

Comparative Indigenous Rights and Serendipity

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The legal effect of colonisation has long been explored, sometimes famously, through judicial decisions in the colonised countries. Each legal regime comes to use a language emerging from its own background and structure – “domestic dependent nations”, “aboriginal rights”, “treaty rights” and the like. In modern times the aspirations of the indigenous peoples themselves are increasingly expressed in terms suggested by international human rights law – self-determination, consultation, good faith and rights to the enjoyment of culture.

The purpose of this brief note is to report on a distinctive feature of New Zealand’s constitutional arrangements: the happy but somewhat accidental alignment between the nation’s foundational document – the Treaty of Waitangi, made in 1840 between the Queen of England and the Maori chiefs – and the imperatives now brought to bear by article 27 of the International Covenant on Civil and Political Rights.

Treaties with indigenous peoples were, of course, common enough in the colonial era. But while the North American treaties often partook of the character of land transactions, the New Zealand one was explicitly about sovereignty.

A story worth telling, then, is the serendipitous choice of text for this treaty. That choice has served to ensure the Treaty’s continuing relevance in modern New Zealand (one hastens to add, a relevance that has surfaced only after 150 years of being on or near the “back burner”). The Treaty text neatly articulates a modern issue in relation to indigenous peoples in colonised countries: is there room for a continuing domestic Maori self-determination, for accommodation of their cultural rights, and for consultation on matters affecting them?

The Treaty of Waitangi and the Maori dimension of New Zealand

The Treaty of Waitangi was signed in February 1840. Its origin lies in the decision of the English Government in 1839 to seek a cession from Maori chiefs of their sovereignty over New Zealand. This would enable the assertion of English authority over the growing number of settlers who were making their way to the then recently discovered isles. But it seems plain that a power to govern Maori was also envisaged.

Captain Hobson was despatched to secure the treaty. Within days of his arrival, and apparently without having been given any suggested draft or precedent to copy, Hobson prepared and obtained the first signatures on a treaty. It was written first in English but, for obvious reasons,

translated into the Maori language. By that time the Maori language had become a written language, on account of nearly three decades of missionary activity from 1814. As it transpired, the Maori version was not in fact a direct translation of the English text and therein lies the serendipity alluded to in my title. But we will begin with the English text, for this indicates English intentions.

The English Treaty has three brief “articles”: by article 1 the Maori cede their sovereignty to Queen Victoria; by article 2 the Crown¹ guarantees to Maori the continued enjoyment of their “lands, estates, forests, fisheries and other properties” for so long as they wish to retain them (and with the Crown to have rights of first refusal); and in article 3 Maori are guaranteed equal rights along with British subjects.

The Treaty is, therefore, an early form of bill of rights, or international human rights treaty. It affirms Maori property rights and a general right to equality. (An oral addendum on 6 February 1840, the day of the first signing at Waitangi – sometimes called the “fourth article” – added a guarantee that all religions including the beliefs of Maori would be equally free.)²

Maori chiefs duly signed the Treaty, albeit the Maori version mentioned shortly. Colonisation of New Zealand proceeded apace, in a manner reflecting the English version. English style institutions were created – a legislature, an executive and a judiciary. Many settlers came in the decades following. Maori were regarded as susceptible to the entirety of English law, ameliorated in the early days so far as criminal law was concerned. Maori customary law was recognised in some areas, but this withered and disappeared in the 20th century for a variety of familiar reasons. These included the alienation of Maori land, Maori migration to cities, integration into European ways, and (in the courts) the influence of legal positivism which came to hold that Maori had no cognisable rights save for those created by Parliament, which were few and far between. That sleight of hand precluded recognition of Maori fishing rights for nearly a century. Indeed, only in 1985 were customary fishing rights successfully asserted in litigation (a time when a similar renaissance of customary rights was being seen in Australia and Canada).³

The crux of the problem for Maori was that the Treaty of Waitangi, from its very inception, was a victim of New Zealand’s dualist paradigm. A treaty is not law unless its provisions are implemented by Parliamentary legislation. No direct recourse to it can be made in litigation; not, at least, as a source of rights.

The Maori Treaty, Te Tiriti o Waitangi

But in fact, the “real” Treaty is in the Maori language, and it is not the same as the English version. Virtually all signatories signed the Maori version, first at Waitangi and then elsewhere

¹ “The Crown” was and remains a common term used to designate the locus of Executive power.

² This was written into the text signed at Waitangi but not included in the many other treaty copies signed at different places over coming months. It reads: 'The Governor says the several faiths, of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected.'

³ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682.

in New Zealand, so it plainly has a moral authority. Its text generates an intriguing ambiguity about the colonisation enterprise, anticipating much of the modern jurisprudence, and politics, of indigenous peoples' rights.

In Maori, article 1 of the Treaty is no simple cession of Maori sovereignty. It is a grant by Maori to the Queen of "governorship",⁴ implying (some argue) a continuing role for Maori in the new order as overseer or at least partner with the Crown in the business of government. Meanwhile, and consistently with the Maori version of article 1, article 2 promises not just continuing Maori ownership of their properties, but *chieftainship*⁵ over them. In other words, an implication of political control over what is theirs and a measure of self-determination. Further, the English word "properties" was translated by the Maori word *taonga*, a word including intangible properties such as language and culture.

Putting this together, *Te Tiriti o Waitangi* is very close to the set of aspirations that modern indigenous people have in the once-colonised nations. It implies continuing self-determination and some sort of place in the constitutional order. It is no surprise, then, that the Treaty remains central to Maori concern about the structure of the New Zealand state and the way their interests ought to be regarded.

Even so, it remains the position that the Treaty can give no legally enforceable rights, unless and to the extent it is embodied in legislation. And no legislation has ever incorporated the Treaty into the law of New Zealand in any global sense. And so courts have not had occasion to declare what the Treaty means and requires, save in certain restricted situations.

Increasingly, however, a convention of regard for Maori interests is coming to qualify the power of Government. The implications of the Treaty are explored in the context of all fields of government activity and policy. This is premised on a continuing Maori claim to be a "Treaty partner", arising from the foundational status of the Treaty of Waitangi. A combination of factors has produced this "re-imagining" of the New Zealand state. They include political pressure and a measure of judicial activism in the few cases where legislation has given the courts a role in pronouncing on the issues.

It is here that the serendipitous overlap with the imperatives of modern human rights law can most easily be seen. The Treaty principles are now taken to imply what modern human rights law also implies: consultation, good faith, and appropriate regard for Maori interests as indigenous peoples (including their right to enjoy their culture as protected by article 27 of the International Covenant on Civil and Political Rights).

The 2001 "views" of the Human Rights Committee in *Mahuika v New Zealand*⁶ is illustrative. A complaint was made under the Optional Protocol by several Maori tribes who had dissented, in

⁴ The word used is *kawanatanga*, a transliteration of the English word "governor", in use by 1840 to denote the office of Pontius Pilate in the New Testament and of Governor Gipps in New South Wales, each of whom answered to a higher authority.

⁵ The word is *rangatiratanga*, derived from *rangatira* or chief, denoting chieftainship.

⁶ (2001) 8 IHRR 372.

1992, from a major settlement made between the Crown and Maori (generally) concerning Maori customary fishing rights. The settlement made a very significant allocation to Maori of New Zealand's lucrative offshore fishing quota. Most Maori tribes were happy with the settlement, and agreed to discontinue their then pending litigation over customary rights. The settlement was duly implemented in legislation, under which all Maori (including dissentients) were thenceforth precluded from asserting customary fishing rights in the courts. (But the dissentients were equally entitled to share in the benefits that the settlement produced – to be participants in the fishing industry with fishing quota allocated under New Zealand law.)

The dissenting tribes argued under article 27 of ICCPR that the settlement was a denial of their “right to culture” (to fish, both commercially and for traditional purposes). But the Human Rights Committee rejected the claim, holding that there had been appropriate consultation with Maori including the dissenting tribes, that the settlement was beneficial for Maori generally, and that the Crown had paid proper attention to the religious and cultural significance of Maori fishing.

The case exemplifies how the Crown's discernment and performance of its Treaty of Waitangi obligations met the contemporary expectations of human rights law.

It is fair to say that this alignment would not necessarily be seen by Maori as wholly good news. Maori would say instead that the special relationship augured by their Treaty with the English Crown is not to be transmuted into one of being merely a minority in islands that have become someone else's state, even if they are a generally well-treated minority.

That is the challenge for New Zealand, reconciling the foundational status for Maori with the equality of all who have come since 1840. And as I write this, it is being played out over the question whether special seats ought to be set aside to ensure Maori representation on the governing body of the new proposed “Super City” structure for the metropolis of Auckland.