Commentary

THE TREATY AND THE PURCHASE OF MAORI LAND

WHEN the Labour Government legislated to extend the jurisdiction of the Waitangi Tribunal to hear claims going back to 1840 it did so with the good intention of bringing into the open outstanding grievances which Maori people had not previously had a chance to air. It was hoped that if these could be frankly recognized by an authoritative tribunal, and some kind of remedy or compensation proposed, New Zealand's race relations would be on a healthier footing. But the Labour politicians and their advisers seem to have assumed that these outstanding grievances would be relatively few in number — actual frauds, or the taking of land for public purposes and using it for private purposes, like Raglan golf course — and that these could soon be remedied. What they did not seem to expect was that almost every bit of land in New Zealand could be the subject of claims under the Waitangi Tribunal legislation.

However, anyone who sat on a marae in 1984 or 1985 and listened to the orators would have learnt that the Maori communities felt aggrieved over a great many of the purchases of land under the Native Land Acts, and they were prepared, furthermore, to bring claims to the Waitangi Tribunal. The purchases were lawful according to the introduced law and, as such, were not thought by some Labour government planners to be open to claims. But lawful or not, the Maori people believed them to have been very inequitable at least. Almost all the elders could tell stories of 100 acres or 500 acres taken in payment of survey fees or for a store debt. When there seemed to be lots of land still available, much of it still under bush, this had not seemed to the Maori vendors to be a serious loss. Many titleholders often freely gave agreement to the settlements of debts in this way. But it did not take them, or the community, long to realize that they had sold their birthright for a mess of potage, and the sense of grievance grew to be enormous. Yet the dealings were usually lawful, under New Zealand law. How did they stand under the Treaty of Waitangi? In what sense, if any, can they be said to contravene it?

First a couple of preliminary observations about the Treaty. These are not legal considerations: the lawyers have interpreted the Treaty differently over the years and recent interpretations would give it much more force than formerly.

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There are also important historical considerations that are relevant, about the understandings of the Treaty held by the people involved at the time and soon after.

It is sometimes alleged nowadays that the Maori people were deliberately deceived at the signing of the Treaty — that they were not presented with the options properly, that the Maori version of the Treaty should have used the word 'mana' to indicate what the Maori people were signing away, and that the missionaries, especially Henry Williams, bear a heavy responsibility for misleading the people who placed a trust in them. I do not think any of this is true. I do not believe there was any intent deliberately to deceive the northern chiefs in February 1840, especially on the part of the missionaries there, or among most of the responsible officials and missionaries who later carried the Treaty about, collecting signatures.

There is a lot of evidence that in the late 1830s Maori chiefs, especially in the Bay of Islands and in the South Island, had been 'selling' land to settlers and speculators from Sydney. It was expected that more land-selling would go on when the New Zealand Company's ships reached Cook Strait. The missionaries in New Zealand and the officials in London believed that the only real form of sovereignty that existed in New Zealand before 1840 was that of the chiefs and their people over their own particular land; and that when they sold their particular lands they had effectively deprived themselves of their sovereignty. There was no other 'national' sovereignty that was real and substantial, no central government to exercise it. Inventions like the United Tribes of New Zealand, got up in the Bay of Islands in 1835 to confront the French adventurer de Thierry, did not amount to a sovereign authority. Substantial and effective sovereignty, if it lay anywhere, lay with the chiefs and people of the several tribes. If they had sold their land they had no real sovereignty left, so it was believed in London, and there was scarcely any real need to go through with a treaty at all. There is an explicit minute in the files of the Colonial Office to this effect.[1] However, the British did decide to go ahead with a treaty, partly to be consistent with the previous recognition of the United Tribes, but more seriously because chiefs in other parts of New Zealand had not yet sold their land but were expected to do so. If they were to have any protection at all, so the missionaries and more thoughtful officials believed, the Crown must establish its authority to control the land trade. That is what the treaty was really about.

Now there was a serious misunderstanding in all of this, which underlies much of the difficulty and confrontation that followed. This was over the notion of what was meant by 'selling' land. It is now clear on the evidence, ably presented in Ann Parsonson's analysis,[2] that the Maori leaders, in accepting money and goods and making their marks on so-called deeds of sale, usually had no intention of parting with all their rights, or their hapu's rights, to their main tribal land. Rather they intended to admit the Pakeha 'buyers' into their communities and

1 Draft instructions to Captain Hobson, 24 January 1839, CO 209/4, p.239.

2 Ann Parsonson, 'The pursuit of mana', *The Oxford History of New Zealand*, ed. W.H. Oliver with B. R. Williams, Oxford and Wellington, 1981, pp.147–50.

give them some land to use. They had every intention of regulating the conduct of 'their' Pakeha. Only on marginal land, contended for with other tribes, did they intend to leave the Pakeha more or less in control. 'Selling' there was a way of out-smarting Maori claimants, and the successful seller expected a form of alliance with the Pakeha. However, the missionaries and officials, knowing what rights the settlers had asserted in Australia, North America, and Southern Africa, believed that they would insist on their view of a land purchase, and that the Maori chiefs were really putting themselves and their people at risk and effectively relinquishing control when they sold land. This was a genuine belief and fear on the part of the missionaries. In fact they greatly underestimated the physical power Maori communities still retained over the land — which showed itself in the next two or three years — but in the light of what had happened in other British settlements the fear of the missionaries and responsible officials was quite reasonable. To the missionaries and officials, therefore, the important thing at Waitangi was to ask the chiefs to give the Crown the sole right to acquire the land. Henry Williams and the other missionaries confidently assumed that the Crown would do its best to protect the essential interests of the Maori in the process of settlement, which was considered, by Maori and Pakeha alike, to be inevitable in some form. A missionary, George Clarke, was to be Chief Protector of Aborigines and indeed he and the Sub-Protectors did generally earn the respect of the chiefs for protecting their interests against the settlers in the first three or four years of the Colony.

It is important to note that the Treaty, in the English version, refers to the 'separate' and 'independent' chiefs and tribes of New Zealand, to the 'Tribes and Territories which are specified after our respective names', and in the Maori version to 'nga Rangatira o te Wakaminenga' (the Confederation) and 'nga Rangatira o Nu Tirani'. The British consistently believed that (apart from the rather phoney Confederation) they were dealing with the several and separate chiefs and tribes and that they had no intention of diminishing the authority of the chiefs in respect of their own tribes and hapu. The questions and responses at Waitangi were explicit on this point, and other official statements later reinforced it. The Treaty was not, in the British view, made with a united Maori nation or people, for such did not exist. Nor did the chiefs at the time assume that it did. It is therefore difficult to base upon it today, as the modern Maori protest movement does, an agreement between two co-equal parties, or to erect on it a claim for equal power between Maori and Pakeha in a senate or upper house. It was, rather, an agreement between the British crown and several hundred separate Maori chiefs, whose authority in their own communities the British intended to respect. That is why they recognized the rangatiratanga of the several chiefs (the authority of the heads of Maori families and lineages). It was an explicit recognition by the British negotiators at Waitangi that contrasts with the omission of any such provision in the 'unsigned treaty' being drawn up virtually the same week by Governor Gipps of New South Wales, for presentation to the Ngaitahu chief Tuhawaiki and other rangatira visiting Sydney.[3]

3 See texts in Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987, Appendices 2 to 5.

Indeed some missionaries believed they would actually strengthen and increase chiefly authority, which was being threatened both by settlers and by disobedient Maori as the controls of the old society weakened. In this respect the missionaries were muddled, not fully appreciating how their own teachings against killing and tapu and makutu were weakening chiefly authority, or that by 1842 the new sovereign authority of England would lead to the hanging of a chief for murder. Yet, though muddled, the missionaries were genuine, not deceitful, and Clarke indeed designed a framework of government (which Governor FitzRoy partly introduced) that gave the chiefs authority in the administration of justice among their own people.

Things really started to go wrong with the arrival of Governor Grey in 1845. While making honorific gestures to the chiefs, and working through them to a great extent, Grey nevertheless systematically eroded their authority. Several decisions on land, notably in respect of reserves in Wellington, relied on the authority of the Crown and set aside chiefly rights. The missionaries began to protest. That, and the military prowess of the Maori, persuaded Grey to respect Maori claims to uncultivated land, which the 1846 constitution sought to set aside. Indeed most land purchases in the 1840s and 1850s (while full of clauses about reserves and supplementary payments which were often later neglected) did generally respect Maori rangatiratanga. Purchases were generally fully discussed by chiefs and community and usually only proceeded with general agreement. Thus Sir William Martin, a former Chief Justice of New Zealand with 'philo-Maori' leanings, could write, rather too blandly, in 1861 (in a pamphlet opposing the Waitara purchase):

> This tribal right is clearly a right of property, and it is expressly recognised and protected by the Treaty of Waitangi. That treaty neither enlarged nor restricted the then existing rights of property. It simply left them as they were. . . .
> The rights which the Natives recognised as belonging thenceforward to the crown were such rights as were necessary for the government of the country, and for the establishment of the new system. We called them 'sovereignty'; the Natives called them 'kawanatanga' (governorship). This unknown thing, the 'governorship', was in some degree defined by a reference to its object. The object was expressed to be 'to avert the evil consequences which must result from the absence of law'. To the new and unknown office they conceded such powers — to them unknown — as might be necessary for its due exercise. To themselves they retain what they understood full well — the 'tino Rangatiratanga' (full chiefship), in respect of all their lands. These rights of the tribes collectively, and of the chiefs, have been since that time solemnly and repeatedly recognised by successive Governors, not merely by words but by acts; for, through the tribes, and through the exercise of the chief's power and influence over the tribes, all the cessions of land hitherto made by the Natives to the crown have been procured.[4]

Little land was sold in the North Island, however, and after Grey's departure the Chief Land Purchase Commissioner, Donald McLean, tried to push through purchases from a few compliant chiefs, ignoring wider chiefly and community

4 *Remarks on 'Notes Published for the New Zealand Government'*, Auckland, 1861, cit. AJHR, 1890, G-1, pp.5–6.

objections. He was not very successful, and forced his methods to a ruthless conclusion at Waitara in 1859–60. As Keith Sinclair has shown in *The Origins of the Maori Wars*, he persuaded Governor Browne to force through the purchase of the land offered by Teira against the objections of the wider Atiawa community, under their chief Wiremu Kingi. All Maoridom protested, including the chiefs assembled by Browne and McLean at Kohimarama in 1860. The Anglican missionaries, still consistently respecting individual rangatiratanga, protested almost unanimously and were largely responsible for getting Browne removed. But the Waitara purchase was a major overt breach of the Treaty promises, and Maori organizations, like the Kotahitanga later in the century, were largely correct in stating that 'Waitara was the root; the evil began at Waitara'.

More was to follow as the Native Land Acts of 1862, and more especially of 1865 and 1873, created negotiable titles for Maori land. Each person named in the title — ten persons, usually chiefs, from 1865 to 1873 and all persons awarded the title after 1873 — could sell their individual interests in the land. A block could be purchased piecemeal and partitioned — this is in fact what generally happened. Once the land went through the Native Land Court, it got whittled away by the purchase of individual signatures. The land laws succeeded in overcoming what Wiremu Kingi, and later the King Movement, had successfully defended — the right of the community, collectively, under its chiefs, to regulate land alienation. Moreover the Native Land Acts set aside the Crown's exclusive right of purchase established by the Treaty, and opened the land to private purchase. A ruthless scramble set in with the wealthy and the unscrupulous having the advantage. A century of purchases under the Native Land Acts wrought enormous damage to Maori society. The constant 'teasing for land' weakened and divided Maori communities and frustrated many efforts at the resumption of agriculture, which had flourished on a tribal or hapu basis before the wars. It left Maori people resentful and bewildered at the inexorable passing of the land.

Moreover, almost all the purchases under the Native Land Acts were probably in breach of the Treaty of Waitangi: besides abolishing the Crown's right of pre-emption, the land law fundamentally shattered the principles of rangatiratanga which the Treaty had undertaken to uphold. Obviously the selling of individual bits of the tribal patrimony by individual Maori after 1873 was in breach of the rangatiratanga principle. But so too was selling under the 'ten-owner' titles of 1865–73, for, even if the ten were chiefs or rangatira, they had obligations under custom to consult with their people and to reflect rather than dictate community opinion. Regrettably they were all too readily induced, by private or government purchasers, to sell their signatures to transfers of the land without consultation with their communities. Investigation of all these early dealings would be difficult now, but there are many which are well documented, like the sale of the Heretaunga plains, which show how the individual chiefs were induced to sell after they had received a Native Land Court title.

If almost all land purchases after 1865 were under laws and processes which breached the rangatiratanga principle, and therefore the Treaty of Waitangi, what can be done? Almost all Maori families, in their marae discussions, do cite

grievances of this nature and almost all could bring claims. The Waitangi Tribunal would soon become bogged down and the process designed for frank disclosure, leading to reconciliation, would break down amidst frustration and the souring of raised hopes. Indeed it is arguable that in granting the tribunal retrospective jurisdiction, in the 1985 amendment, the government was widening the basis of claims, without thinking through the manageability of the process it was setting in train.[5]

Fortunately, Chief Judge Durie of the Waitangi Tribunal has recognized the risk and has encouraged claims to be brought and discussed on a tribal basis. The Kaitahu claim in the South Island is likely to show up any flaws in the pre-1860 purchases. But these at least were usually made with the chiefs and people in open discussion and with some community consensus (though perhaps rarely with full understanding). Claims by North Island tribes will almost certainly expose the fundamental distortion of the customary land tenure system wrought by the Native Land Acts. Indeed the Waitangi Tribunal findings of November 1987 on the Orakei claim have gone a long way towards doing so.[6] Some attempt at compensation on a tribal basis to assist the restructuring of tribal authority, such as is now being attempted among many communities in New Zealand, might go some way towards reaffirming a principle that was explicitly discussed and affirmed in 1840.

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5 It is hard to conceive of a more open-ended drafting than Section 6 of the 1975 Act and its successor, Section 3 of the 1985 Treaty of Waitangi Amendment Act.

6 *Report of The Waitangi Tribunal on The Orakei Claim*, Wai-9, Wellington, 1987, esp. pp.32–62.