

Extract from Lecture by Chief Judge Durie
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THE TREATY OF WAITANGI

..... The Treaty was born of a desire that British settlement in New Zealand would have the prior agreement of its owners, the Maori tribes. No-one, to my knowledge, disputes the propriety of that course. The rule is even more settled today in international law, that the occupation of the territory of another requires some authority or licence from its owners. The authority, conceded by the Treaty in this case, was in the form of an agreement whereby the right to govern passed to the British Crown, in exchange for an undertaking to maintain Maori interests. Looked at that way, the Treaty of 1840 was a constitutional arrangement for the settlement and governance of the country on prescribed conditions.

It is not generally well known that for years after 1840 the Treaty was acknowledged as a basis for political and legal administration. Certainly, at the distant New Zealand frontier there were disagreements as to how the Treaty should be applied. The claim of North Auckland Maoris, for example, to the right to administer tribal laws on unceded lands, had not the concurrence of the Governor, and the first outbreak of fighting came in the North as a result, in 1845. Nonetheless, Colonial Office instructions to New Zealand Governors required "punctillious" recognition of the Treaty, and the New Zealand Courts had no difficulty in drawing from the Treaty's principles for the determination of law. In that respect, New Zealand was then no different from other places, in Africa, Asia and North America, where Treaties with indigenous populations had also been secured. The difference in the New Zealand case, was that while Treaties with other groups, with the Indian tribes of North America for example, continued to be recognised in law if not always in practice, the Treaty in New Zealand was soon struck down and was held to have no application at all.

The denigration of the Treaty coincided with three telling developments in our history. In the first instance, in the 1850's the Government of New Zealand passed from Imperial control to local settlers. For them the Treaty was at best inconvenient. In the second instance, by 1858 the Maori were outnumbered by some 3,000 people, migration having swollen the ranks of one partner to the Treaty, disease having dramatically reduced the other. In the third instance, war broke out over the settlers need for more land and the resolve of tribal authorities to part with no more of it. The war resulted in the confiscation of native lands in 1863.

In the wake of these developments, the New Zealand Courts gave absolution to the political opinion of the time, that the Treaty was, or ought to be, a "mere nullity".

We had then a Fijian situation with roles reversed. In New Zealand, when the population balance changed, it was the non-indigenous who overturned that which was constitutionally fundamental. The non-Maori then took over, land was confiscated and, in 1867 when numbers would still have given the Maori considerable political influence, we placed a gloss upon democracy to limit Maori parliamentary representation to four seats.

In any event, several generations of New Zealanders, including our own, grew up conditioned to the 1860's view that the Treaty had no significance and the indigenous people no greater rights than other citizens. We were abetted in that opinion by the long held New Zealand policy for the amalgamation of the Maori into western society.

What caused us to change all this in the last few years? The Maori now comprise a mere 9% of the population. The race origin of the majority remains overwhelmingly British. 79% of Maoris are now urban dwellers to all outward appearances living little differently from anyone else.

The change came from a combination of factors, not least of which is the resilience of culture and the preferred lifestyles of human beings. The lesson of time is that we ignore these things at our peril. Maori adherence to tribal customs and values was too long held to be subsumed. The culture had survived every vicissitude put upon it, power loss, land loss, amalgamationist policies and urbanisation; but in the 1970's, when the physical survival of the people was assured, cultural survival was proclaimed too. The wounds of historic process were then exposed to view and the Maori people made known their protest that they had had enough.

There was added to that, in the search for a wider world peace, a developing international concern with human rights, minority rights and the rights of indigenous people. The New Zealand stance appeared increasingly suspect. Our claim to the best race relations in the world told only of the extent of our misconception. The United States recognised Treaty rights but we did not. Canada upheld native fishing rights that we knew not of. Reservations for the maintenance of tribal estates were unheard of here, and native values were seen as of no particular significance in the administration of New Zealand affairs.

In any event in 1975, after some protesting by Maori people, the New Zealand Government established a tribunal to measure state policies and practices against the principles of the Treaty and to advise Government on what might be done to restore the concepts of the Treaty in national administration. It was a unique experiment to resurrect the Treaty in that way, not fully a part of the law and yet provided for within it. It was soon apparent however, after the first few claims were heard by the Tribunal, that many changes in policy were needed to accommodate the Maori way. It was even recognised, that making those changes to appease a Maori minority, improved as well our national performance, in environmental management for example, and helped to establish a distinctive New Zealand society for the greater peace and advantage of all. In any event, Government was moved to stipulate for adherence to the Treaty in several new laws, the bureaucracy was motivated to require a Maori perspective in its public service delivery and the Courts showed a new awareness of things Maori in many of their decisions. With Maori pressure, international influence, and through the work of the Tribunal, the Treaty, or at least the spirit of the Treaty, is gradually being exhumed.

All this has happened after the Tribunal has heard only five cases, for, quite wisely I think, the Treaty has lumbered along at dinosaurial speed. More recent changes however suggest the Tribunal will need to hurry up. In 1986, the Tribunal's jurisdiction was extended to consider as well claims for reparation for past wrongs. There are now some 80 claims in this category, and, I am given to understand, each is more pressing than any other.

With these new developments, it is timely to reflect again on what the Treaty means.

Stripped to its barest essentials, the Treaty vested sovereignty in the Crown, and conferred on the Maori a royal protection (in the preamble), a guarantee in respect of land, hunting and fishing rights (in article the second), and full rights of citizenship (in the third). That summarises the English version. There is however a Maori text too, not quite a translation of the other, and much weight must attach to it for it was the Maori text that was mainly signed and used. It conferred on the Maori protection, and the unqualified right to exercise chieftainship over their lands, villages and all things treasured. I do not wish to dwell upon certain rules or interpretation that enable the Treaty's bare words and the conflict between the texts, to be fleshed out and reconciled by reference to surrounding circumstances, policies and things said at the time. Given the two texts, and the factual matrix of the Treaty's execution, it seems sufficient to say that by the Treaty, government and settlement rights were exchanged for an undertaking that Maori needs relevant to their culture would always be upheld and respected.

There exists, as a result of the Treaty, a partnership between the Crown, or Government, and Maori people; a partnership that requires reasonableness and utmost good faith on both sides to be effective. That at least is the binding view of our Court of Appeal as pronounced less than 3 weeks ago. Pertinent to that opinion is the conclusion that the Treaty is always speaking. It applies to today's world. It is not that the principles of the Treaty change, but rather that they are to be freshly applied to changed and changing circumstances.

It ought not to be overlooked however, that the Court of Appeal, in its landmark decision, while putting New Zealand to the forefront in judicial enterprise for the maintenance of human rights, was able to draw upon the Treaty only because Parliament had put it into the particular legislation that the Court of Appeal reviewed. It does not follow that the Treaty has application to all laws. A Bill of Rights that incorporates the Treaty or some other constitutional arrangement would be needed to do that. A Bill of Rights with the Treaty in it is now under Parliamentary consideration.

So it is that the Treaty has still no status in law, save to the extent that Parliament provides for it. Of course, no one told the Maori that that would be so when the Treaty was signed, or that partnership would be conditional upon the affirmation of a democratically elected Parliament.

I am reminded then of the words of an Indian lawyer, the past President of Law-Asia who spoke in Kuala Lumpur this month, only two days after the Court of Appeal decision in New Zealand. "It is in the very foundations of democratic government" he said, "that the rights of minorities are jeopardised. For in a modern democracy (and no country professes it is not) everything is determined by counting heads ...". He stressed therefore the protection of minority groups through entrenched constitutions or Bills of Rights, supervised by an independent judiciary. The burning question then is whether New Zealand will follow the lead of many other countries in adopting a Bill of Rights that includes the Treaty. The issue it seems, is contentious. Most New Zealanders, it appears, see little need for such a Bill. That is entirely to be expected, for most New Zealanders have not shared the Maori experience.

Nor do I think most New Zealanders appreciate the extent of Maori loss that followed the denigration of the Treaty, or the deep seated grievance that continues to exist as a result. It is not well known either that initially, the Maori adapted with alacrity to western commercialism when settlement first began, planting large areas, establishing flour mills and becoming the main suppliers of food and provisions to the emerging settlement towns through the 1850's. The Maori dominated shipbuilding and coastal trading, exported even to Australia, established printing presses and one tribe opened its own bank.

Change was easy then for change was on Maori terms, but after home government, a population reversal and war, the Maori lost nearly all that they treasured. Land confiscation was far less devastating than the confiscation of tribal law and authority over what remained, or the individualisation of native land titles, to expose a handful of individuals to relentless policies for wholesale land acquisition.

Land loss, to an unconscionable extent in my view, led inexorably to a decline in Maori living standards, a fall in population and eventually, for most Maori were rendered landless, a shift to towns in search of work. Less than 5% of New Zealand is Maori land today. Much of that is on poorer country and most is scattered, the small remnants of large scale acquisitions. 79% of Maori, those who call themselves "the people of the land", now live in urban areas, where many are socially disadvantaged. The Maori is more than twice as likely as others to be unemployed or totally welfare dependent and only half as likely to own their own homes. Those earning earn less (80% the national average). 4% Maori men are self employed compared with 21% non-Maori and 63% Maori, as against 28% non-Maori leave school without any formal qualifications. The Maori comprise less than 1% of those in professions, and though only 9% of the total population, they comprise nearly half of those in prison, to rank as one of the most imprisoned races in the world.

It was under democratically elected governments that most tribes lost the greater proportion of their lands. It was under democratically elected governments that the Maori suffered the pressures of assimilation that deprived them of their own laws, tribal authorities and their traditional methods for maintaining social control.

The resurrection of the Treaty may not salvage past losses, but may at least ensure that the past is no longer continued. In the meantime, without full recognition of the Treaty for the maintenance of the indigenous peoples rights, it seems to me somewhat hypocritical that we should criticise developments in Fiji, in paying homage to democracy, or should presume to occupy the moral high ground in international forum.

We need to distinguish here, international standards for the protection of minorities generally. Indigenous minorities claim all the associated rights and then some, and the Treaty achieves the same thing. The distinction is important however. I am not opposed at all to the trend to multiculturalism in our country provided it is recognised that the Maori is more than just another minority culture. Too often, I feel, Maori claims for assistance are met by the rejoinder of 'what about (some other named group)', and that other group can often be relied upon too, to claim advantages secured to the Maori. That the Maori should take a dim view of this is in my view entirely justified. Their culture has no other home base to sustain it than right here, and the people no other place of particular status than in Aotearoa. It is that status that the Treaty was meant to guarantee.....