Migrants and the Waitangi Tribunal

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Wednesday, 08 August 2007
Last Updated Sunday, 12 August 2007

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30 June 2006

MAOR 511: Issues in contemporary Maori Society STEVEN YOUNG

MIGRANTS
AND THE WAITANGI TRIBUNAL: Can the Chinese support the Report on the Orakei Claim[1]?

1. BACKGROUND

Over the past 30 years the Treaty of Waitangi has become an integral part of New Zealand law, Government and society. At the same time the numbers of migrants and descendants of migrant, in particular the Chinese, have increased to become a significant component in the population. From time to time they hear that the Treaty of Waitangi has been invoked - by tribes seeking to lodge a claim, by the Waitangi Tribunal reporting on a claim and by the Government in negotiating the settlement of a claim or introducing a new law or practice.

Seemingly, all this is irrelevant to the migrant communities because, obviously they are not Maori and they do not believe that their interests and concerns as migrants and the descendants of migrant are represented by the Crown in Treaty-related matters. Few people, except the protagonists, have the time or inclination to examine the Treaty or a claim much less a Tribunal Report of several hundred pages. Mostly, even the interested and diligent among them glean their understanding from the news media

Media reports on Treaty claims and Tribunal Reports tend to emphasise the land area covered by the claim, the monetary value of the claim and the length of the deliberations. In order to be newsworthy,

all three need to be large. Other claims under the Treaty have been made in relation to the protection of language, fishing rights and intellectual property and also reported. These are less obvious than land claims and in many minds can be rejected. It is a small step then to casting some doubt on the whole Treaty settlement process and to treat it with some scepticism. This scepticism is often shared within migrant communities and exacerbated by their exclusion from the Treaty process.

However the point of view of the European majority in New Zealand looking at the Treaty process, which naturally dominates in the news media, is unlikely to reflect the culture, experience and history of other migrant groups in New Zealand.

The history of the Europeans and the Maori is one of conflict, oppression, unfair laws and land loss. The history of the Europeans and the Chinese in New Zealand is one of conflict, oppression, unfair laws and cultural loss.

In the light of that shared history it may be enlightening to examining a land claim by a Maori tribe through the lens of a migrant culture.

2. THE ORAKEI CLAIM

The Orakei Claim is essentially that the Crown
breached its obligations under the Treaty of Waitangi by making and administering laws which resulted in the loss of land which should have been protected for the Ngati Whatua under the Treaty and seeks the return of that land.

The Orakei Claim is interesting to examine
from the point of view of the Chinese community because it relates to a relatively small area of land (700 acres) in an urban setting (Auckland) which was lost to the Ngati Whatua tribe through the operation of laws. It does not concern vast tracts of rural land confiscated from Maori accused of armed rebellion during the Maori Wars.

The Orakei Claim(WAI-9) is also interesting
because it was one of the earlier claims to be made to the Waitangi Tribunal under its mandate extended in 1985.
Accordingly the Tribunal developed and stated a line of reasoning which could be applied to many other claims.
The Report of the Tribunal is also fairly "typical" in that it recommends the return of publicly owned land to the tribe for administration and a relatively small cash settlement.

3. A CHINESE VIEW OF THE NEW ZEALAND

The bedrock on which the character and culture of the Chinese people can be said to be founded is Confucianism or the teachings of Confucius (551-479 BC). Although it would be folly to try to explain in a few sentences a philosophy which has endured for over 2500 years we can get something of the flavour of his teachings by referring to his theory of ethics:

Li is about actions to build the ideal society and also to meet a person's surface desires. It is about doing the proper thing at the proper time.

Yi is righteousness, doing what is right and moral. It is about doing the right thing for the right reasons, and about reciprocity.

Ren is about kindness and doing unto others what one would want done to you.

Chinese society has been arranged in certain ways for such a long time that even if a person were not formally educated he would absorb the rudiments of Confucianism from a young age through interaction with family, friends, authority figures and bureaucracies. Thus even uneducated gold miners carried with them the basics of Confucianism.

Li led them to seek their fortunes overseas when opportunities were few in China.

Yi meant they would assume the hardships of the goldfield to seek their fortunes while their wives would stay to look after their parents. Yi also led them to work cooperatively, to look after each other, to band together for mutual help and protection, and to protest various laws and regulations which to them violated the reciprocity between the king (or Crown) and subject (themselves).

Ren may have led to them contributing financially to return the bone of their dead to China en masse.[2]

In terms of Confucianism, the Treaty of Waitangi can be likened to an application of Yi: In return for ceding sovereignty of the country to the British Crown, the Maori were to receive tino rangatiratanga over their taonga.

In a Confucian world, King and commoner were each morally bound to observe Yi, to do what was righteous, abiding by the spirit of a moral code without the need to refer to the actual words of a written documents. The Waitangi Tribunal process can be seen as an attempt for the Crown to observe Yi within a common law structure.

4. THE CHINESE AND THE BRITISH

The dispossession of the Maori and the alienation of the Chinese in New Zealand have many parallels. However, because the Maori were the numerous original possessors of a whole land and the Chinese were originally a handful of guest workers, one need be careful not to over-state the case. Nevertheless both were the victims of the same people who were on a drive for world dominance, with a belief in white superiority - and of their heirs in New Zealand.

In the 1830s China and Britain were in a very unhappy relationship because the British were selling opium, grown in India, in China in exchange for tea, silk and other manufactured goods which were in demand in Europe. The huge quantities of opium devastated Chinese society and China sought to stop its importation. Also in contention were Chinese demands that all foreigners in China be subject to Chinese law and British insistence that that British subjects be judged in accordance with British law- even in China. Resistance by the Chinese resulted in British warships arriving in June 1840 to bombard Chinese ports, marking the beginning of the so-called Opium Wars. The superior technology of the British forces soon overwhelmed the Chinese and in 1842 China was forced to sign the humiliating Treaty of Nanking. There was further conflicts between 1856-60 and China was forced to sign more Treaties.

It is interesting to note that even in these patently un-equal Treaties, the preamble still included fig-leaf terms.

Thus in the Treaty of Nanking:

ARTICLE I. [3]

There shall henceforward be Peace and Friendship between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of China, and between their respective Subjects, who shall enjoy full security and protection for their persons and property within the Dominions of the other.

Taken at face value, Article I of that
Treaty would have afforded the miners and other Chinese in New Zealand the full protection of British law while New Zealand
was a colony. (One might speculate what
a Nanking Tribunal would recommend.)

The other terms of the Treaty of Nanking
were vastly more unfair and humiliating and were enforced by the British Navy.

The terms of the Treaty of Waitangi were,
in comparison, very benign and altruistic. Unfortunately they were largely
ignored for over a hundred years.

5. HISTORY OF THE EARLY CHINESE IN NEW ZEALAND AND

EVENTS AT ORAKEI

The very first Chinese in New Zealand is believed to be Appo Hocton (Wong Ahpoo Hock Ting)[4] who arrived in 1842, only two years after the signing of the Treaty of Waitangi. He is believed to have been a member of a ship's crew.

The first Chinese miners who came in Otago in 1865 left a China devastated and humiliated by the British Navy in the Opium Wars and arrived in a New Zealand in which the Maori had just been "pacified" by the British Army in the Maori Wars.

In 1869 the Native Land Court awarded ownership of Orakei to only 13 people (instead of recognising its communal ownership.)

In 1881 The Chinese Immigrants Act was passed. This sought to severely limit the immigration of the Chinese and instituted the infamous Poll Tax which required Chinese immigrants (and only Chinese immigrants) to pay a ¤10 tax on entry and ships were restricted to carrying one Chinese person per 10 tons of cargo. In 1888 these requirements were increased to ¤100 and 100 tons.

In 1886 part of Orakei was taken for defence purposes.

In 1898 the Native Land Court surveyed and partitioned Orakei among the 13 owners, opening the way to sales of individual areas.

In 1907 an education test was applied to Chinese migrants. This was similar in aim and effect to the English language test currently applied to Chinese migrants.

In 1908 the Stout-Ngata Commission decided that Orakei was not surplus and should not be sold.

Also in 1908 the right of Chinese to be naturalised was removed. This meant that Chinese were excluded from voting, jury service and the armed forces and several important trades and occupations. At one stage even New Zealand-born Chinese were not considered citizens. (There were not many New Zealand-born Chinese, since Chinese women could not migrate for various reasons and for a period were specifically forbidden entry.)

In 1910 the Auckland City Council tries to acquire Orakei, in 1912 a sewer was laid across the beach and in 1913 the Crown declares its intention to acquire Orakei.

In 1920, the New Zealand government finally found a way of excluding Chinese from New Zealand. Previously, overtly racists laws proposed for New Zealand were vetoed by the Colonial Office in London because they could harm British interests world-wide. In 1920 the New Zealand Government declared that immigration would henceforth be allowed only by Permit. No reasons needed to be given for the withholding of a Permit. Thus between 1920 and 1939 very few Chinese were allowed into New Zealand and it was hoped that those Chinese who remained would leave or die out, there being few Chinese women in New Zealand. (Men would return to China to marry and father children then return to New Zealand to work.). In 1939 on the eve of the Second World Ware, the Government relented and allowed a small group of Chinese, being the wives and China-born children to come to New Zealand temporarily as a humanitarian gesture. They were later allowed to stay after the war.

In 1950 all of Orakei had been sold.

In 1951, after more than 43 years Chinese were again permitted to be naturalised. The system of entry by Permit remained. Permits were only issued for family reunification. Thus the only Chinese migrants from 1951 until 1987 were the wives, husbands or children of Chinese resident in New Zealand. This was part of a national policy of assimilation in which all ethnic groups are encouraged to become similar to the majority - adopting their language and culture in preference to their own language culture. It nearly succeeded.

In 1954 a National Marae was proposed for Orakei; however, humiliatingly, Ngati Whatua were not involved in its planning and administration.

In 1976 the Crown decides to dispose of Orakei leading to the occupation at Bastion Point. In 1978 a form of settlement is reached.

In 1987 the Permit system for immigration was radically changed to a Points system allowing large number of Chinese to arrive.

6. A SHARED HISTORY

The Maori and the Chinese shared history in New Zealand to the extent that they were victims of British Imperialism of the times and of an ideology of white superiority.

From a comparison of the interaction between the white majority and the Chinese in New Zealand on the one hand, and on the other, the interaction of the white majority and Maori in general and Ngati Whatua in relation to Orakei in particular, it is possible to draw some interesting conclusions.

To the British, wars and treaties were instruments of Empire. It is interesting to compare the attitudes within the British Empire which led to the Opium War in 1840 (that the Chinese should be forced to consume opium in order to pay for goods desired by the Empire) with the words of Lord Normanby at the same time, as recorded in the Orakei Report:

In the first case, the Treaty of Nanking provided for Chinese ports to be forced opened for free trade and British residence, the annexation of Hong Kong, the legalisation opium and the payment of large sums in silver over a period of many years as war reparation. Clearly the British were not there to make friends with the Chinese.

ARTICLE VI.[5]

The Government of Her Britannic Majesty having been obliged to send out an Expedition to demand and obtain redress

for the violent and unjust Proceedings of the Chinese High Authorities towards Her Britannic Majesty's Officer and Subjects, the Emperor of China agrees to pay the sum of Twelve Millions of Dollars on account of the Expenses incurred, and Her Britannic Majesty's Plenipotentiary voluntarily agrees, on behalf of Her Majesty, to deduct from the said amount of Twelve Millions of Dollars, any sums which may have been received by Her Majesty's combined Forces as Ransom for Cities and Towns in China, subsequent to the 1st day of August 1841.

In the case of New Zealand, as noted in the Report[6]
Lord Normanby stated the benign position of the British Government thus:

I have already stated that we acknowledge New
Zealand as a Sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty Tribes, who possess few political relations to each other, and are incompetent to act, or even deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate Predecessor, disclaims for herself and for her Subjects, every pretention to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained.

Clearly in the case of New Zealand, there was no point
bombarding Maori coastal villages from British gunboats - especially if it was the intention for British settlers (initially few in number) to colonise the country long term.

By the 1880s, the settlers, having "pacified"
the Maori 20 years before, were clearly in a mood to expand and dominate the country and to make it in their own image.
The presence of Chinese was
clearly not pleasing to the settlers, who undoubtedly found them strange and alien to their way of life. After numerous attempts, the Chinese Immigrants Act was passed in 1881 which included the Poll Tax provision as another way to restrict migration.. At the same time,
moves were made through the Maori
Land Court to partition Orakei among the 13 owners
who a few years previously had been award individual interest in the land (not trustees for iwi).

Between 1910 and 1920 there were further strong moves to limit migration of Chinese culminating and to limit the rights of those who were already here. Thus the right to naturalisation was removed from the Chinese in 1910 - a right which was not restored until 1951. Also in 1920, the Permit system almost totally prevented until the 1950s when this was eased but only to allow family re-unification.

Between 1910 and the beginning of the Second World War, ownership of the Orakei site was chipped away with both the Auckland City Council and the Crown signally their intention to acquire the site. By 1950, all of Orakei had been sold.

Throughout this period the European majority were determined to make New Zealand "a better Britain": to have homogeneity of race and culture- so far as this was possible after taking over a Maori population, and to acquire land for European-style urban development regardless of the rights and effects of the native owners.

It is only after the late 1970s that New Zealand (and much of the world) starts to recognise the rights of racial minorities in their midst.

7. THE TRIBUNAL'S INTERPRETATION OF THE STATUS AND SCOPE OF THE TREATY OF WAITANGI AND ITS APPLICATION TO THE ORAKEI CLAIM

These matters are covered in Section 11 of the Orakei Report.

INTRODUCTION
Section 11.1

The Report notes that the Tribunal is guided by the decision of the Court of Appeal's findings, in particular in the case of the Maori Council v Attorney-General (1987) 6 NZAR 353 that is, it is subject to the principles inherent in the laws of New Zealand and does not contradict them. The Tribunal also bases its deliberation in the Orakei Claim on its earlier findings but notes that these are not a set of definitive and exclusive criteria, indeed it leaves open the probability that these will be "amplified, developed and refined in the light of subsequent claims."

It is somewhat comforting to migrant communities, sometimes troubled by news of Treaty settlements that the Waitangi Tribunal in its findings is guided by superior courts.

STATUS
OF THE TREATY Section 11.2

The Reports accepts that the Treaty is a
proper Treaty between independent states and, as Lord Stanley, the Colonial Secretary, instructed Hobson: "not a mere blind to amuse and deceive ignorant savages".

Migrant communities should note that to the
British, New Zealand under
the Maori, was considered a fully independent state, just as much as China or India were, with their thousands of years of advanced civilisation.

PRINCIPLES
OF TREATY INTERPRETATION Section 11.3

The Report quotes Lord McNair in his Law of Treaties[7], who states the primary duty of a tribunal charged with applying or interpreting a treaty as being to give "effect to the expressed

intention of the parties, that is, their intention AS EXPRESSED IN WORDS IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES." (McNair's emphasis,1961:365).

Further McNair is quoted as saying that: In relation to bilingual treaties neither text is superior to the other and that it is permissible to interpret one by reference to another (1961:432-3).... Moreover, this is consistent with the contra proferentem rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision (1961:464)

The Report quotes at length the Opinion of the United States Supreme Court (Jones v Meehan

(1899) 175 US 1) delivered by Mr Justice Grey, which in part says:

In construing any Treaty between the United States and an Indian tribe, it must always

(as was pointed out by Counsel for the appellees) be borne in mind that the

negotiations for the Treaty are conducted, on the part of the United States, an

enlightened and powerful nation, by representatives skilled in diplomacy, masters

of a written language, understanding the modes and forms of creating the various

technical estates known to their law, and assisted by an interpreter employed by

themselves; that the Treaty is drawn up by them and in their own language; that

the

Indians, on the other hand, are a weak and dependent people, who have no written

language and are wholly unfamiliar with all forms of legal expression, and whose

only knowledge of the terms in which the Treaty is framed is that imported to them

by the interpreter employed by the United States; and that the Treaty must therefore

be construed, not according to the technical meaning of its words to learned lawyers,

but in the sense in which they would naturally be understood by the Indians.

The Chinese, with a formal language replete
with historical and classical references, can readily agree that bare words need to be considered in the light of the circumstances of their use.

Chinese can easily understand that if there
were versions of a contract in English and Chinese, both drawn up by the English-speaking party, then the Chinese version has equal standing and that any ambiguities should be interpreted to the advantage of the Chinese especially if as a result of the contract, they were the aggrieved and disadvantaged party.

BROAD
IMPLICATIONS OF THE TREATY Section 11.4

The Tribunal accepts that the existence of
the Treaty implies the acceptance that Maori occupied all of New Zealand and
would remain and be respected.

ENGLISH
AND MAORI VERSIONS OF THE TREATY Section 11.5

Many non-Maori, including the Chinese in New Zealand
consider the "real" and indeed the only valid version of the Treaty to be the
English version. This is the version
they have seen in its shamefully neglected and damaged condition.

Those who grew up in the Original Settler
community, were "assimilated" into the mainstream culture in the period
1950-1985, speak English in their daily lives and little or no Chinese. They learned about the Treaty in much the same way as most school children of that period, as a brief mention in the history
of the New Zealand.
Without much thought, these people tend to regard the English version of the
Treaty as the "real" Treaty.

The New Settlers (from 1985 onwards) probably learned about the Treaty in an information pack given to migrants just before or just after arrival as part of orientation. Typically this would include the English version of the Treaty together with a Chinese translation of that version. Within this community there is a lot of translation of English to Chinese often by translators who are themselves migrants, whose native language is Chinese and who have only a superficial knowledge of English and New Zealand history. Therefore the translations might not be informed by a full understanding of the differences between the English and Maori versions. However, in this community, based on their bi-lingual experience, there would be greater acceptance that a Maori version of the Treaty might be equally valid.

THE
MEANING OF KEY TERMS

Tsze-lu said, "The ruler of Wei has been waiting for you, in order with you to administer the government. What will you consider the first thing to be done?"

The Master replied, "What is necessary is to rectify names." "So! indeed!" said Tsze-lu. "You are wide of the mark! Why must there be such rectification?"

The
Master said, "How uncultivated you are, Yu! A superior man, in regard to what he does not know, shows a cautious reserve.

If
names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success.

When
affairs cannot be carried on to success, proprieties and music do not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot.

Therefore
a superior man considers it necessary that the names he uses may be spoken appropriately and also that what he speaks may be carried out appropriately. What the superior man requires is just that in his words there may be nothing incorrect.")[8]

The interpretation of the Treaty by the
Tribunal is largely determined by the meaning given to a number of key terms in the English and Maori versions.

In the English version the Maori are asked to cede sovereignty over New Zealand to the Queen. The correct Maori translation of this would have been "mana". Because mana is something which any self-respecting Maori could never cede it was translated as kawanatanga (a Maori transliteration of governorship). However kawanatanga is something less than sovereignty and such giving may sometimes be less than permanent and final.

In the English version the Maori Chiefs and Tribes are guaranteed full exclusive and undisturbed possession of their lands, estates, forest and fisheries and other property. This is translated in the Maori version as tino rangatiratanga over their taonga which may be more accurately translated as total chieftainship or authority over all their treasures. As it turns out this can be considerably more than the possession of their lands estates, forests, fisheries and other property because taonga can include a wide range of intangible treasures such as the Maori language and culture.

Another source of misunderstanding has been the assumption by the British that Maori society was more or less feudal with the rights to land and resources owned and controlled by rangatira who held a position assumed comparable to a European hereditary lord. This misunderstanding led to the Orakei land being vested in only 13 people as individuals and not as trustees for the whole iwi. It was this vesting that then led to the partitioning of the land, its survey and finally its sale.

The Report canvasses at length various authorities, contemporary and modern to determine the true historical origin, rights and functions of "rangatira" in Maori society at that time and to prove that the status of a rangatira was determined and awarded by the people rather than inherited by descent and imposed on the rest of the tribe. The purpose of this in the Report is to

underpin a key finding that in the claim, that the vesting of the Orakei block in only 13 people was wrong because these rangatira got their status from the people and did not enjoy their status as a right in some feudal system. (The implication of a contrary finding would be that the land was perhaps rightly vested in the 13 people.)

For completeness this argument incorporated in the Report is attached in Appendix 1.
It is rather romantic and relies to some extent on an invented protocol for the recognition of rangatira

Apart from the obvious martial abilities of the Maori chief, a rangatira might almost be likened to the perfect Confucian gentleman.[9]

The term "JknzĐ" (P) is a term crucial to classical Confucianism. Literally meaning "son of a ruler", "prince", or "noble", the ideal of a "gentleman," "proper man," or "perfect man" is that for which Confucianism exhorts all people to strive. A succinct description of the "perfect man" is one who "combine[s] the qualities of saint, scholar, and gentleman"

Thus while the case is made, it is not very strong, because the Report already recognises that it is contradicted to some extent by evidence of Te Rangihau, who implies, and by Meade who claims, that rangatira received their status mostly by inheritance from their rangatira fathers.

NATURE
OF THE GUARANTEE Section 11.6

The Report cites various authorities,
including previous Reports, to conclude that the "guarantee" should be more
than passive, that affirmative action is required. The authorities include various dictionaries
and:

The Tribunal's Te Reo Report in 1986:4.2.7

The Manakau Report 1985:8:4

Cooke P in the New Zealand Council case
p370

Affirmative action or positive discrimination is a controversial concept implemented in many countries, most widely reported from the United States of America where for example in some states educational institutions admit members of racial minorities to classes they would otherwise be excluded from on the basis of their lower entry test results. It is also practiced in China where non-Han Chinese groups (of which there are officially 56 tribes or groups comprising approximately 9% of the population) are exempt from the one-child policy.

DELEGATION OF AUTHORITY Section 11.7

It has been argued that the actions of bodies such the Native Land Court or the Auckland Harbour Board are not actions of the Crown - and therefore not bound by the Treaty. However the Tribunal has found that while bodies such as the Native Land Court and the Auckland Harbour Board are not the "Crown", the Crown should have provided proper assurance of its Treaty promises when vesting any responsibility in that Court or body.

This is a sophisticated legal argument which arrives at the right answer by convoluted means.

PROVISIONS
AND PRINCIPLES Section 11.8

The Report states that in its
determinations would try to determine whether the various Acts

"was
or is inconsistent with the principles of the Treaty", rather than
with

its provisions as such. We are not confined to the strict legalities. We
believe

that the essence of the Treaty of Waitangi transcends the sum total of its

component written words and puts narrow or literal interpretation out of

place.

This is a re-statement of 11.3.

PRE-EMPTION
AND RECIPROCAL DUTIES Section 11.9

The Report dwells at considerable length on
the meaning and implications of pre-emption, that is the right of the Crown to
be the sole purchaser of land that Maori wish to sell.

The Tribunal concludes that pre-emption
under the Treaty imposed on the Crown a
duty to ensure that Maori did in fact wish to sell and that they were left with
sufficient land for their needs.

THE
DUTES OF THE TREATY PARTNERS Section 11.10

The Tribunal found that "the Treaty signifies a partnership between the Crown and the Maori people and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other."

From the above it can seen that the text of the Treaty has indeed been extended to "effect to the expressed intention of the parties, that is, their intention AS EXPRESSED IN WORDS IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES." (McNair 1961:365.)

While this extension of the meaning of the Treaty beyond its text may make some New Zealanders apprehensive (including migrant groups who have barely come to grips with Common Law), this has been function of one of the most respected bodies in the world, the United States Supreme Court. However in that body, among its Justices there is a balance of those who might be classed as "strict constructionist" and those who rely to a greater or lesser extent on "legislative intent as gleaned from contemporaneous commentaries or legislative debate or on metaphysical ideas such as natural law."[10]

8. CONCLUSION OF THE REPORT ON THE ORAKEI CLAIM

Given the Tribunal's interpretation of the status and scope of the Treaty of Waitangi and its application to the Orakei Claim in its Section 11, it would be surprising if the Report were not supportive of the Claim overall, and this is indeed the case.

The Report recommends that in effect that wherever possible, the land lost should revert to Ngati Whatua communal ownership with a cash settlement to compensate for land which cannot so revert. However, it should be noted that the land returned was in some form of public or Crown ownership and the return is therefore largely nominal and symbolic, apart from any commercial rental which might be derived.

So long as this remains the case, migrant groups would support Treaty settlements.

9. MIGRANTS AND THEIR UNDERSTANDING OF THE TREATY

It is only recently that migrant groups in New Zealand such as the Chinese have considered the Treaty in relation to their constitutional position in New Zealand.

In 1995 I was invited to contribute to a chapter to Maori Sovereignty -the Pakeha Perspective by Carol Archie[11]. It was probably the first time that a person of Chinese descent allowed his views on this subject to be published in a book. I expressed the view that claims for Sovereignty and Treaty interpretation were inefficient devices to redress past wrongs and to re-allocate and share resources. Today I am perhaps less certain of my understanding than I was then.

In 1998 I presented a paper entitled The Chinese in a Bicultural New Zealand: The way forward[12]. In it I urged the acceptance of the concept of a bicultural New Zealand, and activism and participation by Chinese New Zealanders in the Treaty debate.

In October 2004, I presented a paper at the Human Rights Commission entitled Human Rights and the Treaty of Waitangi, a view from the Asian Community.[13] I noted that the gradual movement of the Treaty to becoming a constitutional document excluded migrant groups from the constitutional debate.

In 2005 The Human Rights Commission co-hosted, with the School of Asian Studies, the University of Auckland, a Symposium entitled Human Rights, The Treaty of Waitangi and Asian Communities.

In the Symposium Associate Professor Manying Ip presented a paper Our Treaty Too? - A Chinese view[14] in which she traverses the marginalisation of Asians including the Chinese in New Zealand in general and in Treaty discourse in particular.

In the same Symposium I presented paper entitled The Treaty of Waitangi and Human Rights: From Bi-cultural to Multicultural[15] I noted the development of a discourse recognising the multicultural reality of New Zealand and a possible renegotiation of its bi-cultural framework via human rights principles which are "superior" to Treaty principles.

10. CAN THE CHINESE SUPPORT THE REPORT ON THE ORAKEI CLAIM?

We have noted that:

The Chinese and the Maori have a shared and contemporaneous history of conflict with the British and the selective use and misuse of Treaties as part of British expansion.

When white settlers took control of New Zealand they passed laws which were designed to dispossess the Maori and alienate the Chinese laws which would be countenanced by Britain in view of its wider interests.

Both the Maori and the Chinese were expected to be assimilated into the mainstream or die out as a distinctive race in due course leaving New Zealand as a better place for the Europeans.

New Zealand law and high international legal authorities and precedence support the interpretation of the Treaty beyond the bare words of the English version. However, right answers have been arrived at with considerable convolution.

Migrant groups can readily understand the justice of reading both versions of a Treaty signed in two languages and interpreted in the advantage of the subordinate party.

The principles used in Treaty
interpretation in the Orakei case, and in other similar cases, are consistent with long-established Confucian principles of appropriate action, reciprocity and kindness.

The Treaty settlements, like Orakei, using
public land and money do not affect them personally and to that extent they do not feel threatened.

Migrant groups such as the Chinese accept
the bi-cultural state but are concerned that the Treaty is becoming a part of the constitution to which they have no access.

The multi-cultural reality of New Zealand
may mean that in the future the bi-cultural state may need to be renegotiated.

STEVEN YOUNG

6742 words including Appendix of 848 words.

APPENDIX 1

The Tribunal Report tries to show that the status of rangatira is not hereditary or feudal.

11.5.11 Te Rangikaheke however defines the qualities of traditional leadership rather than the nature of tribal authority. After reviewing the attributes of chieftainship, the chief's ability to conduct discussions, lead in battle, supply food, entertain guests and the like, he says, according to the translation. That is why it is proclaimed to the land, "So-and-so is a rangatira".

The people of the land will enquire,
"What does the rangatiratanga of that man consist of?" Then the
people who have seen will perhaps enumerate all the traits noted. The listener
will say, "There indeed is a true rangatira. Who were his parents? Who was
his ancestor?" The people who heard this would then reply, "According
to what I heard So-and-so was the ancestor". Who then were the parents?
So-and-so was the father and the mother was the daughter of So-and-so. Then the
people will say, "No wonder! It is because of his chiefly birth! Such
chieftainship will not lie dormant. That which was begun before must continue on down; that
[line] is of So-and-so. His name is being heard. Never shall be found wanting
the chiefly heritage, the capacity for courage, the ability at battle speeches,
the capacity to produce food, industry, feasts or celebrations, the urging against
departure of travelling parties, council speeches, welcoming of guests and the
kindness and also the liberality to travelling parties, large or small".

None of these qualities repose in
the belly of the common man. They are possible only from the noble heritage.

11.5.12 On this view, chiefly status
belongs to those who exhibit the chiefly traits of their noble forbears. But Te
Rangikaheke appears to say that chiefly traits are hereditary, not the right to
rule. It is not an affirmation of the western view that 'ascent to the throne'
follows one line but an opinion that leadership in Maori terms requires both
status proven by descent and a strong display of certain personal attributes.
Most significantly it is for the people to recognise those qualities and so
identify the rangatira in the course of time.

11.5.13 So at Orakei, it was the
nephew Tuhaere who led after Te Kawau, and there was no hurry to acknowledge a
'successor' to the equally prestigious Uruamo.

Kawharu and Cleave would therefore
hold common ground with Rangikaheke, that leadership depended on recognition of
both descent and ability. The judges however are the people of the tribal
community. The leaders they are bound to follow are none other than those they
recognise as worthy or who prove their prowess. The rangatira "is a
trustee for his people, an entrepreneur in all their enterprises"
(Kawharu, 1984:5) and always answerable to them, it being succinctly stated
that "a chief who persistently flouted majority opinion committed
political suicide" (Kawharu 1977:56).

11.5.14 Recognition by the people
was, according to John Rangihau of Tuhoe, a very important element in the
identification of a rangatira. In a recent discussion with two of our members,
just ten days before he departed to his final resting place, Te Rangihau took
the view that there was no such thing as a chief in Maori terms, insofar as the
concept of "chief' was an English concept, suggesting the rangatira above
and the people below.

11.5.15 Rather, the position was
that certain people assumed leadership or took on the mantle of rangatira by virtue of a number of factors, one of the most important being recognition by the people. Te Rangihau was firm in the view that given the attributes of noble descent and strong leadership ability, taking the role of rangatira was dependent upon confirmation of such by the people - in his words, "rangatira was people bestowed".

11.5.16 Te Rangihau went further in
his analysis. In his opinion that which distinguished the true rangatira was the quality of commonality. In other words the rangatira has the ability to bring himself to the same level as those who recognise him as their leader. So it is not uncommon to hear the rangatira address his people "e aku rangatira", thereby acknowledging that all his people are rangatira.

11.5.17 The quality of commonality
is the component that binds the leader as one with his people, for in fact in Te Rangihau's opinion, every person is a rangatira, in that every person is regarded as being his/her own person, and allowed his/her own space. Thus in greeting a person by saying "tena koe", one is not merely saying "hello". In fact one is saying exactly what the words mean - "there you are". Embodied in that statement are the following sentiments as expressed by Te Rangihau, "I acknowledge you as the person you are, for the aura that you have".

11.5.18 It is this element of
commonality and the part it plays in recognizing that every person is a rangatira that highlights the importance of the people component in the concept of rangatiratanga, confirming the view that the authority embodied in that concept is also the authority of the people.

Wikipedia is a new, vast and readily accessible source of information on-line. However because of the way the articles are written, by anonymous authors, often without citation and attribution and open to editing by "anyone", it is regarded as a less than reputable for some academic purposes. I have found that it has a legitimate use in providing background information and a concise summary of diverse concepts as the basis for more detailed investigations and I have used it for that purpose.

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