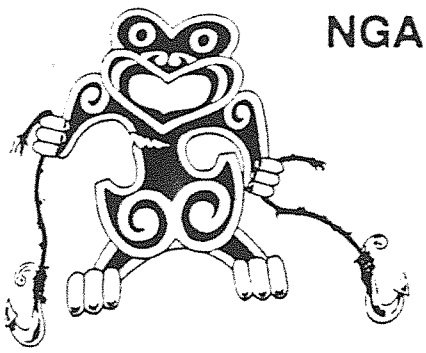

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MAORI EDUCATION PERSPECTIVES ON A CLAIM TO THE WAITANGI TRIBUNAL

A PAPER PREPARED FOR TINO RANGATIRATANGA HUI 1991

te tino rangatiratanga o o ratou whenua
o ratou kainga me o ratou taonga katoa.

MAORI EDUCATION

PERSPECTIVES ON A CLAIM TO THE WAITANGI TRIBUNAL

Chiefanship

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INTRODUCTION

Supreme Sovereignty
Supreme Authority / Power

It is the premise of this preliminary Paper that before the details of a substantive claim are laid before the Waitangi Tribunal the claimants should consider the rights and jurisdictional issues involved in such a move.

The terms of the Treaty of Waitangi Act 1975 which established the Tribunal, and the Tribunal's subsequent actions, have placed Treaty issues firmly within a context of Pakeha law and Crown control.

The effect of this process has been to redefine the textual guarantees of the Treaty into a set of "principles" which actually diminish the rights of Maori and facilitate increased Crown control over Maori.

Such a consequence is a denial of the rights of Maori both as outlined in the Treaty and as encompassed in the context of te tino rangatiratanga.

Maori claimants therefore need to consider two different approaches to the authority of the Tribunal-

1. To frame a statement of claim within the Court and Crown-defined "principles" and thus participate in a further diminution of rangatiratanga by acknowledging the final authority of the Crown to make resource decisions.

2. To frame a statement of claim which asserts the ultimate authority of te tino rangatiratanga as reaffirmed in the Treaty text, and thus seek a recognition of the sovereign right of Maori to make resource decisions.

The first option is consistent with current Pakeha legal thinking but denies the truth of the Treaty.

The second is consistent with continuing Maori analyses of the Treaty but is contrary to contemporary political and legal views.

The philosophical base of each approach is outlined in the Paper.

THE "PRINCIPLES" APPROACH

The role of the Tribunal is prescribed in the parent statute as being an authority

> ".... to make recommendations on claims relating to the practical application of the principles of the Treaty."

Its structure, its powers, and its theoretical approach are thus creatures of statute. Indeed the notion of Treaty "principles" was first adumbrated in the statute and subsequently refined by the Tribunal and the Courts in the 1980's.

The concept itself flows from the recently rediscovered common law doctrine of "aboriginal title".

This doctrine was first outlined by a school of Spanish jurists known as the Salamanca Divines over 600 years ago.

In attempting to find a "legal" basis for the relationship between a colonising power and indigenous people the Divines concluded that native inhabitants were possessed of certain rights which had existed since "time immemorial".

If their country was subsequently colonised those ancient rights or title would continue, but would be subject to the over-riding authority of the new sovereign power. In a recent Canadian case it was declared that indigenous rights in fact exist only at "the whim of the sovereign".

For over a century Pakeha New Zealand law overtly stated that Maori had in effect no indigenous rights, either because they expired with the cession of sovereignty alleged in Article One of the English text of the Treaty or because the unilateral proclamations of sovereignty by Governor Hobson extinguished them.

Recent legal thinking has revised that position and acknowledged the applicability of the doctrine of aboriginal rights, subject always to the sovereign will of the Crown.

In pursuit of this sovereign power, the Crown has chosen to define a set of "principles" to help it interpret the Treaty.

Since 1975 the Tribunal, the government and the courts have refined the "principles" to effectively limit Maori authority to narrow "property" interests, or interests requiring "consultation" with Iwi before implementation of a particular Crown policy.

Each view is framed within the supreme authority of the Crown, and can be found clearly in Tribunal Reports.

Thus, for example, the Orakei Report states

"... Maori accepted the Crown's higher authority and saw themselves as subjects."

Likewise the Muriwhenua Report states

"... the principle that emerges is the protection of Maori interests consistent with the cession of sovereignty."

The final authority of the Crown has also been consistently reaffirmed by the Courts.

In the 1987 SOE case, Cooke P stated that the Treaty provided that

"... the Queen was to govern and the Maoris were to be her subjects."

In the same case, Somers J held that neither rangatiratanga, nor

"... the provisions of the treaty nor its principles, are ... a restraint on the legislative supremacy of Parliament."

This approach has led to five main developments in Treaty jurisprudence -

1. The denial of the historic Maori analysis of what the Treaty means and a delimitation of what Sir James Henare called the "absolute authority" of rangatiratanga.

2. The evolution of a "needs based" endowment policy as a means of settling Iwi claims and recognising Maori rights. This is a welfare distribution approach which removes any concept of reparation and looks to the future (and minimal) needs on an iwi to survive. It involves no recognition of iwi rangatiratanga.

3. The reaffirmation of the view that Maori ceded sovereignty to the Crown and thus subordinated rangatiratanga to its control.

4. The digital, or article by article, reading of the Treaty. This allows both texts to be used and has resulted in an approach by government and Treasury along the lines of the "Crown principles", ie 'Article 1 kawanatanga' legitimates current forms of government or Crown sovereignty; Article 2 is read subject to Article 1, and so limits tino rangatiratanga to claims over property rights and 'self-management' of remaining resources; and Article 3 makes Maori into British subjects, rather than affirming the right of Maori to enjoy their rights, and British subjects enjoy theirs.

5. The use of literal interpretations of the Maori text, such as the Kawharu interpretation used in the courts and tribunal. This results in a sterile reading of the Treaty which reinforces the interpretation of Article 1 as legitimating the current style of government over Maori. It severely restricts the meaning of "taonga" by linking it to possessions and treasures, and tends to freeze rights at 1840, thus restricting Maori development and access to new technology.

A claim framed within this approach would need to assert that Crown action (or inaction) in relation to education within two main heads:

a. That the Crown has breached an appropriate property interest reserved to Maori within the Treaty "principles".

b. That because Education is a "taonga", the Crown has an obligation to actively protect education and it has not fulfilled that obligation.

Arguments under these two heads could lead to widespread ramifications in the implementation of Crown policies in education.

However, they are ultimately incompatible with, and unable to address, the broader issue of te tino rangatiratanga as defined by Maori.

Any protection which they may afford to Maori interests in Education will remain subordinate to those of the Crown.

THE RANGATIRATANGA APPROACH

A claim framed within a rangatiratanga approach acknowledges that the concept of "principles" is a recent Pakeha refinement aimed at denying Maori authority.

More specifically, it acknowledges that te tino rangatiratanga is not a power subordinate to the Crown; that just as, for example, Nga Puhi would never subordinate their rangatiratanga to Te Arawa, so te Iwi Maori katoa would not submit to the authority of the Crown.

Indeed the 1835 Declaration of Independence (which uses the word "rangatiratanga" for independence) acknowledges the non-transferability of rangatiratanga -

> "... they (the rangatira) will not permit any legislative authority separate from themselves."

In 1922 Apriana Ngata defined this authority as being

> "Law to (the) tribe. It was he (the rangatira) who declare was and sued for peace. It was the chief who bespoke the land."

Rangatiratanga and mana were interdependent threads of sovereign nationhood. They were the nexus allowing the Iwi to be governed.

John Tangiora (Ngati Kuhungunu) explained the inseparable nature of rangatiratanga and mana as being like:

> "... the amo and maihi of a whare. They support each other and together they put on a face to the world. Mana and rangatiratanga are the face of Iwi authority ... and just as your tipuna knew a whare could not be built without both and amo and a maihi, they knew that mana and rangatiratanga go together ... they are the same face."

That "face" allowed the Iwi to control its resources, which was an inherent part of the interrelated notions of both tangata whenua and mana whenua.

As Ranginui Walker has stated:

> "... this guarantee of chieftainship is in effect a guarantee of sovereignty because an inseparable component of chieftainship is mana whenua."

When the Iwi held mana whenua they could effectively exercise authority over all of their resources and people. The Iwi and its authority became one. Nganeko Minhinnick (Ngati Te Ata) thus says simply of her people

> "Ngati Te Ata is our rangatiratanga: our mana is Ngati Te Ata".

This interdependence of the Iwi, its land, its people, and its authority meant that rangatiratanga was non-transferable.

The mana of an Iwi, and the authority of those entrusted with exercising it, came from tipuna and could not therefore be transferred or ceded to another.

No rangatira could give it away; no Iwi would want to do so:

> "... if a tribe should lose its mana, its rangatiratanga, it has lost is soul ... all that our tipuna gave to us we must hold."
>
> (John Tangiora)

Such a power of government includes all the rights and powers of sovereign nations - the power to make laws and dispense justice; the power to conduct trade with other Iwi (nations); the right to regulate the use of Iwi

resources (land, fisheries, etc); and the right to develop and educational processes for its people.

Thus in 1863 Karaitiana Takamoana (Ngati Kahungunu) could speak of Iwi authority in the context of legal processes and state that

> "you must know that it is by our law that we should sty our own",

and in 1879 Apihai Te Kawau (Ngati Whatua) could define Iwi mana as including resources of the sea since

> "the sea belongs to me".

In 1989 Rima Eruera (Ngati Kahu, Te Rarawa) explained this absolute and not-transferable nature of rangatiratanga by referring to teachings of the whare wananga which held that it embraces

> "... the retention of te ihi, te wehi, to mana motuhake me te tapu (the power of authority, the protection of this authority, the control of this authority, and the sanctity of this authority) over our land and sea."

Such authority, so imbued with ihi, wehi and tapu, and so wide-reaching in its efficacy, was truly the soul of a people which would not be ceded or given away.

The Crown argues that in the Treaty of Waitangi the Maori, of course, did just that: that in Article One of the English text they did cede their sovereignty to the Queen.

However, as Sir James Henare (Ngati Hine) said in an often quoted statement:

> "Because of the Treaty the Maori believe, the right to this day, that they are equal partners and they know from experience that it's not so. But right to this day, and those Chiefs that I had the great privilege of being associated with, Runanga o te Tiriti o Waitangi, and they always said that, that they had equal rights. That is why they signed the Treaty. And lots of people ... seem to infer that those Chiefs didn't know what they were signing. They knew what they were signing, reading the Maori version. But, when it came to sovereignty in the English version what in fact they did sign was giving away all their mana and everything else to the Queen of England. Which they never believed and never intended to do so. And that's quite plain from signing the Maori version ... not sovereignty."

Dame Mira Szasy (Te Rarawa) has constantly reaffirmed this view. Three years ago she wrote that tino rangatiratanga is

"self-determination" and the "power to rule over something".

She links that term to the phrase mana motuhake (mana tuku iho) which:

> " ... implies the very essence of being, the eternal right to be, a God given right to the individual or a people to live, to exist, to occupy land ... These rights existing prior to 1840 and since there was no mention of (them) in the Treaty we must deduce that there was no thought in the minds of the Maori signatories to forego them ..."

In the submissions to the Runanga Iwi Bill in 1990, all Maori expressed similar views and often linked rangatiratanga directly to resource control.

Thus Te Rarawa acknowledged the importance of rangatiratanga as the source of control over resources:

> " ... each tribe and each region is different, with different land and people resources and with different levels of development of those resources ... the concept of tino rangatiratanga reaffirms that we as Maori people may determine the stewardship of our lands, forests, fisheries and of all our resources ..."

Ngai Tuahuriri (of Ngai Tahu) outlined the broad sovereign nature of rangatiratanga by saying:

> "... rangatiratanga is our independence which is responsible for our kawa, our cultural identity, our history, our heritage that meshes and binds us to ... the heavens, to land and water and all the resources that arise from and within Papatuanuku."

In essence, any Tribunal claim based on rangatiratanga that is consistent with these views is incompatible with the "principles" approach.

Indeed, the court and Tribunal's "principles" are a violation of tino rangatiratanga as they leave government with ultimate authority to make laws and economic and education policy, and reduce the authority of the iwi to being consulted and perhaps some form of redress for violations of property rights, however they may be interpreted. While it may be possible to selectively take parts from the court and Tribunal's report to frame a "principles" claim it is impossible to do so without rejecting the base-line of rangatiratanga as understood by Maori.

To submit a rangatiratanga claim, however, would mean

- challenging the Tribunal's position on the Treaty and their adoption of the court's principles, thereby selling out tino rangatiratanga, since 1987.

- challenging the Court of Appeal which the Tribunal will be politically and legally reluctant to do, and which may leave the Tribunal open to judicial review.

- being prepared to reverse the current tide of Pakeha legal argument on the Treaty, and put unpopular politically and legally risky arguments.

If claimants are prepared to make these challenges the chances of "winning" are unpredictable, as no one has framed a claim within such terms. But pursuing a "principles" claim would mean perpetuating an approach to the Treaty which denies tino rangatiratanga, adds to the weight of argument which suggests Maori endorse the converse in the "principles", and would ultimately reaffirm Crown control over Maori education.

Should claimants be prepared to argue on the basis of rangatiratanga, a potential argument might run along the following lines.

A POSSIBLE RANGATIRATANGA ARGUMENT

a. pre-existing tino rangatiratanga was affirmed in the 1835 Declaration of Independence

b. tino rangatiratanga was reaffirmed in te Tiriti in 1840, as a response to changed conditions of increasing Pakeha immigration and settler disorder. Through te Tiriti iwi and hapu sought

   1. a guarantee of protection of their tino rangatiratanga over whenua, kainga and taonga katoa;

   2. the exercise by the Crown of kawanatanga over settlers, imposing law, order and security in a way which would safeguard te tino rangatiratanga;

   3. continued but controlled Pakeha immigration which would provide the benefits of access to technology and development whilst securing te tino rangatiratanga

c. The reaffirmation of the right to exercise tino rangatiratanga related directly to education and to continued well-being, security and development of iwi and hapu.

Both Sir James Henare in his affidavit in the SOE case and the recent transcription of Te Ataria's

journals from Ngati Kahungunu talk of the Maori signatories' understanding of taonga as a guarantee of protection for the "Maori way of life"; a balanced approach to education was essential to that way of life.

d. Te Tiriti thus creates an ongoing right to development and conservation where Iwi and Hapu would benefit from Pakeha technological developments in a manner consistent with the Maori way of life and self-determination. This can be broken down to include:

1. the right to retention of economic sovereignty, whatever form economic development assumed subsequent to 1840;

2. the right to positive economic development in manner which will advance the well-being of iwi and hapu on the personal and commercial levels;

3. the right to participate in and benefit from existing and future technological developments;

4. the right to control and make decisions about the application of new technologies;

5. the right to develop educational systems and processes to ensure Maori access, use and control of those technologies;

6. the right to protect, enhance, and transmit the cultural, economic, and spiritual bases of te ao Maori through education;

7. the right to control decision-making processes in relation to the implementation and development of Maori educational systems;

8. the right to use education for social development in a way which will advance the well-being of iwi and hapu on the personal and commercial levels;

9. the right to security of cultural well-being;

10. the right to economic well-being.

e. These rights have been denied by consecutive governments, acting on behalf of the Crown and without the consent or authorisation of Iwi and Hapu:

1. The sovereignty of iwi and hapu has been denied through Crown breach of its Treaty promise to recognise Maori resource control and through successive government's economic and social policies.

The Hui Taumata called for Maori development on Maori terms. Government policies have not met those demands, but have further impoverished Maori communities and entrenched dependency. Control of education will be vital to restoring Maori well-being on Maori terms and reasserting economic and cultural sovereighty.

2. Policies of the government have explicitly and indirectly excluded Maori from meaningful participation in the education decision making processes of Aotearoa. Access to and control over, decision making processes relating to education are essential to the well-being of iwi.

3. Maori have been denied access to control of their educational needs through

   a. exclusion from education through political, economic and social policies, and
   b. exclusion from educational decision making processes.

Such a claim would involve remedial compensation for the past denial of rangatiratanga in relation to education and positive moves needed to recognise rangatiratanga in this area in the future.

PREPARATORY WORK

Should this approach be accepted, the following work would need to be done -

a. Documentation of Maori perspectives on the place and importance of education in general.

b. Documentation of Maori expectations of benefits from Pakeha and the development of appropriate education systems.

c. Documentation of Maori use of that technology to advantage within Maori economic processes until excluded from the economy. (This was done to some extent in the Muriwhenua claim.)

d. Documentation of (each of) the social, economic and cultural impact of exclusion from development in general and technology in particular on Maori communities in the past, present and future. This could include case studies of particular communities and specific Crown educational policies.

e. Location of Treaty interpretations which support the interpretation of whenua, kainga

and taonga as Maori well-being and development within the contact of the Maori way of life, so as to include education as an essential part of rangatiratanga.

f. Analysis of the implications of continued control of education by the Crown for the cultural and spiritual well-being of Maori.

g. Analysis of the benefits (cultural, economic, scientific) in reaffirming education as a process subject to the authority of rangatiratanga.

Moana Jackson