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Land Claims, Treaty Claims and Self Determination

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Introduction

Thank you for inviting me to address this inter-university academy for Maori academic and professional advancement. One of your objects is to strengthen the link between Maori academics and professionals. The Treaty claims process is one where criticism of the process, good or bad, would best come from the academic community as there are constraints on those in the field. For that purpose the academic and the professional practitioner would benefit from any strengthening of the link.

I therefore raise a matter for academic consideration – he take mātāpono, no te rangatiratanga, e kiia ano hoki, te mana motuhake. I wish to raise the principle of 'self-determination'.

I ask first whether there is some way its application can be measured.

I argue then that if it is feasible, it should be measured, for while the principle of rangatiratanga can be readily expounded, in practice it is readily compromised. I will seek to illustrate that by reference to practices affecting Maori land and Treaty claims.

Then I hope we can have a discussion.

The need for some measure of analysis

He pātai tāku ki a koutou, nga tohunga rangatira. Is it possible to measure the quality of rangatiratanga in official processes? Can one isolate the elements of self-determination and so develop criteria for each, as to gauge whether a specified process, helps or does not help our people to drive their own journeys forward? If it is possible, then I argue, it is necessary.

Enough has been made of the principle to assume its importance. It was recognised as a right in the Treaty of Waitangi. Our forbears upheld it in peace and war - so much so that I say it forms part of post-Treaty, tikanga Maori. And now it is internationally recognised in the Declaration of the Rights of Indigenous People.

Theoretically, no more is needed than to assert the right. It should be enough to say, as is indicated in the Declaration of Human Rights, that it is part of that which provides the foundation of freedom, justice and peace in the world.

However, since specific outcomes are sought for publicly funded processes, it would help to show as well that the principle improves performance. I think that could be shown. Anecdotally, I think it fairly obvious that there was more progress when Kara Puketapu managed Maori Affairs by engaging with leading Maori in matters of kaupapa, than there was before his time, or than there was in the mainstreaming period that followed immediately after him.

Similarly, there were more strides in law reform when the New Zealand Maori Council was at its zenith, than now, when it is not.

Accordingly, when measuring progress today, it would help if was feasible to use some other starting point than that of the existing practice. The devolution of services to service providers, as currently practised, has had many successes, but the question remains whether the success would have been more if Māori had more say in the services required.

That introduces how fragile is, the principle of self-determination. No matter how much providers seek independence for their communities, in the pursuit of funds they can be readily reduced to jumping through whatever hoops the administrators put up for them to jump through.

That is not a criticism of the providers, but of the system. Gaining resources is a necessary step towards building the capacity of the community to take control of their collective lives. The end may be seen to justify the means.

That shows too, as I have already mentioned, the value of a connection between the academic and the professional, or practitioner, in the field. In assessing how well the process respects the Maori right of self determination, in social service delivery, the academic can say what the practitioner dare not, without jeopardising the community's access to funds.

The same concern arises with regard to the settlement of treaty claims. Here too, a willingness to leap through the hoops, no matter what they may be, is sometimes seen as necessary and justified to achieve the greater goal of securing the funds by which tribal self-determination will be provided for in time. Failure to jump the hoops means going to the back of the queue, as seems to have happened with Whakatohea.

In similar vein, in the Maori Land Court and Waitangi Tribunal one may be bound to apply the golden rule, more usually framed with an expletive, that one should not upset the judge – or at least not if one wants a good outcome, or indeed, any outcome at all. Again, the protest would better come not from the players but from the outfield.

Land Claims, Treaty Claims and Self Determination

While many government services could be used for a case study, I have chosen the Māori Land Court and Waitangi Tribunal. This is only partly because I know them best, having served there. More importantly it is because as a Māori land owner, and now an active member of a tribe with outstanding claims, I see things as an end user of their services.

The Tribunal processes are instructive because they show how easily the principle of rangatiratanga can be overlooked, even by the body that was probably responsible for popularising the term 'rangatiratanga' (in its foundational Motunui report, 1983).

I was a Maori Land Court judge in 1974 and was there when the Minister of Maori Affairs Hon Matiu Rata, discussed the draft legislation for the Waitangi Tribunal with the then Chief Maori Land Court Judge.

Matiu was a visionary. He also had a grasp of Maori land issues. He promoted the seminal legislation of 1974 that reversed the ill-effects of the highly contentious Amendment Act of 1967 to place a constraint upon the continuing alienation of Maori land. However, it was in his Treaty of Waitangi Act that Matiu most sought to give effect to the self-determination principle that he and his advisor, Dr Pat Hohepa, understood well. Later, he formed a political party named for the earlier Maori term, te Mana Maori Motuhake.

The vision for the Waitangi Tribunal process was that of a people's forum, by which the people would be empowered, through ready access, with a guarantee that they would be listened to, in relation to their many complaints about Crown policies and practices. They would be empowered by the absence of that which had previously constrained the courts, that they would be fairly considered, according to their own laws and perspectives, by restorative and cathartic processes, and where Maori culture and whanau and hapu structures would have status. One of the major problems before then was that tribes had no status before the Courts. Previously the courts were mono-cultural, the process was adversarial, tribes had no legal standing and could not sue, the people's voice was manicured through lawyers and the Treaty could not be considered. It is little wonder that the principle of self-determination ranked so highly amongst the Maori leaders of the time or why talk was more voluble then of tribal courts. There was some hope that the Tribunal would make a seismic shift in gaining recognition for the tribal institutions and processes.

Within the constraints of the age, the legislation set out to capture that vision.

- The Tribunal was established as a commission not a court (sched 2 cl 8(1))
- It would be recommendatory only (s 5, 6(3)),
- It would promote the *practical* application of the Treaty (preamble).
- *Any* Māori could claim (s 6(1))
- The Tribunal would hear *every* claim (s 6(2)

- It would be inquisitorial, and unconstrained by normal evidential rules (sched 2 cl 6),
- It could engage in informal discussions, adopting 'te kawa o te marae' (sched 2 cl 5 (9)).
- Most telling is a provision unique to the Waitangi and Disputes Tribunals, that lawyers would appear only with leave (sched 2, cl 7). Leave would be on terms and could be withdrawn at any time. It would enable the Tribunal to hear the people and the lawyers later, if need be, on strictly legal issues. It is a critical aspect of the scheme.

In 1985, Hon Koro Wetere, as the then Minister of Māori Affairs, made provision for historic claims and, in expanding the membership, appointed Māori with wide experience in tribal protocols and practices. It was expected that these would manage the tribunal's cultural compliance and generate appropriate contact with key leaders and institutions in devising appropriate processes.

The first claims, relating to Te Atiawa, Manukau Harbour and Kaituna River were prosecuted tribally, and it was apparent that any practice notes could only be general. Circumstances varied between districts so that processes were shaped to local circumstances.

There is now specific provision for the Tribunal to issue practice notes after consulting with appropriate persons (sched 2 cl 5 (10)). The appropriate persons I presume are Māori claimants, since the Tribunal is plainly structured by law to provide a forum where the processes might normally be set by them, subject only to natural justice requirements.

Most of all the Tribunal process was expected to empower the people. Using the words of the Māori and National Parties in their relationship and supply agreement of November 2008 it was structured under the Act to maintain, restore and enhance Maori mana, as claimants, whether successful or not, as well as that of the Crown. 'Mana enhancement' is a good description for self-determination in the New Zealand context where it is managed with respect for the integrity of the state, and it is a good description too for the objectives of the Treaty of Waitangi Act.

Reverting to the theme

I now revert to the theme, of the fragility of rangatiratanga, mana enhancement or self-determination.

Today, when one hears of up to 50 or more lawyers appearing on inquiries, all at the same time, from beginning to end, and dominating the process at the expense of acknowledged or elected tribal leaders, indeed prescribing and managing the process according to Tribunal organised clusters, then there is obviously a problem about the process and its compliance with the Act.

Something has plainly gone wrong too when there is a diminished cultural element in the structuring of claims and no willingness to deal with the affected iwi through their own

institutions. Not only is there no mana maintenance or enhancement, and no recognition of indigenous self-determination, but there is no obvious fit with the law as prescribed by the Act.

> Part of the problem appears to be that any Maori can file a claim and the Tribunal has presumed to treat them as absolute proprietary owners. The alternative and plainly better view is that they are mere conduits for all affected by the acts complained of, and that the true beneficiary is the affected whanau, hapu or iwi. The question is simply who should manage the tikanga for the iwi to present the case for the iwi, and then arrange for each whanau, hapu and iwi to be individually heard.
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> The UN Declaration earlier mentioned supplied the answer. Indigenous peoples should be dealt with through their own chosen representatives or representative institutions (art 18, 19 and see arts 4, 5, 20, 23, 32, 34). This position infuses the principle of self-determination. A proper examination of the principles of the Treaty of Waitangi would produce the same answer. But in the Tribunal today the tribal institutions are not recognised, the individual is placed above the group and the lawyers above all. I believe it is the reverse of what the Declaration would seek to achieve.

Causes

Although for present purposes one need not inquire of the causes, still it is natural to ask.

The unfocused provision of legal aid must be one.

The Tribunal may also be overawed by the legal fraternity, for notwithstanding its wide power to constrain legal appearances, it has never used that power.

Recent appointments show also a tendency to appoint judges without long-term, practical work experience with Maori communities, persons who might better understand the practical difficulties that they and their leaders face.

There is a question too of whether the Tribunal now makes the best use of its senior Māori members in advising on process. Working with kaumātua requires a skill and if it is not possessed, then I think the judges need to be trained in it, especially having regard to the inhibiting effect that legal processes can have on lay persons, as those who have conducted jury trials well know. Control of legal process gives enormous power to judges and they should not forget that the Tribunal process is not about the maintenance of that power, but the release of it so as to empower the hapu and iwi who are the true owners of the claims.

However, the Tribunal is plainly overstressed by the number of claims, the competing Maori factions and the many demands for urgent hearings over government actions said to predicate irreversible harm, and which usually relate to the government's negotiations

process. A reaction of creating rules to constitute barriers to being heard deserves sympathy in that circumstance, and appears to be what has happened, but it cannot be justified when the essence of the statutory scheme is to provide ready access to the Tribunal for Maori when confronted by deleterious and pressing government action.

Another reaction with which one can sympathise but not endorse, is when the Tribunal works with government to hasten settlements, which would end the claims, or to settle processes with government and other agencies, like the Crown Forest Rental Trust, so that they are more Treaty compliant. It makes the Tribunal part of the government arm and can mean that the Tribunal has bought into, or may be seen to have bought into, the processes complained of. This raises larger issues of bias, natural justice and judicial independence in terms of the rule of law.

Remedies

The solution is not to say that the claims process is nearly over. When the historical claims are done the Tribunal merely shifts back to where it began with the contemporary claims. The problem does not disappear. The water claims, if pursued, promise to produce the usual bevy of lawyers to take away control, unless the Tribunal takes control of itself.

However this address is not about solutions to the present problem. The present problem merely illustrates a larger concern. For the present it is enough to assert a ready answer in recognising the tribal right, in terms of the Declaration. It means working through the people's representative institutions, built with Tribunal help if need be, and negotiating an inclusive process.

The answer in other words, is in the capacity of the people to develop their own institutions and the capacity of the Tribunal to assist in the resolution of internal disputes.

Maori Party

I go back to the need for academic supervision. In October 2007 the Maori Affairs Select Committee declined a proposal to investigate the Treaty claims settlement process. It was probably unsurprising given the government's interest in maintaining an unbridled authority over the negotiation process. Nonetheless, Dr Pita Sharples, now the Maori Affairs Minister, expressed profound disappointment. The Māori Party, which he co-leads, subsequently released its policy, of which its partner in the relationship agreement must be informed, to review the Treaty settlement process and in particular the processes of the Waitangi Tribunal and Office of Treaty Settlements.

However there is a larger issue of human rights involved in relation to indigenous self determination, or mana enhancement. The advancement of that issue, whether in the Treaty claims context or some other, should not have to depend on a single political party. The politicians deserve the dispassionate and impartial

advice of the academic community, and indeed, they depend on such advice, and public reaction to it, in advancing the issues before them.

Office of Treaty Settlements

I had proposed to examine the concept of self determination and its progress or otherwise by reference also to the Office of Treaty Settlements and the Maori Land Court. Probably the Crown Forest Rental Trust should be included too.

However, they are merely further illustrations of the point already made on how the principle of self determination may be compromised. Therefore, and because of the time, I will touch on them only briefly.

I see three main difficulties in relation to the negotiations process.

The process of negotiations was never formalised by statute. Rule by administrative fiat is problematic for the citizen for it leaves them without a remedy when the government itself does not obey them or unilaterally changes them.

Second, not only were members of the House denied the opportunity to debate the process, especially the Maori members, but no disclosure has been made of any significant discussion with Māori, as the other party to the negotiations, as to what the process should be. Māori have merely been presented with the hoops to jump through.

Finally, it is obvious that a tribal structure had first to be in place before discussions began. I need hardly say again that this is what the Declaration envisages. The provision of a sound, democratic tribal structure would have given access to the courts on many cases of unfair practice to discourage the opportunistic conduct which seems to have become rampant. That in turn would have avoided many heart-wrenching and divisive disputes. It would also have provided some relief to the Tribunal from applications for urgent hearings.

On the other hand, there are good reasons to support the Office of Treaty Settlements policy of settling with large groups. This is provided the entity structure reflects the interests of the hapu and there are settled distribution policies in place. It is certainly an advance on the Tribunal that government is prepared to deal with tribal representatives notwithstanding doubts about a mandating process that is out of keeping with the international norm.

I suspect the Government would have found greater support for its policies however if those policies had not been unilaterally imposed and were it not for the presumption that government could decide the appropriate, Maori cultural combinations. I am not saying that government has not made the right combinations. I am saying that it is not for government to decide.

The present practice of engaging negotiators independent of government also appears to have worked.

Maori Land Court

It is difficult to see how the institution of the Māori Land Court advances the principle of self determination for so long as its judges continue to override the wishes of owners and to appoint trustees favoured by the Court rather than the people. Remarkably, the principle of rangatiratanga actually gains mention in the preamble of the Court's governing statute, and respect for the wishes of the owners is written into the statutory objectives (see preamble, s2(2), s 17(1)(b) and s17(2)(a)).

The element of paternalism which I have mentioned also constrains the opportunities that now exist to promote greater community involvement in problem solving through the engagement of Māori arbitrators and mediators trained in community rebuilding and in the opportunities that now exist to engage willing tribal authorities in land management and dispute resolution..

End piece

The same analysis of other bodies whose services constrain independent Māori growth, would point to the breadth of the problem but probably not to its resolution. For that we would better look at those services promoting self-determination norms.

The present discussion however, seeks as an outcome, an early warning system that identifies those things that depart from the norm and sounds an alarm before there is too much damage. I have sought to show how easily a problem can arise, even from within a body that itself has espoused the importance of mana Maori motuhake, or mana enhancement. I have sought to show that without an independent watch-dog, even such a well intentioned body can lose sight of the basic principles, when it is faced with extraordinary demands and pressures. The purpose then is not to destroy but to restore.

In moving now to some discussion, your criticisms and questions would all be good, but better still would be any insights or information, you have on what has been proposed.