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‘A Quarter Century of Treaty of Waitangi Reconciliation Processes, 1988–2013: An Appraisal.’

[This is a slightly revised text of a paper presented by Richard Hill to the ‘Reconciliation, Representation and Indigeneity’ conference hosted by Johannes Gutenberg University of Mainz and Victoria University of Wellington, held in Wellington, 23 March, 2013. It was selected for this series in part because of its possible interest for our international readers.]

Introduction

I am speaking today as a *practitioner* in the Treaty of Waitangi reconciliation system. Most practitioners enter Treaty-based work through the Waitangi Tribunal’s hearings processes, and remain there for the duration of their involvement. Comparatively few people work on the negotiations that follow or bypass hearings, the processes by which ‘Treaty settlement’ arrangements are struck between the Crown and claimants.

I entered what has been called ‘the Treaty world’ through these negotiations processes, when they were in their infancy in the late 1980s. Alex Frame appointed me as the founding historian in the Crown’s policy and negotiating unit which he had begun to set up in the Justice Department from late 1988. This unit, the Treaty of Waitangi Policy Unit

(TOWPU), had become fully operational by May 1989. After some years in that environment (during which TOWPU became the Office of Treaty Settlements in 2005), I moved to the Stout Research Centre at Victoria University, where (among other things) I did a great deal of work on behalf of claimants engaged in Tribunal hearings processes. This was under the auspices of the Treaty of Waitangi Research Unit, which continues to exist today but in different form. From 2008, I have also been a Member of the Waitangi Tribunal.

I appreciated being asked to reflect on my various experiences over almost 25 years, as I have not done so before, at least not in any systematic way. But when I sat down to think about it, I found it really hard even to *summarise* everything I wanted to say.

So instead, I decided to focus on one or two things. In particular, I centre this paper on the experience of being an historian inside what are ultimately very *political* processes, and on some performative, representational and aspirational matters.

Early Negotiations

I will start with the pioneering negotiations that took place from 1989 onwards. The first point might seem obvious, but it is often not well understood: namely, politicians do not embark on difficult and costly ethno-cultural healing processes out of the goodness of their hearts. They do it because they are under *pressure* to act. Paul McHugh and Lisa Ford are the most recent scholars to note this, in a chapter in a new book called *Between Indigenous and Settler Governance* (edited by Ford and Tim Rowse).

In the New Zealand case, the Maori Renaissance, that huge political and cultural resurgence of Maoridom from the early 1970s, provided the context. This had led parliament to establish the Waitangi Tribunal, which was given power in 1985 to report on claims dating back to the nation's founding document, the Treaty of Waitangi of 1840. By the late 1980s, Tribunal and judicial decisions had heightened both Maori bargaining power and expectations, including their hopes for historical justice. There were grievances which were common to most iwi, and negotiations began on a national level with fisheries claims. But each tribal grouping had specific issues of its own to present and negotiate, generally focussing on resource loss and broken promises by the Crown.

Waikato-Tainui were the first iwi in the queue for tribal-based negotiations, arguably because they had the greatest political and judicial capacity to disrupt government plans for the disposal of state assets, in this case the coal resource. Yet while the government was prepared to begin dialogue, history loomed as an impediment to progress. Ministers were very conscious that the Crown had signed agreements to compensate Waikato and other tribes in the 1940s, and the resulting legislation had deemed the settlements to be 'full and final'. If the state were to treat this legislation as meaningless, what precedent would this create? Many European constituents believed that Maori were already receiving disproportionate Crown attention and expenditure, and Opposition politicians strongly opposed what they deemed to be special-treatment initiatives. The government was initially inclined to agree. With historical Maori grievances supposedly settled 40 years before, revisiting the question of reparations was seen to be unnecessary as well as politically unwise.

The Burden of History

In their advice to ministers, TOWPU officials sought to get across some appreciation of the point which William Faulkner summed up in the words: ‘The past is never dead. It’s not even past.’ Ministers needed some appreciation of how, for indigenous peoples especially, the present lay in the past, and vice versa. Or, in an indigenous formulation, walking backwards into the future.

This is something that many people operating within western paradigms find hard to grasp. That is why, to this very day, the point has to be endlessly repeated around the world. About a fortnight ago, for example, Henning Melber, the chair of the Namibian-German Foundation for Cultural Cooperation, strongly restated it: ‘We cannot escape [the past], and it won’t disappear by trying to avoid or ignore it.’

To get this point across in 1989-90, myself and other TOWPU officials had to present ministers and their advisers with a history of which they had been unaware, a history of indigenous loss and deprivation. We also had to stress the need to take reconciliatory *action* on the basis of that history. What we produced, therefore, combined ‘pure history’ with instrumental history. This was often produced fast, to meet the needs of the moment.

The first memorandum for Cabinet, ‘Settlements of Major Maori Claims in the 1940s: A Preliminary Historical Investigation’, was compiled within days. Produced with referencing so that its accuracy could be verified, and with a transparent purpose, it ended with recommendations

which flowed from the history it outlined. It argued that ministers should abandon their policy fixation with legislation purporting to be full and final; and further, that the government needed to return both productive and culturally significant land and other resources to tribes.

In its incorporation of recommendations, our ongoing historical production had some resonance, methodologically, with indigenous concepts of history, which frequently combined advocacy with analysis. While adhering to western historiographical conventions and values, our historical packages drew conclusions for current action on the basis of the historical analyses they presented. We strove to meet both government requirements for policy outcomes, and the professional standards of the ‘curiosity-driven’ scholarship in which we had been trained – that which stressed the critical examination and contextualisation of all relevant sources.

Ministerial requirements and historical scholarship went hand in hand. The Prime Minister had posed a specific question to officials: what, if anything, was wrong with the Crown insisting on holding to the terms of earlier agreements with Maori? If there was to be movement on policy, ministers needed to be able to argue publicly that new Crown initiatives were based on robust, ‘best practice’ scholarship. That meant western-style historical production based on documented citation of written sources, scholarship which could survive legal as well as western historiographical scrutiny. While inclusion of oral-based tribal history had to be viewed through the lens of western analysis, it was possible to incorporate it to some degree. Most significantly, it could be included to indicate the depth and longevity of tribal feeling about resource depredation and broken Crown promises. This was evidence which could feed directly into recommendations about the need for restorative justice

for all iwi with substantiated claims against the Crown, those which had reached settlements in the past as well as those which had not.

The most obvious and readily understood reason for the failure of the 1940s deals had been that they mostly constituted annual monetary grants which were not inflation adjusted. But officials needed to help persuade ministers that, even if these payments *were* to be retrospectively adjusted to inflation, there were far more profound issues involved. Essentially, the agreements constituted no more than the best arrangements which Maori could extract from the Crown *at the time*, after two decades of negotiation, and they had always fallen far short of indigenous needs and aspirations. With evidence of increasing Pakeha understanding of Maori historical grievances, and with Maori having acquired considerable political influence, it was timely to revisit and replace agreements reflecting the mores and politics of an earlier time. Officials had to join claimants in getting across a message to politicians, one which Melber summed up neatly in the article I mentioned: ‘Only if we face history can we build a [sound] future.’

Facing History

The 1940s settlements had not, for example, reflected the implications of the Maori name for their people: *tangata whenua*, people of the land. In view of the inseparability of the *tangata* and the *whenua*, the tribes had always aspired to return of land alienated from them. As Waikato elders put it to us in our scoping negotiations with them, when their land was confiscated they had become orphaned from the Earth Mother, Papatuanuku – the god which scholar and activist Moana Jackson declared, in the Te Papa debates in 2013, to be ‘central to us all’. The

orphan reference eventually went into the deed of settlement with Waikato-Tainui, along with other reflections of the iwi's oral archive, accompanying the return of land and monetary reparations.

Ideally, the tribes would have presented their perspectives directly to the ministers. But ministers were busy people, and neither they nor some government departments (such as The Treasury) were inclined to accept the validity of oral sources, especially those not backed by written and very specific documentation. In early negotiations, then, *officials* had to mediate matters of great importance to tribes. This was the case even with something so central to tribal being as *whakapapa*, or genealogy, including the names and deeds of ancestors who had dealt with the Crown over generations. This mediatory role was greatly facilitated by Maori officials, including Tamihana Winitana, a key cultural advisor in the Department of Justice. Of Tuhoe, Ruapani and Waikato descent, Winitana had initially gained his position when Crown officials realised that progress in Waikato-Tainui scoping negotiations would be enhanced if a senior member of the iwi joined the Crown team. After a National government replaced Labour in office in 1990, Winitana became chief Maori adviser to Justice Minister Doug Graham, who was soon to take up the new portfolio of Minister in Charge of Treaty of Waitangi Negotiations.

In those early days, negotiational interaction between claimants and the Crown was conducted in small groups with little ceremony. It was hard-edged, often focussing on legal and financial matters, with little scope for community participation or presentation of many issues important to the tribes. Given this, many tribes preferred to continue to take their grievances before the Tribunal, where they could present their case to the

Crown in the way they wanted, in front of their own people and the general public, as well as in front of the Crown.

Hearings

I came increasingly to appreciate, when I later worked with claimants, and even more so after I joined the Tribunal, the profound significance such public presentations had for many tribes. The decision to delay negotiations was not taken lightly – resource return would have to wait for years of hearings to elapse, and then long negotiations would follow in any case.

In Tribunal proceedings there was always a strong performative element, with each grouping presenting itself according to its own customs and protocols, rather than those of the Crown, and mostly doing so in meeting houses within their own *rohe*/tribal areas. Often this meant downplaying matters that the Crown required under the Treaty legislation: detailed and documented evidence of acts and omissions of the Crown which violated the promises inherent in the Treaty of Waitangi.

In the current Te Paparahi o te Raki claims hearings, the situation is heightened by the northern dominance of Ngapuhi, the iwi which hosted the foundational meeting of the Treaty itself in 1840. Audiences at the hearings can see western and indigenous worldviews and methodologies of historical production and advocacy standing alongside and often contrasting with each other. The tribes present what they wish the Crown to hear, even where this has no necessarily *obvious* relationship (in conventional western eyes) to breaches of the Treaty – extended genealogical recitations going back to creation, for example. Verbal

presentations from claimant hapu might bear little resemblance to pre-circulated written versions, and songs, dances and other performances may well be integrated into them. Claimant presenters or their supporters might unfurl and wave flags, or display tribal carvings and other *taonga*/treasures, or pay respect to paintings and photographs of ancestors, or sing or pray, or enact vigorous ceremonial challenges to the Crown representatives.

Such expressions of *rangatiratanga* in hearings highlight the extent to which things have changed over the last quarter century. The Tribunal does more than just incorporate a much greater ceremonial component than in the 1980s, for example; the presiding officer hands over the daily running of hearings to the local leadership of the host meeting house/*wharenui*.

The Crown, in turn, has gradually leant to become more flexible in its approach. It has frequently expressed a desire to bypass hearings and negotiate a settlement with Ngapuhi, as some claimant sectors want. But it agrees that this should not happen until, in its assessment, the people of the claimant groupings want it to. Long ago it agreed that the first Te Paparahi o te Raki Report by the Tribunal will cover pre-Treaty history, essentially ending with the signing of the Treaty – the initial day of which was 6 February 1840, the date from which, technically, the legislation takes effect. The Report will examine what the Treaty meant to both parties at the time, notwithstanding the pre-existence of Crown interpretational perspectives in Treaty of Waitangi legislation and executive guidelines such as 1989's *Principles for Crown Action on the Treaty of Waitangi* produced in the early days of TOWPU. (It is suffice to mention here that the claimants argue that their signing of Te Tiriti o

Waitangi, the Maori wording of the documents generically called the ‘Treaty of Waitangi’, did not involve transfer of sovereignty to the British).

Rangatiratanga

From a claimant perspective, what underpins the development of Treaty reconciliation processes over the last quarter century? Arguably, it is all about the word I mentioned before but which I did not attempt to translate – *rangatiratanga*. This was what was promised to Maori in Te Tiriti o Waitangi, and there have been many translations of it ever since. I have followed the Waitangi Tribunal in using ‘autonomy’ as a catch-all word to encompass the various (and sometimes varied) meanings of the term, although sometimes I use other terms to reflect different contexts – self-determination, or tribal running of tribal affairs, for example. However it is defined, Treaty processes and discourses have placed *rangatiratanga* firmly before the eyes of the Crown and the Pakeha (non-Maori) public.

Tribes have always sought as effectively as they could, at any given time and through changing sets of circumstances, to assert *rangatiratanga* against the weight and power of the dominant Pakeha culture and polity. The Tribunal’s Taranaki Report put it this way in 1996: ‘Maori autonomy is pivotal to the Treaty’. This report situated *rangatiratanga* as a New Zealand manifestation of an international phenomenon, viz ‘the right of indigenes...to manage their own policy, resources and affairs’. It stated powerfully that: ‘Through war, protest, and petition, the single thread that most illuminates the historical fabric of Maori and Pakeha contact, has been the Maori determination to maintain Maori autonomy and the Government’s desire to destroy it.’

This fundamental clash of interests through time should not be oversimplified. It involves an infinitely complex and subtle set of processes, including (as I argue it in two books, anyway) the Crown appropriating Maori organisational energies, and Maori reappropriating these appropriations in their pursuit of gaining the Crown's respect for their *rangatiratanga* – of achieving autonomy. So one needs to be careful in making assessments and judgements. However, I will venture one or two.

One significant outcome of the Treaty resolution processes over the last quarter century relates to political attitudes and Crown policies. It seems to me that governments and their officials have generally come to accept that the state's historical efforts to (as the Tribunal put it) destroy Maori autonomy were wrongheaded. Rather, the Crown has been increasingly driven to seek accommodations with *rangatiratanga*, in many and varied ways. I have briefly canvassed how this can work in a Tribunal and Treaty resolution context. But at least *a degree* of Crown respect for iwi protocols and aspirations also operates in many other areas of Crown–Maori relations – albeit sometimes falteringly, as was seen early in the current century when the political executive and parliament overrode good faith and due process over customary claims to the foreshore and seabed.

After Reparations

Treaty settlements over historical grievances are now officially scheduled to be finalised within a couple of years, and may actually be completed (or somewhere near it) by the end of this current decade. Many Pakeha

seem to feel that with the last of the historical grievances resolved, the Treaty can finally disappear from official and public discourses. In a way this reflects a populist reversion to the old policy of assimilation (the inverse of the state attack on autonomy), which did not disappear until the Maori Renaissance forced a rethink. The situation presents a profound challenge to the Crown, perhaps a bigger one than it faced in the late 1980s over historical grievances.

While the historical settlement processes were *necessary*, they were not sufficient. They were necessary to remove a roadblock on the route towards socio-political justice for Maori. In the early 1990s, the minister in charge of Treaty negotiations, Douglas Graham, depicted reparational settlements as empowering Maori to ‘move from grievance mode to development mode’. This reflected advice by Winitana and other Maori officials, and was a way of expressing a concept in common usage within Maoridom at the time. While settlements compensate for only a fraction of the losses suffered by iwi since 1840, they have made a discernible difference for many tribes. On Waitangi Day this year, a tribal commentator declared that ‘claims had [once] been our culture’, but that now his people had moved on.

This point having been noted, far more is now required before what was promised in Te Tiriti – Crown respect for the exercise of *rangatiratanga* – can be achieved. A key challenge for the country, in other words, is to find ways of using the concept of the ‘Treaty of Waitangi’ as the basis of a modern, and inevitably evolving, ‘living relationship’ between Crown and Maori – and by extension, between *tangata whenua* and all later comers to these shores. The Crown needs to explore, with Maori representatives of tribal and other collectivities, ways of achieving the

respect for *rangatiratanga* which *tangata whenua* have long sought. This might ultimately take the form of embedding the Treaty relationship into constitutional or other arrangements, or it might involve other reconfigurations of the Treaty's place in modern polity and society.

This was never going to be an easy process, despite some smoothing of the way by the official and popular biculturalism which has emerged since the Maori Renaissance. For a start, in a country which prides itself on egalitarian ethos, there is an endemic European resistance to 'special treatment' for any given community. Rednecks, neoliberals and outright racists whip up hysteria on this from time to time, aided by attention-seeking politicians and sensation-seeking news media. And the increasing reality of multiculturalism in New Zealand society needs to fit into the mix as well.

Conclusion

The challenges are huge. But I think it reasonable to argue that Treaty settlement processes since 1989 have assisted in establishing at least *some* kind of base from which appropriate relational discussions and discourses can proceed. They have tested some things which might work, and sifted out others that do not. In 1996, for example, officials were tasked with exploring the concept of providing legal personalities to tribes who sought them. This revived previous but abortive earlier attempts which foundered as a result of political or bureaucratic machinations. Subsequently, a number of tribal groups have gained governance regimes which legally protect their rights and interests, sometimes in innovative ways for western legal systems – tribal property vested in perpetuity in a revered ancestor, for example. Anthropologist Anne Salmond recently

noted that Treaty resolution processes had seen the Whanganui River able to be legally deemed a living person, bringing the law in line with tribal understanding of its role in the cosmos all along. And national and tribal-based hearings and negotiations have been complemented by a fascinating array of modes of formal and informal cooperation between communities and local government.

We are fortunate in New Zealand that all such discussions and arrangements fall under the ethos and rubric of a single Treaty which has not just refused to disappear, but has had a dramatic revival. Treaty-derived and Treaty-based reconciliation, then, has been assisting Crown and Maori to forge relationships that hold out promise for a healthy bicultural polity – although ultimately full success will require non-Maori inclusion in discourses and acceptance of decisions.

Looking at developments over the past quarter century in the context of the 150 years before that, much healing has taken place, and many positive developments have occurred to help resolve deeply rooted, historically based difficulties. But updating the partnership between Crown and Maori will undoubtedly prove to be an even greater challenge. While Treaty settlements might provide a good base to work from, there remains a very long way to go. Nevertheless the pressure and pace is on; the voice of *rangatiratanga* is consistent and insistent. Because of this, and despite having worked inside the mechanisms of state and experienced the cynicism and opportunism which can pervade them, I am a cautious optimist on the future of Treaty relations in Aotearoa New Zealand.

When TOWRU officials first visited the Waikato in 1989, two elders, Aunties Mere Taka and Iti Rawiri, asked what made them any different from the officials they had seen come and go over many decades. The reply was that both the Maori Renaissance and Crown concessions in response to it had created a scenario that at last made some meaningful progress possible – and that this particular set of officials was *determined* to try and make a difference. At that point the Crown’s offer to Waikato-Tainui remained at zero, and even inflation-adjustment payments under the previous agreements remained a controversial issue within the Crown apparatus. Alex Frame has written about these pioneering negotiations, which were centred on returning Crown land to the iwi, in his chapter in *Raupatu: The Confiscation of Maori Land*. By the 1990 election a tentative offer totalling some \$20m had been made. Four years later, the iwi signed up to a package of land and money worth \$170m, and an iwi governance regime that embedded rights to control its own destiny within the overarching law and constitution of the country.

When officials were asked early on in the historical reconciliation processes what would stop tribes coming back for more settlements in the future, the answer was essentially that the *adequacy* of the agreements would be the test of their durability. The same can be said of whatever constitutional or other arrangements are put in place once historical grievances have been fully settled – with the addition of the point that durability will also depend on flexibility within those arrangements to adjust to changing circumstances. Treaty settlements might provide a good base to work from. But, I repeat, there is a very long way to go. Updating the partnership between Crown and Maori might surely be seen to be one of the biggest challenges facing the nation.

Richard S Hill,
December 2013.