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THE TREATY OF WAITANGI IN THE 1980's

When two strong forces meet the collision always results in change. When the sea meets the shore the boundaries of the water-line are altered as the coast is eroded. When the great geological plates on the surface of the earth exert their power on each other the face of the land above them is changed.

When the Oriental culture meets with the European both must make adjustments to accommodate each other.

In just the same way in our own country the Pakeha culture and the Maori culture have had to adapt to each other as they have been doing throughout the past 150 years.

In the last quarter of this century more changes will take place in preparation for those that will inevitably come to pass in the next hundred years.

My purpose is to look at society today in the light of our history and to bring into focus some of the pressure-points at which friction occurs, as friction must always occur when two great forces rub against each other. Friction causes change and just as change has been forced upon the Maori culture, so also will the Pakeha culture have to adapt as time goes by. The great question for us is whether we will make that adaptation willingly.

1. TE TIRITI o WAITANGI

The Treaty of Waitangi is not unique. It is one of a long series of such contracts made between the British Crown and indigenous peoples in many parts of the British Empire.

In North America there were treaties made with Indian tribes in both Canada and the American Colonies. Those treaties have been before both United States and Canadian Courts on many occasions and have been both interpreted and enforced by those Courts.

As recently as 1981 the Ontario Court of Appeal considered a treaty that had been made in 1818 and enforced an arrangement or protocol that had been part of the negotiations and agreed upon by the Indian tribe concerned and representatives of the Crown but which was not in fact recorded in the treaty itself. The case is The Queen v Taylor & Williams (1981) 62 C.C.C. (2nd) 227 and is important for a re-statement of the legal principle that "the honour of the Crown must not be besmirched".

This principle has been applied over many years by the Privy Council especially in the 18th century and by United States Courts after the War of Independence, the Government of the United States accepting as binding upon it treaties made by its predecessor, the British Crown.

From the 17th century there has developed a body of law called "colonial law" which governed relations between the Crown and the original inhabitants of lands that became British colonies. This law covered hunting and fishing rights and especially land rights as between colonists and the indigenous people and between the Crown on the one hand and both colonists and natives on the other, i.e. between the Crown and subjects of the Crown.

For example a Royal Proclamation in 1763 officially declared that the legal right of North American Indians to their land was absolute and could only be extinguished by fair purchase or free gift, but not otherwise.

The essential feature of Colonial law was the important rule that "the honour of the Crown must be maintained". By that I mean that when the Crown made promises in a treaty the Courts were solicitous to ensure that those promises were not broken because it was unthinkable that the Crown should disavow its own word.

The principles developed during the 17th and 18th centuries in North America were applied in the 18th and 19th centuries in Africa also where the Crown made treaties with various native peoples in 1788, 1791, 1807, 1818, 1819, 1820, 1821, 1825, 1826 and 1827 all of which can properly be described as forerunners of the Treaty of Waitangi.

The settled policy of law relating to the rights of indigenous people was quite clear by 1840 which no doubt caused the Colonial Secretary Lord Normanby to include in his instructions to Captain Hobson the following admonition:

"The Maori title to their soil and to the Sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government ..."

For present purposes it is important to emphasise this acknowledgment especially the first point that "Maori title ... to the Sovereignty of New Zealand is indisputable ..."

For nearly 40 years after Waitangi there is no doubt that the Courts recognised the Treaty as valid and binding at law. The position was expounded more than once but the leading case is that of Reg. v Symonds (1847) 2 N.Z.P.C.C.387 where a full Court comprising Sir William Martin, Chief Justice and Mr Justice Chapman formally declared that the Maori right to land was protected by the Treaty and rejected a claim brought following a purchase that had not been offered to the Crown.

The Court used language carefully chosen to illustrate the solicitude of the Crown for the rights of "Her Majesty's new subject or of "the aboriginal inhabitants" or of "Maori New Zealanders".

The legal propositions enunciated by both Judges are felicitously phrased; it is said that Reg. v Symonds is now regarded as the locus classicus for the exposition of the legal relationship between the Crown and indigenous peoples, and is much cited in American and Canadian judgments. In New Zealand it is virtually unknown because of the change of attitude in society after the Land Wars.

Before this case was decided there had already been trouble between Maori and pakeha in the North where Hone Heke and his Ngapuhi warriors took up arms more than once. But overall there was a period of comparative peace and the heavy Maori population and very small European population enabled both to live side by side in amity and friendship. At the time of the signing of the Treaty the Maori outnumbered the pakeha by something like a hundred to one and it was not until about 1860 that immigration brought the two populations into more or less equal proportions.

At this time serious trouble began. In 1859 there occurred the Waitara Rising in Taranaki and in 1861 full scale warfare broke out there with losses of significant numbers on both sides. But in 1863 the Land Wars began in earnest and continued until 1872 by which time hundreds had died and many more were wounded in fighting that was prolonged, bloody and one-sided.

There is absolutely no room for doubt today that the Waikato Wars began in a way that reflects nothing but shame upon those responsible for starting them. It is quite clear that the Maori people gave no cause to be invaded as they were by British troops who behaved as conquering armies always behave. The pillage, plunder and rape in the Waikato quickly became known elsewhere and in the Bay of Plenty, the East Coast, Taranaki and the King Country Maori resistance was stiffened and the fighting became more ferocious than

Atrocities and rumours of atrocities abounded and the attitude of many pakeha toward the Maori hardened as Maori resistance became ever more fierce.

This new attitude of hostility towards anything Maori cannot be regarded as surprising. At the end of any bitter war the two parties look at each other with antagonism born of the conflict, as many of us can recall from our own feelings and experience in the years after the Second World War. There are some who, even today, find it difficult to deal civilly with Germans and Japanese.

So it was between many pakeha and most Maori, and lawyers were no exception to this social attitude.

Maori New Zealanders were a conquered embittered and sullen people who brooded on the wrongs that had been done to them. Those in the Waikato knew that they had been attacked and that they had resisted in self-defence to protect hearth and home. They knew that their courage had not failed them and that it was only English artillery that had won the day, yet they were treated as rebels, their land was taken from them and they were driven from their homes to survive in the bush as best they might - men, women and children alike.

As the Waitangi Tribunal has said:

"They were (attacked without just cause) then forced to leave their lands and treated as rebels, all their property being confiscated in punishment for a rebellion that never took place ..."

In 1877 Chief Justice Prendergast was called upon to decide the case of Wi Parata v The Bishop of Wellington [1877] 3 N.Z.J(N.S.)72 He reflected in his judgment the social attitude I have just referred to. The Maori plaintiff and his people relied upon the Treaty in their claim to land but the Court no longer spoke of "aboriginal

natives" or "Maori New Zealanders" as Mr Justice Chapman had done 30 years before. Instead the judgment is peppered with references to "savages" "barbarians" and "primitive barbarians".

Then the key decision in the case:

"(The Treaty of Waitangi) could not transform the natives' right of occupation into one of legal character since, so far as it "purported to cede the sovereignty of New Zealand, it must be regarded as a simple nullity for no body politic existed capable of making cession of sovereignty ..."

This view is to be compared with the Colonial Secretary's instruction to Captain Hobson referred to earlier in which he said that Maori title to the sovereignty of New Zealand is indisputable and "has been solemnly recognised by the British Government".

Thereafter Maori attempts to have the Treaty recognised in law failed time and again. There was one brief success in 1902 in the case of Nireaha Tamaki v Baker [1840-1932] N.Z.P.C.C. 371 when the Privy Council overruled Wi Parata v The Bishop of Wellington but the decision was quickly nullified by the passing of the Land Titles Protection Act 1902 and later the Native Land Act 1909. Thereafter every Maori attempt to rely on the Treaty has been rejected by the Courts on the ground that at international law a Treaty does not have any effect unless it is adopted by municipal law.

This thesis ignores the two centuries of colonial law referred to in the Symonds case and it ignores "the honour of the Crown".

Colonial law can be said to comprise a series of Privy Council decisions dating from the 17th century that recognise treaties between native people and the Crown, and the provisions of such treaties. The underlying principle is that when the

Crown makes a bargain, "the honour of the Crown must not be besmirched" (The Queen v Taylor and Williams (above) and any such bargain must be enforced by the Crown's Courts to preserve the honour of the Crown and to ensure that promises solemnly made by the Crown are equally solemnly kept by all concerned, Parliaments and settlers alike.

That principle has been followed in Canada and the United States, but in New Zealand it has not been observed since the Land Wars and Prendergast's time. The Courts have consistently taken the view that the Treaty is a nullity and therefore meaningless. To reach this conclusion they have applied the principles of international law and have not applied the correct principles to be found in colonial law.

The State Owned Enterprises Act 1987 changed the ground a little by including a special provision that the words of the statute should be interpreted having regard to the principles of the Treaty. A similar provision exists in the Conservation Act 1987; but those clauses apply to those two Acts only, not to all legislation.

The Court of Appeal interpreted the first of these two statutes last year and gave emphasis to the need to recognise the Treaty as a partnership with all the duties that go with a partnership, especially the duty to act in good faith. For one partner to call the Treaty a nullity after taking the benefit of it is hardly an act of good faith.

It is against this background that we must view the Treaty today. It is without question a solemn contract made between the Crown and Maori New Zealanders. And our Maori fellow citizens are making it very plain that they expect the promises made so solemnly in that contract to be kept in the future even if they have not been kept in the past.

2. THE MAORI AND THE ENVIRONMENT

As in any society, Maori society had its own laws. They covered all the usual subjects - marriage, inheritance, adoption, decision-making, tribal and family rights - but they also covered two other very important matters, land and fishing rights.

It is important to remember that different cultures have different values. So the Oriental will prize beyond almost everything else, his personal prestige, or that of his family, or perhaps his family group. Loss of "face" still has a profound effect on people in Japan, China, Korea, Taiwan and elsewhere.

By contrast the European will prize beyond almost anything else his right to property - and by that term there must be included not just land and buildings, but shares money and assets of every kind. The European culture in modern times is remarkable for the emphasis it gives to material things. The modern New Zealander who has influence and prestige is frequently the rich New Zealander, the man who has "succeeded" in life - succeeded that is, in acquiring a strong hold on the sinews of our economy. So also with the American, the Australian, the Briton and a proportion of other people in other countries that can be described generally as belonging to the European culture. On the continent of Europe this is not necessarily as pronounced as it is in the United States or New Zealand because in some places, Italy and Spain for example, prestige can come from values other than wealth. In both of those nations the honour of the family is often the highest value, more important than money or position.

To return now to the Maori culture it might be said that the highest value is mana, a word incapable of precise translation into English but a concept that includes self-respect, status, prestige and standing - but especially self-respect. If a Maori loses his mana he loses his self-respect - the greatest loss of all.

9

The things that go to make up mana are many-sided but one feature that is rightly bound up with the concept, is land. The importance of land to the Maori is enormous - not for its own sake as a European might value it - but because of its link between the Maori and his ancestors. He "keeps warm" the place where his tupuna walked.

His right to stand on that land is part of his mana for there on that spot is his turangawaewae. Maori cultural values have always prized the land - again I emphasise not for its own sake - and the link between the Maori and his land is culturally powerful and emotionally vital.

The Second Article of the Treaty promised in the English version that the Queen would guarantee Maori New Zealanders "the full exclusive and undisturbed possession of their Lands, Estates Forests Fisheries and other properties .. so long as it is their wish and desire to retain the same in their possession ...". In the Maori version the guarantee related to "all their lands and all their habitations and all their prized possessions:.

So long as the Colonial Office controlled New Zealand affairs this promise and guarantee was, in the main honoured and observed, but when the Colony attained responsible government and the settlers took control the promise was broken time and again. For example the Native Land Purchase & Settlement Act 1893 empowered the government to take any land it deemed suitable for settlement subject to payment of compensation. Between 1893 and 1900 nearly 3 million acres passed into pakeha hands notwithstanding Article II of the Treaty or the wishes of the owners. Of course as we have seen, by this time - the end of the century - pakeha settlers deemed the Treaty to be "a simple nullity".

But to return to my topic of the environment, the land was something clearly identified by the Maori, with every geographical feature of almost any kind named, and having its place in the history of the tribe. Tribal boundaries were definite and established and there was no part of New Zealand that could be described as 'waste land' in the sense that nobody owned it or cared about it. Boundaries changed from time to time according to law by marriage, or by conquest and occupation, but a successful battle did not alter the boundary - occupation and settlement was necessary for that result.

The Maori of pre-European times used the land for agriculture, for habitation and for hunting. It had never been his way to alter the face of the land except to the extent necessary to cultivate it. Sometimes forest fires occurred but they were natural events, not a deliberate policy that was introduced by the pakeha.

But he had another great resource as well and this was the sea. It was not only a garden providing much of his food, it was also a highway by which he travelled up and down the country. The coast and coastal fishing grounds were identified like the land, marked off in tribal boundaries just as the land was, and there was no significant shellfish bed or fishing ground that was not claimed, possessed and jealously guarded.

The importance of kai moana to the Maori was very great, as it is today. Just as meat is the staple diet of the pakeha so was seafood the staple of the Maori. It was, as it is now, a matter of mana for the hapu or tribe to provide sea food on any special occasion in much the same way that a pakeha will always have at least one course of meat at any celebration or special social occasion.

Conservation was part of Maori culture. Elaborate laws - at times very detailed - governed use of the sea as they did use of the land. For example it was a rule strictly enforced that in gathering shellfish, a flax kit would be used no larger than was necessary to provide two meals for the household. And what was even more strictly enforced was the rule that such a kit should always be carried - never dragged over the mudflats or shellfish beds. To do so would of course expose other shellfish to the sun, or to the ravages of the sea birds and gulls that would deplete the resource.

Even when whitebaiting it was the custom in many places for children to be given the task of separating and throwing back the females - easily distinguished by the dark stripe that keen young eyes could quickly pick out.

It is not remarkable that conservation should have played so important a part in Maori life, because protection of the resource is not a new idea - it is no more than common sense readily recognised by any intelligent people.

Apart from the land and the sea, the Maori developed another cultural treasure in wood and stone sculpture. Every wharenuī or meeting house was carefully decorated over many generations as we in the European culture used to build our own structures. The whole building was dedicated to a revered tupuna (as we have dedicated our cathedrals to a particular saint) and the ridge pole, rafters and wall posts were all part, symbolically speaking, of that ancestor's body. The ridge pole running the length of the building was his backbone, and the rafters and wall posts were his ribs. Within that building and within that sacred body, the people would gather to meet, to debate and to settle decisions of great moment.

The vertical carved panels along each wall may often appear to the pakeha as no more than grotesquerie - strange shapes vaguely human but distorted and sometimes repelling.

Not so to the Maori. Each panel was another ancestor, a descendant of the tupuna in whose name the building had been erected, and on each such panel were carved the notched loops and whirls so characteristic of Maori sculpture. Each loop was a line of descendants, and each notch on that loop one generation in that particular line.

To the pakeha these panels are mere curiosities. To the Maori they are each an encyclopedia.

To understand values one must understand the culture that creates those values. To understand the culture one must understand the people. To understand the people, the culture and the values one must understand the language.

Maori culture is the heritage of our nation unique in the world, rich in song and story, with an oral literature in poetry and narrative that is to be found nowhere else. It could make the New Zealander a different person from his Australian and Canadian and English cousins. When we grow to value our national heritage and to recognise the worth and value of Maoridom we will all become unique in the world - New Zealanders - who can point to our polynesian and pakeha histories that complement each other and make the blending of the two richer than each single culture standing alone.

The Maori New Zealander can see this. It is his pakeha compatriot who has yet to appreciate it. To do that he must somehow rid himself of the ethnic arrogance that has led him to believe that the European culture is superior to all others - with which Japanese, Chinese, Arabs and many more have never agreed - and that the English European is superior to all other Europeans - with which the French, the Germans, the Scandinavians, let alone the Irish have never believed to be true.

But you may say to yourselves - what is a Maori? Are they not almost all partly, or even mainly, European? Let us consider that question. It deserves to be answered on its own

3. WHAT IS A MAORI

In the first half of this century it was widely believed that the Maori was dying out. From a population of well over a hundred thousand in 1840 numbers declined until the turn of the century when the total Maori population is recorded as being 42,100. As it has turned out those expectations of extinction by assimilation have not been fulfilled. The Maori population in this century has increased eight-fold and was estimated in 1981 at 385,000.

But an important question is, what is a Maori? The Waitangi Tribunal has answered this question in the following way:

"... It can fairly be said that at the root of many conflicts between races lies a belief in racial supremacy - the idea that one race is better than another. There is nothing new in this, it is as old as mankind. So a European will consider himself racially superior to an Oriental, while the Oriental will regard the European deprecatingly as no more than "a hairy barbarian". (The Japanese word for foreigner means exactly that. Even the English have a saying "All Wogs begin at Calais!" Superiority or a sense of superiority is to be found everywhere). The soundness and justification for the disposition is open to doubt.

" The early settlers in this country (and some more recent migrants too) brought with them all the prejudices that they themselves inherited, and after the atrocities committed (by both sides) in the Land Wars those prejudices became ingrained at least for a time. They brought forth an attitude of superiority towards the Maori that persisted, but the exploits of the Maori Battalion in the Second World War had a

profound effect on both Maori and pakeha alike. The pakeha came to respect the Maori soldier for his military prowess and the whole community admired the men of the Maori Battalion for their courage and gallantry. The Maori on his side realised that he was just as good a soldier as his pakeha comrade in arms and on his return to New Zealand at the end of the war he carried himself proudly no longer feeling himself to be one of a conquered people as his father and grandfather had felt before him. It was probably in the sands of the desert and in the mountains of Italy that the new Maori renaissance had its origins. There was born then and is to be found everywhere today the feeling that the Maori is every bit as good as the pakeha and that he will not tolerate in any way the attitude that he is some kind of inferior being.

" The truth is that many pakeha New Zealanders have never regarded their Maori compatriot as inferior - especially those who have been born and bred in this country and who have grown up with Maori playmates. But some New Zealanders more especially those who have come here recently or whose geographical location has meant that they have never had anything to do with Maoris have persisted in an attitude of superiority. It is these who are most likely to say that most Maoris are "not of full blood" - as if that makes any difference. The idea is that if a Maori has European ancestry then really speaking he is European. The Maori looks at the same situation from exactly the opposite point of view. He says that if someone has a Maori ancestor, then that person is a Maori even if his ancestor was three or four generations back.

14

"Statistically speaking the Maori view is the correct one because now any person who is descended from a Maori is Maori for the purposes of the Maori Affairs Act, the Treaty of Waitangi Act, the Electoral Act and many other statutes. The real test is the attitude and disposition of the person concerned. So long as he is descended from a Maori he can choose for himself whether he regards himself, or is to be regarded by others, as a Maori or as a pakeha.

"This throws into relief the difficulty of population projections. Who can tell how many people in the future will regard themselves as being Maori, and how many whose ancestry qualifies them to do so will prefer to consider themselves to be European? Being "Maori" rather than "European" is as much psychological as biological. A Maori is one who has Maori ancestry and who feels himself to be Maori ..."

Population projection is an inexact science. It depends upon many assumptions, birth rates, death rates, immigration and emigration patterns and other factors as well. But there is a view held by some that the Maori population of New Zealand is to increase rapidly over the next two or three generations and that in some parts of New Zealand especially north of Taupo, it may even become the majority. A demographer from the University of Waikato has suggested that in fifteen years time 25% of all children leaving school will be of Maori descent, and north of Taupo that proportion will be 50% of all school leavers.

If that projection is anywhere near right it needs only a moment's thought to realise what a change could be wrought in many parts of the North Island, in the Bay of Plenty, in Rotorua, in Northland and in parts of the city of Auckland.

The sense of injustice over land losses in the last century is as vivid today among our Maori compatriots as ever it was. But it would be wrong to think that all land grievances had their origins a hundred years or more ago. Many such grievances are comparatively recent, some within living memory. The Bastion Point troubles do not go back to 1840 when Api Te Kawau stood on the top of Mount Eden and stretched out his arms to Hobson Bay in the east and Cox's Creek in the west thus marking out the 3000 acres he sold to Hobson for £241. Nor do they relate to the fact that within nine months Hobson sold 44 of those 3000 acres for £24,275.0.0. The trouble at Bastion Point arose mainly during the first World War.

On another level, until as recently as 1974, the Public Works Act empowered the Crown or any local body to take Maori land without any notice to the owner, a source of much grievance and the reason why so many of our country roads have inexplicable bends in their alignment when running across level country.

The deepest and most dangerous Maori grievance today is in Education. The Waitangi Tribunal has canvassed this matter recently in its Finding on Te Reo Maori. It had evidence that Maori children and pakeha children have very different levels of success in education. For the year 1983 for example it was shown that out of every hundred pakeha children who left school in that year, 37 had not attained a pass even in three subjects in the School Certificate examination. For Maori children in the same year 76 out of every hundred left school without three such passes.

It then went on to say:

"... The education system in New Zealand is operating unsuccessfully because too many Maori children are not reaching an acceptable standard of education. For some reason they do not or cannot take full advantage of it. Their language is not adequately protected and their scholastic achievements fall far short of what they should be

"The promises in the Treaty of Waitangi of equality in education as in all other human rights are undeniable. Judged by the system's own standards Maori children are not being successfully taught, and for this reason alone, quite apart from a duty to protect the Maori language, the education system is being operated in breach of the Treaty.

"When such a system produces children who are not adequately educated they are put at a disadvantage when they try to find work. If they cannot get work that satisfies them they become unemployed and live on the dole. When they live on the dole they become disillusioned, discontented and angry. We saw such angry people giving evidence before us. They are no more than representatives of many others in our community.

"When one significant section of the community burns with a sense of injustice, the rest of the community cannot safely pretend that there is no reason for their discontent. That is a recipe for social unrest and all that goes with it. Recent events in other places illustrate this fact with tragic vividness ..."

The Maori perception is that the Treaty of Waitangi has not been honoured by the pakeha. The history of legislation in this country from 1863 to 1974 abounds, they say, with clear examples of statutes passed in direct violation of the Treaty and to their disadvantage.

But the deepest grievance is not so much in land as in education, and in the sense of injustice that all these matters have engendered.

The Tribunal has adverted to this matter too when it said: "Whether this attitude is justified or not, it is real and quickly develops into a feeling of injustice. We have to say that it is a common experience of mankind that

there is no more dangerous element in the community than a sense of injustice and when it is felt by a growing section of society the results can be explosive ..."

It is reasonable to say that the right to equality in education is one of the rights guaranteed by the Treaty. As to this the Tribunal found as follows:

"If the people of New Zealand want to avoid racial tension and racial violence in the future the place to begin is in the schools. The more pakeha New Zealanders grow up knowing Maori culture and history (for which they must be familiar with the language) the more will adult New Zealanders relate warmly to one another as pakeha and Maori come to show each other mutual respect. The days of looking down on Maori values as being inferior or even worthless must be put behind us if we want peace and harmony. It is possible. It is necessary. It is urgent. And with goodwill from the community and good leadership from the highest levels in the Government and its administration it can be done to the great benefit of us all now and in the years ahead ..."