

Maori Development Corporation Report

Appendix 6

6.1 - The Principle of Reciprocity - ie the cession by Maori of

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Treaty Principles

6.1 The Principle of Reciprocity - ie the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

This over-arching principle of paramount importance, deriving directly from articles 1 and 2 of the Treaty, has been elaborated by the tribunal in these terms:

Implicit in this principle is the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of article 2.

The Crown in obtaining the cession of sovereignty under the treaty, therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.¹

The tribunal has also accepted that several vital concepts inherent in or are integral to the fundamental reciprocity principle, namely:

o the Crown obligation actively to protect Maori Treaty rights

o the tribal rights of self-regulation^{February 13, 1995}X112 of redress for past breaches; and

o the duty to consult.²

In the Muriwhenua Fishing Report, where the Crown's duty of active protection was discussed, it was said that:

Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.

The settlement profit to Maori derives from the tribe's access to new technologies and markets, from Maori opportunity to adopt Western ways or from a combination of both. In terms of the Treaty none of these alternatives was denied or can be denied today, but at 1840, the former was uppermost in the minds of both sides....

... The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.

The application of this principle at any particular past or future point, must depend upon the conditions then applying, the extent to which Maori have subsequently chosen to benefit in Western terms and the degree to which the tribal base remains preferred. The essential problem lies in balancing or blending the competing philosophies of protecting Maori as equal citizens, or upholding their distinctive heritage, as Mr Justice Richardson observed (in the 1987 New Zealand Maori Council case) in commenting on article the third.³

Again, on the matter of tribal self-regulation, an inherent element of tino rangatiratanga, it has been said:

`Rangatiratanga' and `mana' are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.⁴

It may be added that, because of the cession of sovereignty in article 1 of the Treaty, article 2's guarantee of tino rangatiratanga has been further explained as referring to:

... tribal self-management on lines similar to what we understand by local government.⁵

The right to redress for past Treaty breaches arises when detriment has been caused to Maori as a result of the Crown's failure to protect the rangatiratanga of a tribe or hapu.

Mr Justice Somers in the New Zealand Maori Council case enunciated the principle in these terms:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle... As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.⁶

The tribunal has emphasised in this regard that it is out of keeping with the spirit of the Treaty that the resolution of one injustice should be seen to create another.⁷

As a result of the Court of Appeal's statements in the New Zealand Maori Council case, the duty to consult does not arise in all situations. Sir Ivor Richardson, after highlighting the difficulties in deciding which matters affecting Maori might require consultation, who should be consulted and how consultation should be conducted, said:

In truth the notion of an absolute open-ended and formless duty to consult cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.⁸

The Ngai Tahu tribunal, applying these words to the situation before it, considered that:

Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources - mahinga kai - also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says,

vary depending on the extent of consultation necessary for the Crown to make an informed decision.⁹

Waitangi Tribunal, Department of Justice, Wellington.

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6.2 - The Principle of Partnership

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This principle, firmly established by the Court of Appeal in the New Zealand Maori Council case, requires the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith. In the words of Sir Ivor Richardson:

Where the focus is on the role of the Crown and the conduct of the Government that emphasis upon the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.¹⁰

Elaborating on the reasonableness which must characterise the Treaty partners' dealings with one another, the President of the Court of Appeal stated:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try and shackle the government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other cooperation.¹¹

The tribunal later described the basis of the partnership concept in these terms:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon

their pledges to one another. It is this that lays the foundation for the concept of a partnership.¹²

References

1. Report of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Claim (Wai 27), (Brooker & Friend 1992), p 269
2. Ibid, p 269 and Report of the Waitangi Tribunal on the Ngawha Geothermal Resource Claim, (Wai 304), (Brooker & Friend, Wellington 1993) pp 99-100
3. Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988), p 194
4. Report of the Waitangi Tribunal on the Motunui-Waitara Claim (Wai 6), (Waitangi Tribunal, Wellington 1983), p 51
5. Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988), p 187
6. New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 693
7. Report of the Waitangi Tribunal on the Waiheke Claim (Wai 10), (Waitangi Tribunal, Wellington 1987), p 99 and Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988), p xxi
8. New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 683
9. Report of the Waitangi Tribunal on the Ngai Tahu Claim (Wai 27), (Brooker & Friend, Wellington 1991), p 245
10. New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 682
11. Ibid, pp 665-6
12. Report of the Waitangi Tribunal of the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988), p 192

Waitangi Tribunal, Department of Justice, Wellington.

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