an equal power relationship. And that's exactly what the Maori language version of the Treaty promises. And remember, under this kind of system there still be a third site of power or sphere where we meet together. Perhaps that third site would look a little like Parliament looks today. Who knows.

Of course, for many Maori this is uncontroversial. As the Waitangi Tribunal found in its Te Paparahi o te Raki (Northland) inquiry "the rangatira who signed the Treaty in 1840 did not cede their sovereignty". The Tribunal goes on to say "[the rangatira] did not cede their authority to make and enforce law over their people and within their territories." Of course, we all knew this, because we know that while the English text holds that rangatira cede their sovereignty the Māori text promises that they retain their tino rangatiratanga, their unfettered authority. What the Māori text cedes is kāwanatanga, governorship.

In other words in the Maori text the rangatira who signed the Treaty are asked to create exercise their tino rangatiratanga to create a derivative power, that's the kawanatanga power. So instead of transferring power from one people to another, the

Treaty redistributes power between Maori and the Crown, or the people of the land and the people of the Treaty. Remember it is not the Proclamation of Waitangi, it's the Treaty of Waitangi. It was a document giving the Crown the right to govern, but only subject to the guarantee of rangatiratanga.

And so these are the two sites of power or spheres of influence. Unfortunately this isn't how a good deal of New Zealanders understand the Treaty. Instead most New Zealanders would seem to understand the Treaty as the death of the Maori system and the birth of a new, Pakeha system. But we know from the Tribunal's Northland Report that this isn't the case. Simple common sense would say this isn't the case. What kind of person would surrender their own mana? But my concern here isn't how do we teach New Zealanders their own history, I'll leave that one to the teachers, my concern is how might we implement a constitution where there are two sites of power or spheres of influence and one site of power or sphere where we meet in the middle.

Some people would say it's impossible. It's too radical. We would need a written constitution, Geoffrey Palmer-style, and no one is going to agree to that. I suppose that is one way to do it, but people who do or would say that it is impossible do not understand their own existing constitution and their own culture's intellectual history.

The wonderful thing about New Zealand's *existing* Westminster constitution is that it operates in what the scholars call "the eternal present." That means we are free to make and re-make it as we please. No present Parliament can ever bind a future Parliament. Parliament may even decide to abolish itself. Very few countries operate like this. There is us and there is our parent Parliament in Westminster.

Now this kind of constitutional set-up is sometimes called an unwritten constitution, and what we deem part of that unwritten constitution isn't solely up to judges, but up to the scholars and the politicians and citizens as well. This is what makes our constitution special. Unlike in the US or nearly every other country in the world, the courts are not the ultimate enforcers of the constitution: that job is left to politics.

This is what we call a political constitution, where those who exercise power are held to account through politics and political institutions as opposed to the courts. For Professor Griffith, the bloke who invented the term the political constitution, 'the constitution is no more and no less than what happens'. It is always in a 'process of becoming.' This means it is always changing with events. For example the Treaty principles are not cleanly and comprehensively outlined in legislation, but they are a part of our political constitution. Not because they are mentioned in law here or there, but because we measure our politicians and our institutions against the principles. This is how a political constitution works.

Mark Hickford, the leading scholar of political constitutionalism in New Zealand, says the most enduring feature of our political constitution is the Maori insistence on treating any agreement with the Crown as never final, but only as "punctuated moments in conversations without end." In other words, the political constitution is about two sites of power or two spheres – Maori and the Crown – in dialogue with each other.

Now it's my proposition that this dialogue creates a third site of power or sphere, the sphere where Maori and the Crown meet to make joint decisions. They meet in the Waitangi Tribunal and in Treaty settlement negotiations, constitutional moments if there ever were any. They meet when the holders of the Maori seats in Parliament join the government. They may even meet in public debate in the media. With a political constitution, the full promise of the Treaty is always a little closer than we might think.

But there's one problem with this: when Maori and the Crown meet in this imagined third place, they do not meet on equal terms. The Crown is the party setting the terms. Maori, whether in the Waitangi Tribunal or the Maori seats in Parliament, are still operating *within* the kawanatanga. This is the challenge for political constitutionalism, creating that third site of power or sphere where kawanatanga and rangatiratanga meet on equal and neutral footing.

Of course, when one sphere is dominant over the other, well, this is how life works in almost every settler colony, from Australia to Canada to here. One culture and party gets to draw the line between the acceptable and the unacceptable, the normative and abnormal. Which culture gets to draw the line is a matter of power and where the line is drawn is then a matter of ideology. In New Zealand the culture that draws the line is Pākehā culture and where they draw it will often exclude Māori.

And this is very much what the two popular accounts of the Treaty do: they draw a line and declare that we go no further. The Winston Peters and David Rounds say that we can have a Treaty, just do not expect it to mean anything much for Maori. The public service and the judiciary and the media say the Treaty does mean something, just not what the words actually say. There are principles, but an equal relationship between kawanatanga and rangatiratanga is taking things too far, too fast.

It's up to us to change that. To imagine a third account, one that adheres to what the Maori text of the Treaty actually says. It's up to us to do this because social and political reality does not change simply because it is unjust. It changes when we advocate, protest and reform. And when we advocate, protest and reform, our political constitution can change with it. We can take it forwards, or we can stand idle while others take it back.

Of course, this kind of thing must always come with a warning. Throughout this country's history it has seemed as if the qualities we cherish in our democracy we condemn in our politics. We revere a kind of abstract equality, but we hesitate when it means substantive equality for Māori. There are plenty of New Zealanders willing to admonish Māori underrepresentation in local government, yet few are willing to support any measures to achieve the equality they claim to support. There are plenty of intellectuals and politicians who applaud the rule of law, yet few who supported the rule of law so much that they opposed the Foreshore and Seabed Act. Standing up for an equal Treaty relationship often means inviting attacks.

Yet throughout that history the burden of compromise always falls to Māori. We can push only for what is compatible with the Crown's system, they say. Or perhaps think about it this way: for each iwi a typical Treaty settlement represents around 1 to 5 percent of what was lost. In this situation who is making the compromise? The party

which agrees to concede 95 to 99 percent of what it lost or the party which agrees to return 1 to 4 percent of what it gained? The answer is obvious.

This is my way of saying that, yes, while there are two partners to the Treaty relationship. Tangata whenua, people of the land, and tangata tiriti, people of the Treaty, both the compromises and triumphs must be shared equally. I hope that our existing political constitution helps us do that. I hope that the fact it is always changing in response to events is an advantage. I hope it can one day provide that third site or sphere where Maori and the Crown meet, on equal footing. I hope this is all true because the alternative is to burn it all down.