DRAFT.

KAWANATANGA

It seems to me that since 1981, or there abouts, our work to promote the Treaty of Waitangi both actively and passively has centred very strongly on the area of Tino Rangatiratanga. The emphasis that came out of Project Waitangi, while encouraging Pakeha to debate the Treaty, came to mean, in active terms, support for Maori in pursuit of their Tino Rangatiratanga. There is of course nothing wrong with this in fact I personally believe that this was indeed a very good place to begin. However, taking the next logical step seems to be where we Pakeha seem to be floundering.

In our loss of direction we are doing what ~~Pakeha~~ always tend to do. We are following through on our original focus (Tino Rangatiratanga) to extreme lengths to the point where there are those in the forefront of Treaty training and Treaty activity who appear to believe that to be 'politically correct' in Treaty matters (and all matters are Treaty matters in one way or another) we must at all times defer to the Maori partner, we must constantly verbally flog ourselves and other Pakeha, we must in fact allow ourselves to become the oppressed, or the martyr on the funeral pyre of monoculturalism.

Of course this gives us an easy out. If we simply swap roles and allow our Maori partner to become our oppressor then we don't have to think for ourselves. Like the victim wife we can bow our heads and say we are useless and no good because our partner tells us so.

This kind of misguided missionary thinking is not only debilitating, it is dangerous to those who wish to see the full development of Tino Rangatiratanga.

So what is the next logical step?

I believe the time has come to look at the Kawanatanga doctrine of the Treaty. The rightful role of Kawanatanga has never really been addressed let alone adhered to, so let us begin by looking at some of the things that are well known about the word Kawanatanga:

1. Most of us have talked about the fact that the word Kawanatanga was used in Te Tiriti rather than 'Sovereignty' as in the English text.

2. We have been told by Ranginui Walker and others that the better Maori definition of Sovereignty would have been Mana but it was well known to the translators that no chief could or would give up his Mana so the word Kawanatanga was used.

3. We know that this word was a transliteration of 'governance' and was well known to missionary taught Maori in relation to the role of Pontius Pilate as the Roman Governor of Israel, as opposed to Herod the King and the priesthood who enforced Jewish law. Perhaps we need to know more about these different roles in order to understand more clearly just where the boundaries were.

4. We know too from Moana Jackson that according to the international rule of contra preferentum "if there appears to be conflict between different language texts of the Treaty, then it must be interpreted in a manner which is least favourable to the drafting nation." (Jackson M. in Mana Tiriti, p. 17) However, Jackson goes on to point out that this rule has never applied in Pakeha law. In fact the Pakeha law makers have

developed "The Principals of the Treaty" without any recourse to Maori which in itself, I believe, oversteps the boundaries of Kawanatanga. I would however like to point out here that these Principals seem to be less and less considered by serious Treaty practitioners as well as the Treaty of Waitangi Tribunal because the plain truth is that the simple Articles of the Treaty are easier to deal with than the very flawed Principals as set out by the Lange Labour government. Principal 1 equates Kawanatanga with sovereignty and most of the recent writing on this matter completely denies this.

So what do recent Treaty writers say about the relationship between Kawanatanga and sovereignty?

According to Moana Jackson "Maori people would have understood the meaning of the word 'kawanatanga' as being a lesser authority than that implied in the word 'sovereignty' as used in the English text. But of course it was not the English text they were signing."(Jackson M. 'Mana Tiriti' p.19 (Emphasis added)) It is this second part of the statement that is important. As well as the contra preferentum rule there is this simple fact that Maori, in the main, signed the Maori version of the Treaty, and it is for this reason that word Kawanatanga must be used in this discussion because that is what was agreed to. MAORI DID NOT CEDE, NOR HAVE THEY EVER CEDED, THEIR SOVEREIGNTY TO ANYONE.

So what was ceded? According to one literal translation -

> "The Chiefs of the Confederation and all those chiefs who
> have not joined in that Confederation giving up to the
> Queen of England forever all the Governorship of their land."

This is Article 1 of the Treaty. Article 2 then goes on to say that the Queen gives the Chiefs and the Hapu full chieftainship of "their lands, their villages, and all their treasured cultural possessions."

As you can see it is very clear and simple and it would seem very safe for Maori to sign.

However, one of the paradoxes of Westerm culture is the dualism of theory and practice - one does not necessarily reflect the other. In fact, as in all things to do with Western thought, our dualism is all about opposites and the tension between the two for one or the other to prevail and control the other.

I think the time has come to re-visit the theory and try to make the practice more reflective of it.

Dr. Maarire Goodall makes some strong statements regarding Kawanatanga. He believes that "Kawanatanga was merely authority for the Crown to control its own immigrants in New Zealand." (Goodall M. in Te Whakamarama No.7 p.11-12) He goes on to say that the Crown in New Zealand, and the Parliament should be constrained by the requirements of the Treaty. "It must follow. . . that many actions taken in the name of the Crown in New Zealand during the past 140 years or so, and given sanction or a false veneer of legality by Parliament, have been quite unconstitutional and illegal." (Goodall M. in Te Whakamarama No.7 p. 12.)

In the Manukau claim the Tribunal stated that in ceding Kawanatanga Maori relinquished something less than the sovereignty of the English text. Later however, in the Orakei claim they stated this again but qualified

it by saying that cession of sovereignty had become implicit. It must be remembered that the Tribunal is not a Maori institution but part of the Pakeha Justice department. For this reason it cannot deny the Crown under whom it operates.

According to Paul McHugh Sovereignty as defined by historians as "supreme unaccountable power". He goes on to say that lawyers extend this to "supreme, unaccountable power as defined by the constitutional law of those subject to the power."(McHugh P. in Sovereignty and Indigenous Rights, p.170) Certainly this is the kind of sovereignty that has been assumed by the Pakeha law makers so where does Kawanatanga fit into it? At the moment it doesn't.

If Maori ceded Kawanatanga but maintained their Tino Rangatiratanga who should hold sovereignty, that supreme unaccountable power? It seems clear to me that both should. The trick is to know just where the boundaries are and how the two ought to fit together.

Another thing that is very clear is that the Crown has assumed total sovereignty and it is time that was challenged and now is the time to do it. Paul McHugh says that "If future generations of lawyers become unsure of the boundaries of sovereignty. . . It is within this arena of constitutional discourse and discord where established suppositions are upended and reorientated that constitutional change occurs." (McHugh P. in 'Sovereignty and Indigenous Rights' P. 189) I think it is not only lawyers that need to address this issue. In fact lawyers are only instruments and can only discourse on what society demands of them. We need to make these demands and perhaps create issues or situations that demand this kind of activity take place and perhaps we may begin to bring about some

constitutional change that might bring about a dual sovereignty that is more in keeping with the Treaty.

The time is right to do this as we work towards MMP and political change.

Moana Jackson says that the Treaty is a Political document not just a legal document. He says that Treaties are about political relationships and political power and the Treaty is a practical framework for establishing political relations. (Jackson in 'Mana Tiriti" p.17) In order to test this we must use the legal system supposedly set up under this Treaty to challenge it and bring about political change.

The Treaty is also a Social document outlining just how we ought to treat each other. I remember recently watching an American documentary of a challenge made to the Supreme Court of the U.S.A. by Black Americans regarding their constitutional right to education in non-segregated schools. They tried to argue first on legal and then on historic grounds and lost. It wasn't until they argued on social grounds that they won their argument. This became the catalyst for major change and it was done through the legal system of the very people who had made the laws that prejudiced them. While it did not change the constitution in this case it CHANGED THE INTERPRETATION OF THE CONSTITUTION.

At the moment Aotearoa is facing electoral reform and I believe that this is the time to bring about broader constitutional change. After all a constitution is about how a country is constituted, how it is governed, how the government is to be elected and the framework of the government. So how can we best make it clear that true sovereignty for Aotearoa can only

come about by recognition of the two main elements of the Treaty, Tino Rangatiratanga and Kawanatanga?

We as Pakeha ought to be defining the role of Kawanatanga and communicating with Maori about just how this will fit with Tino Rangatiratanga. AND WE MUST NOT BE WIMPY ABOUT THIS. We must have some clear ideas and we must bargain as EQUALS.

While we are talking about equals one of the things that bothers me is the legal doctrine of 'fiduciary duty.' As a researcher of Treaty claims I constantly have to ask the question. Has the Crown fulfilled its fiduciary duty towards Maori? Much of the legal law so far developed in our courts relating to Maori and the Treaty is the notion of 'aboriginal fiduciary duty' and about acting 'reasonably and in good faith'. I don't mind so much the reasonably and good faith idea as it can imply two equals treating each other in a responsible way. But the whole notion of fiduciary duty implies a strong/weak relationship. The Crown is the strong partner and therefore has a duty to protect the weaker partner.

The American and Commonwealth courts all adhere to this principal of fiduciary duty in their dealings with aboriginal tribes.

> "The rationale is that if the Crown is to avow certain powers and duties over tribal societies and their resources, it will be held legally accountable for the performance of its self-assumed commitment."(McHugh P. in The Maori Magna Carta, p. 239.)

Please note that it talks of a 'self-assumed commitment.' Later McHugh states:

> "Still there is an underlying equitable basis to the aboriginal fiduciary doctrine in that it goes back to a notion of fairness

and a consequential attribution of legal consequence to an unequal relationship between the parties. The relationship between the Crown and aboriginal tribe is not simply a 'political trust' bereft of legal accountability, nor is it solely tied into the Crown's administrative assets. Like common law aboriginal title, the aboriginal fiduciary doctrine is *sui generis* and a response to the facts of history including, most especially, the Crown's consistent depiction of its status and role *vis-a-vis* the indigenous tribes." (McHugh P. in The Maori Magna Carta p.264)

(sui generis = the only one of its kind.)

So long as the Crown is allowed to continue to use this kind of rationale in its courts, Maori can only ever receive second-class consideration. It is paternalistic and oversteps the bounds of Kawanatanga. It has taken upon itself a role which it justifies simply by self-recognition.

Again as a Treaty researcher it is clear to me that there is not a square centimetre of land owned by the Crown that it obtained according to Treaty requirements. The very nature and basis of the law that the alienation of any land went under is flawed in Treaty terms. Yet claimants have to spend huge amounts of money to go to the Waitangi Tribunal to 'prove' that the Treaty was breached in order to claim any Crown land. Not only do they have to prove breach of the Treaty they have to then prove that the result of the Crown's actions were detrimental to the origninal owners.

If the Crown was to deal fairly with Maori the least they could do would be to admit that all lands in their 'possession' have been obtained in breach of the Treaty via their own laws and the job of the Tribunal ought to be simply to ensure that the land is returned to the descendants of the original

owners before alienation. Again, as a Treaty researcher I know that this is not so difficult to do. The only difficulty is that for some tribes there is less claimable land than others. Something has to be done with regard to compensation for the rest of Aotearoa. But I believe this too can be worked out if we began to share sovereignty rather than have the Crown assume total sovereignty with Maori as some kind of poor relation.

While it would seem a good thing that the citizens of Kawanatanga ought to know just how unfair the laws have been that have affected Maori generally and Maori land in particular, those of us who work in this field know this is a dead end as we suffer from a colonial history that has deliberately not only hidden but denigrated the value of history. We only want to know the good stuff, anything bad must not be tolerated. We can only deal with this issue by some active challenge to these laws that will affect the future.

One of the things that must be remembered about Treaties is that they protect old rights and provide new rights in the new and emerging state. The provision of new rights of citizenship is implicit in Article 3 of the Treaty, but Article 2 protects all the old rights that they had anyway as citizens of sovereign nations. It is this later part that the Crown and the parliament have overstepped.

So, what is Kawanatanga?

Kawanatanga is governance that does not repress Tino Rangatiratanga.

Kawanatanga is one partner in the dual, equal sovereignty that ought to be implicit in the constitution of this country.

Kawanatanga is western based which highlights the rights of the individual and is hierachical by nature. It must learn to deal with the collective Rangatiratanga of many tribes without repression or manipulation. It must stop expecting the Rangatiratanga of the tribes to speak with one voice.

Kawanatanga must ensure that it does not clobber all the resources and it must negotiate with Maori tribal Rangatiratanga to determine their fair resource base. It could well be that for some resources this may be done as one rather than split into many parts. However, determination of how the resource is used must not be simply the role of Kawanatanga. There must be an end to this business of consulting and a beginning of joint determination.

Kawanatanga must revisit the Treaty AS IT WAS SIGNED and begin to follow its own doctrine of reasonableness and good faith.

The true sovereignty of Aotearoa has to be worked out by all parties and it won't be a simple matter. Too much water has flowed under the bridge and the framework probably cannot be a simple parallel one. After all, the first Article did charge Kawanatanga with the duty to govern all the people but without imposing on the rights protected in Article 2. The boundaries are not clear because they have never been recognised, but they can be worked out. The first step has to be to make the Crown aware that it must do this.

How are we going to begin this process?

It seems to me that the time has come for a legal challenge. While in the past we have rejected the law courts my study of the history of other groups in similar situations shows that part of the process of redress is the use of the court system created by the partner at fault. It is not the only way but it is a part of the process that as yet we Pakeha have not come to grips with. We have always left this to Maori. We can no longer sit back and allow this to happen.

Also, as a result of Treaty training, anti-racism training, etc, there ought to be a foundation to build on. There must be other Pakeha waiting for the next step and I believe the time has come to capitalise on that before it is too late.

Conclusion.

These are just a collection of thoughts at this stage but I believe they must be worked on. What I am suggesting will not be easy. A battle-ground has to be chosen and we may only have one chance to get it right. It may very well be long drawn out and will therefore need much support both financially and emotionally. However, it has been done by others before and we can do it too.

I believe a great deal more thought and reading needs to happen before any action can be contemplated and for this reason I have put together a short bibliography that may be of some use. There are other people about too who I feel need to be involved, people who have a far better understanding of the of the issues than I do.

Finally I would like to say that in confronting the Crown, under whose wing we as Pakeha legaly exist here and in trying to come to grips with Kawanatanga we are going to have to come to terms with areas that most of us would rather not acknowledge. To illustrate what I mean by this I will close with a quote from Queen Elizabeth 11 made at Waitangi in 1963.

> "whatever may have happened in the past and whatever the future may bring it remains the sacred duty of the Crown today as in 1840 to stand by the Treaty of Waitangi, to ensure that the trust of the Maori people is never betrayed."

What are your thoughts?

Gwenda Monteith Paul

Ohope.

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I would especially recommend at least chapters 6, 7, and 8. McHugh gives us important insights into the nature of our own law and constitution especially in our relationships with Maori and Rangatiratanga. I believe we need to have a really good understanding of our own law and its origins if we are to challenge it.

Renwick, William, *The Treaty Now,* GP Books, 1990.

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I especially recommend chapter 3, Tauiwi.