

RAUPATU: THE SEARCH FOR JUSTICE

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From the 1860s right through until the present day, Raupatu has had a devastating effect on the Tainui people. Left landless and without other economic resources, Tainui have suffered poverty, unemployment, ill health, low levels of education, loss of culture and mana, and political powerlessness. Governments, rather than addressing the issue of unjust and unlawful Tainui land loss, have offered band-aid systems of unemployment, sickness, and family benefits: negative forms of funding which result only in short-term solutions to immediate problems rather than the establishment of an economic base with its consequent comprehensive improvement in the life of the tribe.

This paper outlines some of the means by which the longstanding grievances of the Tainui people over Raupatu, or land confiscation, may be addressed. Specifically, it describes the outcomes that the Tainui Maaori Trust Board wishes to achieve through direct negotiations with Government.

An international perspective

During the past two decades there have been significant international developments concerning the legal and human rights of indigenous people. The efforts of the United Nations, the International Labour Organization, and other international and non-governmental organizations have caused a growing number of nation-states to begin re-examining the legal and moral implications of their policies and laws for indigenous tribal minorities. As a result, the fate of the world's 200 million indigenous people is no longer just a local or national "domestic issue". The rights of indigenous peoples are now of worldwide concern and the basis for legal action.

What is happening (or not happening) in New Zealand must be viewed against these larger developments. Already the courts and the Waitangi Tribunal have made extensive use of international laws, covenants, standards and principles to reach their decisions and recommendations on Maaori claims. As a signatory to many of these international instruments, New Zealand has a legal and moral responsibility for their "full and faithful" implementation. What follows is a brief overview of some of the international agreements that have relevance to the Tainui claims.

The United Nations

Over the years the United Nations has ratified a number of instruments that are applicable to land and property rights of indigenous people. Besides Article 17 of the UN Charter and Articles 6, 7, 8, 17, and 22 of the Universal Declaration of Human Rights, the UN General Assembly in 1986 passed Resolution 41/32 which states that the "right to property" is fundamental to the enjoyment of other human rights. In 1987 the UN Commission on Human Rights adopted Resolution 1987/17 to encourage states to provide legal protection of property rights. Similar statements can be found in the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights (all 1966).

In 1988, Madame Erice-Irene Daes submitted to the UN Working Group on Indigenous Populations a "Draft Universal Declaration on the Human Rights of Indigenous Peoples". Part III provides for "individual and collective ownership of

lands or resources which they have traditionally occupied or used. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement." Land rights include "surface and substance of resources pertaining to the territories they have traditionally occupied or otherwise used including flora and fauna, waters and ice seas." Where lands and resources have been taken, indigenous peoples have the right to "reclaim land and surface resources or where not possible, to seek just and fair compensation . . . when the land has been taken away without their consent."

Convention 169

Convention No. 169 of the International Labour Organization (1989) applies to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community." It calls upon nations to uphold the cultural, economic, religious, educational and political integrity of indigenous people, and to ensure they receive equal treatment under national laws and programmes. To avoid the use of "equality" as a guise for national assimilation, all the Convention's articles make clear that state consultation and cooperative planning with indigenous people is essential in those areas, such as education and economic development, that may affect their rights or well-being.

On the subject of education, for example, the Convention says: "Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations."

Furthermore, the Convention includes guarantees for the protection of indigenous languages and their use in education, as well as the right to establish educational institutions and to implement their own educational programmes.

In regard to lands the Convention says: "Adequate procedures shall be established within the national legal system to resolve land claims by the people concerned"; "Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences." Where violation of land rights occur, the state has the obligation to restore these rights or, where not possible, to provide ". . . lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."

Official New Zealand comment on Convention 169 cites the rights to Maaori under Article III of the Treaty of Waitangi, and notes that Article II "guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain. The preservation of a resource base, restoration of iwi self management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga." Similar comments of support for rights to self-determination and culturally relevant education were expressed by the New Zealand Permanent Representative.

It should be noted that the New Zealand comments on draft principle 27 of Convention 169 state that the proposed wording of the "right to claim that states honour treaties and other agreements with indigenous peoples" is weak. New Zealand called for:

". . . a mechanism to ensure that states honour their treaty commitments. In the New Zealand context, the Treaty of Waitangi Tribunal was established . . . to hear grievances and make recommendations about alleged breaches of the courts and direct negotiations. The important point is that the Government accepts its

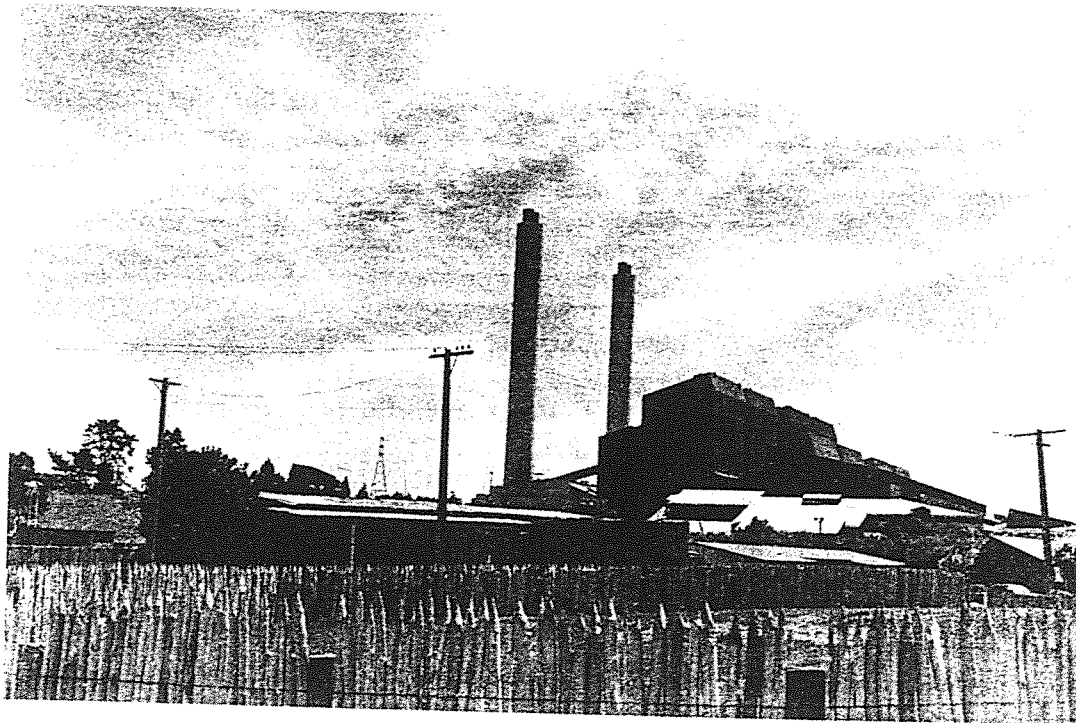
responsibility for providing a process for the resolution of grievances arising from the Treaty.”

The courts

Similar developments are emerging in national and international courts concerning indigenous people's rights, particularly where land and natural resources are involved. With a few notable exceptions, these court decisions have re-affirmed the legal standing of treaties involving indigenous people.

At the national level, an increasing number of court decisions – for example, in the United States, in Canada (*Saanichton Bay Marina Ltd v Claxton*, 1989), India (*Lal Chand Mato and Others v Coal India Ltd and Others*), and Brazil – suggest a convergence in legal thinking which is also reflected in more recent political developments in Eastern Europe and amongst other captured ethnic and indigenous peoples.

What one can conclude from the UN initiatives and the growing list of court cases is that it is becoming increasingly difficult for nation-states to impose “equality-as-assimilation” and parochial judicial reasoning to maintain control over the legitimate aspirations of indigenous people.



The historical background

The present attempts by the Tainui Maaori Trust Board to seek redress for the confiscation of their lands are merely the most recent in a long series of efforts.

At the commencement of colonization, and seeking to avoid the devastation of indigenous groups which had followed other British colonial ventures, the Treaty of Waitangi embodied the principles which were supposed to guide ethnic relations: in return for the Crown's right to buy any land the Maaori wished to sell, and for recognizing the Crown's sovereignty (English language version) or administrative governorship (Maaori language version), the full rights of Maaori chieftainship were guaranteed; Maaori possessions (lands, forests, fisheries, and other treasures) were protected; and the Maaori were granted the rights and privileges of British subjects.

At first the Treaty was upheld but, once the chiefs realized that land was being sold in such quantities that the economic viability of their tribes was threatened, they resolved to shut up shop. Maaori rights were violated as the colonial government moved to acquire more land. Waikato lands were invaded and tribal members were wrongly labelled "rebels" for defending their homes.

Following this armed conflict, one-and-a-quarter million acres of the most fertile and productive lands in New Zealand were confiscated under provisions of the 1863 New Zealand Settlements Act. Although some lands were later returned (314,364 acres), they were not returned to the original owners but rather to those Maaori (kuupapa) who fought with the British.

As a result of Raupatu, Tainui's economic foundation and previous affluence were destroyed. This has had grave and continuing consequences for the well-being of Tainui people.

There has been a constant stream of attempts to obtain justice, including delegations to the Queen of England and petitions to Parliament. The outcome has included several Commissions of Inquiry, several series of drawn-out negotiations with the Crown, a Waitangi Tribunal hearing in which the issue was indirectly addressed, and an Appeal Court hearing on the ownership of coal within the Raupatu boundary.

The Sim Commission in the 1920s found that Waikato people were forced into the position of being "rebels" and then had their lands confiscated. However, the brief of the Sim Commission did not include consideration of the legality of confiscation. Hence, while coming down on Waikato's side, the finding was limited to a judgement that confiscations were excessive.

After almost twenty years of negotiations between Tainui leaders and the Crown, a first step was taken: the Tainui Maaori Trust Board was established in 1946 to administer a small annual grant. As the historical record indicates, this settlement was inadequate and further measures are needed.

Historians including Sinclair, Dalton, Ward, Belich, Sorrenson and Orange agree:

"... that the Tainui people of the Waikato never rebelled but were attacked by British troops in direct violation of Article II of the Treaty of Waitangi."

(Waitangi Tribunal, Report No. 27.)

More recently, the Bentinck-Stokes Commission (1981) found that confiscations were illegal, and the Waitangi Tribunal hearing on the Manukau (1985) stated that the problems created by Raupatu must be fixed.

In 1989, the Appeal Court adjudged that the 1946 agreement was inadequate and that Tainui has rights to lands in the Raupatu area. Now, the Crown has undertaken to enter direct negotiations concerning Raupatu.

The negotiation strategy

A just settlement would involve the return of all the Raupatu area, full compensation for wrongs done to Tainui, and full compensation for lost economic opportunity. However, the majority of the Raupatu lands have passed into private ownership and a settlement of this magnitude would run into billions of dollars – an unrealistic prospect in the present political and economic situation. Therefore, Tainui anticipates a progressive settlement based on two fundamental principles:

I riro whenua atu, me hoki whenua mai

– as land was taken, so land should be returned

Ko te moni hei utu mo te hara

– compensation should be made for past wrongs

In other words, serious negotiations will result in a mixed land, resource, economic, and political package. The composition of this package must provide for a strong tribal economic base.

The relief package sought is comprised of the following parts:

- land for land
- return of resources
- compensation for wrongs done and opportunities lost

Each part has several components. The Tainui negotiators, together with the Crown, should identify those components which can be immediately agreed to, those which will require some time but are resolvable in the near future, and those which should be discussed later.



Land and resources

The title to all lands in the Raupatu area should be transferred to the Tainui Maaori Trust Board or, where that is not possible (i.e. where lands have passed into private ownership), land of comparable value substituted. In practice this would mean:

- Return of viable farmlands to assist hapuu (sub-tribal groups) affected by Raupatu.
- The title to land and resources utilised by SOEs, such as Coalcorp, transferred to Tainui and partnerships established for management. A plan for the training and employment of Tainui people in all facets of these operations would be implemented.
- The title to Crown properties being used for post offices, hospitals, etc., returned to Tainui with an agreement to lease back to the present users. A plan for the training and employment of Tainui people in all facets of these operations would be implemented.
- The title to areas designated for parks and reserves transferred to Tainui; the Crown would retain management of these, but Tainui would have the kaitiaki (trustee) role and so must approve of management plans. A plan for the training and employment of Tainui people in all facets of these operations would be implemented.

- The title to the Waikato river bed, inland waterways, and West Coast harbours transferred to Tainui. Tainui would have the kaitiaki role and so must approve of management plans. Naturally, Tainui would be compensated for any use or removal of resources associated with these.

The annual grant

The Crown has paid \$475,000 to the Tainui Maaori Trust Board since 1947. The annual grant should be updated to 1990 dollar values and regularly adjusted for inflation. Also, a back-payment for lost development opportunities should be made as an operating endowment.

Education

Based on the return of tribal lands which were either given or confiscated for educational purposes and used to support New Zealand universities, funding for the following educational package is sought:

- The establishment of two post-graduate endowed colleges, one at the University of Waikato and the other at Auckland. These colleges would:
 - be autonomous, each comprising a physical entity within the university with its own residential, tutorial, study and workshop provisions;
 - be a place of residence for students – predominantly but not exclusively Maaori – who wish to live in a college environment which is Maaori in as many aspects as possible;
 - have a tutorial staff working within the college and offering some specialised lecturing to other departments in the university;
 - provide, through seminar and research activities, a “think-tank” where national matters of policy and international matters of scholarship can be pursued at an advanced level;
 - be a place where scholars of national and international stature may be in residence for varying lengths of time;
 - be a place for Maaori activities and workshops, especially in the arts.
- To establish links with major international universities, the Tainui Trust Board intends to invest in residential properties in these places to accommodate Maaori students. Part of the compensation settlement would be devoted to this purpose.
- The Trust Board is seeking the provision of autonomous technical and vocational training courses (including “second chance” academic instruction) to be operated at various locations in the Waikato and funded through bulk grants on a rolling-triennium basis (the same basis as that of other post-compulsory educational institutions). The Trust Board believes that Tainui students can only succeed in tertiary education if they have exceptional preparation at the secondary level. The present system of secondary schooling is not meeting the needs of Tainui students. The Trust Board therefore seeks assistance in the form of:
 - grants for secondary students to attend residential colleges;
 - the establishment of three Tainui-controlled secondary units for university-bound students, one in South Auckland, one in Huntly and the other in Hamilton.
- Support for Kaupapa Maaori programmes. Although there is widespread demand for additional bilingual units and schools in the Waikato, the existing programmes are handicapped by a lack of Maaori language materials, and new programmes cannot be established because of the lack of qualified Maaori-speaking primary teachers. The Trust Board therefore seeks assistance in the form of:
 - increased resources for the development of materials;

- expanded facilities for training Maaori teachers (guaranteed places at Teachers' College for Maaori students).
- The Board wishes to see a Kohanga Reo established on each marae within its boundaries and, where appropriate, in those urban centres which contain a large number of beneficiaries.

Conclusions

Settlement and compensation as described in the preceding sections will result in long-term socio-cultural, economic, educational, and political improvements in the lives of Tainui people. The return of land will begin to provide an economic base and will serve as a symbol of the return of Tainui mana and pride. The education programmes will assist Tainui children and youth to obtain the qualifications they need to become contributors to Tainui and New Zealand society. The settlement proposed allows Tainui people the opportunity to become the arbiters of their own destiny.

Tainui has selected a strategy for settlement that will result in the least possible impact on national interests, yet allow the tribe to pursue meaningful and reasonable self-determination. The tribe is seeking the return of a small fraction of its traditional land and resources as just settlement for the significant economic, cultural, political, social, and educational losses it sustained as a result of illegal and unconscionable acts by the Crown and other parties. As set forth by the Court of Appeal, the government document *He Tirohanga Rangapu* (Partnership Perspectives), and the Treaty of Waitangi, a spirit of partnership is needed so both Crown and Tainui can achieve what one author refers to as "the sharing of initiative, power, and responsibility."