

A MAORI 'RIGHT TO DEVELOPMENT' UNDER THE TREATY OF WAITANGI

Its Emergence and Extent in the Jurisprudence of the New Zealand Courts and the Waitangi Tribunal

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Over the last twenty years a Maori 'right to development' has emerged in the jurisprudence of the New Zealand courts and the Waitangi Tribunal as a right under the Treaty of Waitangi. This emergence echoes the recognition in international human rights law that the right to development is an 'inalienable right of all human beings and peoples to participate in and enjoy economic, social, cultural and political development' (United Nations 1986: article 1).

This paper examines how the Waitangi Tribunal has progressively recognised three levels of a Treaty right of development:

1. A right to develop resources that Maori used in a traditional manner in 1840 ('the first level');
2. A right to develop resources not known in 1840 (when the Treaty was signed) under the partnership principle of the Treaty ('the second level'); and
3. A right of Maori to develop as a people ('the third level').
(taken from WT 1999: 30)

It argues that while the Tribunal has accepted the right at all three levels, the New Zealand courts have taken a more limited view of the right and its extent. Further, this paper argues that the right is likely to have a very wide application. In canvassing the Tribunal's reports and relevant court cases, this paper also explores some of the contemporary manifestations of the right to development in New Zealand resource politics.

This paper assumes a basic knowledge of the Treaty of Waitangi and its principles (see Orange 1997; Biggs 1989; Hayward 1997 and the Tribunal reports cited below). In brief, the principles of the Treaty include: the Treaty implies a partnership between Maori and the Crown characterised by a duty to act in good faith and co-operation; the right of the Crown to govern is subject to a duty of active protection of Maori interests, and in particular, 'tino rangatiratanga' (chieftainship) over resources and taonga (treasured possessions), but is not unreasonably restricted; and the Crown has a duty to remedy past breaches (Gibbs 2002: 14).¹ It is out of, and in furtherance of the ideas expressed in the principles of the Treaty, that a Treaty development right has emerged.

The Tribunal's Early Reports: An Acceptance of the First Level Right

The idea of a development right under the Treaty of Waitangi has its roots in the early Waitangi Tribunal reports of the 1980s. For example, in 1983 the Tribunal said that the Treaty is a document 'capable of a measure of adaptation to meet new and changing circumstances' (WT 1989: 52). It is 'more than an affirmation of existing rights' and is 'not intended to fossilise the status quo, but to provide direction for future growth and development' (WT 1989: 52).²

In 1988 the Waitangi Tribunal specifically referred to a Treaty 'development right' for the first time. Following the United Nations' Declaration on the Right to Development in 1986 (referred to above), in its *Muriwhenua Fishing Claim Report* the Tribunal argued that '[i]t is the inherent right of all people to

develop and progress in all areas' and asserted that '[a] treaty that denied a development right to Maori would not have been signed' (WT 1988: 116). In relation to the fishing claim before it, the Tribunal held:

[t]he Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear (quoted with approval in WT 1992: 234).

The Treaty development right included the right to expand fishing into areas not fished traditionally, as a result of adopting new technologies. It encompassed development of either or both customary or commercial fishing. The Tribunal reinforced these views in the *Ngai Tahu Sea Fisheries Report* in 1992 adding that expansion of fishing into offshore or deepwater fisheries, and therefore to species not traditionally fished or possibly known of, was part of the right to development (WT 1992).

In 1993 the Tribunal was called upon to examine the Treaty development right in the context of a claim to generate electricity from geothermal resources (WT 1993a). The Tribunal found that the geothermal resources in question were taonga of the claimants and had been used in a traditional manner in 1840. As with fisheries, such resources clearly fell within the protections of Article II and therefore, the right of development applied to the resource and extended to the right to generate electricity from it (WT 1993a: 22). The Tribunal found that:

... the claimants' interest in the [geothermal] resource is not confined by the traditional or pre-Treaty technology or needs, but ... includes the development of the resource for economic benefit and by modern technology. (WT 1993a: 34)

The Tribunal left open the issue of whether the right to development could be an exclusive right, suggesting that exclusivity

would depend on 'the nature and extent of the particular resource and the development sought' (WT 1993a: 23). The Tribunal held that the claimants, who owned a substantial amount of the land overlying the geothermal resource, had a Treaty right to develop the geothermal resource underlying their land and should be given priority in the granting of any resource consent (under the Resource Management Act 1991) to utilise the geothermal resource generally in their tribal area (WT 1993a: 23).

These early statements by the Tribunal indicate an acceptance of the first level of the right to development, namely that the development right applies to resources used traditionally by Maori in 1840. The right to develop extends to the use of new technologies and methods, and as a result of these developments, to utilise a traditional resource in new ways and in expanded geographical areas. These views were reinforced in later Tribunal reports (WT 1998: 120; WT 1999: 41).

The Courts: Tentative Steps Toward the Second Level Right

A Maori right to development has arisen before the New Zealand Court of Appeal on only a few occasions. In 1989, the Court indirectly considered the right in *Tainui Maori Trust Board v A-G* [1989] 2 NZLR 513.³ In the course of the decision Cooke P held that coal could be 'classified as a form of taonga' (529). Maori had used it in a limited way prior to 1840 and had made a significant contribution to the coal industry. Further, coal was a natural asset of Tainui's traditional lands. However, since the coal industry was primarily a result of Pakeha endeavors, Cooke P suggested that in any negotiated settlement of Tainui's claims the tribe would be 'entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource' (529).

Cooke P did not use the language of a 'right to development', most probably because the case was not argued in this way. However, the Court's comments above suggest its acceptance of at least the first level of the right to development.

The Treaty right of development arose, again somewhat indirectly, in *Te Runanganui o Te Ika Whenua Inc Society v A-G* [1994] 2 NZLR 20.⁴ The Court was required to consider whether the appellants had a right to generate electricity. It held:

... however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840 (24, per Cooke P).

President Cooke of the Court of Appeal reiterated the idea that Treaty rights only applied to things in the contemplation of the parties when signing the Treaty in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553. The case concerned the issuing of whale-watching permits by the Director of Conservation (under the Marine Mammals Protection Act 1992 and the 1992 regulations) that would allow another company to compete with an established Ngai Tahu whale-watching business.

Cooke P held that a 'right of development of indigenous rights is indeed coming to be recognized in international jurisprudence' albeit 'not necessarily exclusive of other persons or other interests' (at 560). Reiterating his previous views, Cooke P held that:

... tourism and whale-watching are remote from anything in fact contemplated by the original parties to the treaty. Ngai Tahu's claim to a veto must be rejected (560).

Neither tourism nor commercial whale-watching are taonga or part of the enjoyment of a fishery 'within the contemplation of the Treaty' (560). Ngai Tahu had used whales for food and bone but did not assert any ownership over

whales. Notably the case did not turn on any right to develop the whales themselves.

However, the Court of Appeal held that Ngai Tahu's whale-watching business was 'so linked to taonga and fisheries' (560) that the principles of the Treaty were relevant to the Director-General's decision whether or not to grant another party a permit to undertake commercial whale-watching. Cooke P stated that more than consultation would be required and that '[a] period of complete protection [from competition] sufficient to justify the development expenditure incurred by Ngai Tahu may be' appropriate (560).

Thus, the Court of Appeal has not accepted a bare right of development, rejecting a right to generate electricity or undertake tourism and whale-watching. Further, the High Court has held that the Treaty development right does not apply to a resource that was not in existence in New Zealand in 1840, for example introduced trout (*Taranaki Fish & Game Council v McRitchie* [1998] 3 NZLR 611).

The Court of Appeal has accepted, however, that the Treaty principles may require that Maori development of their taonga, together with resources 'analogous' or closely linked to taonga, be given a degree of priority.⁵ This indicates acceptance of a Treaty development right at the first level and hints toward acceptance of the right at the second level, namely a right to develop resources not known in 1840 under the partnership principle of the Treaty. In the cases discussed, the contemporary circumstances and the Crown's proper exercise of kawanatanga (government) were held to limit any exclusivity of the claims in question correlating to development under the partnership principle.⁶

Recent Tribunal Findings: Acceptance of the Right at All Three Levels

Around the same time as the Whale-watching case, the *Waitangi Tribunal's Kiwifruit Marketing Report 1995* was released.⁷ The Tribunal found that the right to export kiwifruit was not a taonga:

... in pre-contact times the exchange of treasures by iwi

and hapu might have been regarded as a taonga. It would, in our view, be an unjustified straining of Treaty principles to hold that the right to develop such a treasure could extend all the way to the modern kiwifruit export trade (WT 1995: 1).

Even if it had been a taonga, the Tribunal held that 'the regulation of export trade is a legitimate exercise of kawanatanga [government]' (WT 1995). Therefore, in line with the courts, the Tribunal held that the right is not a bare right to develop and may be constrained by the Crown's right to govern.

More recently in the 1998 *Te Ika Whenua Rivers Report* the Tribunal re-affirmed the first level right (WT 1998: 120). The claim concerned, in part, the right to develop the claimant's rivers for generating electricity. The Tribunal held that as at 1840, Te Ika Whenua had a 'right of full and unrestricted use and control of the waters thereof – while they were within their rohe [tribal area]' (WT 1998: 124). This was property guaranteed protection under Article II of the Treaty (WT 1998: 126). Therefore, the right to development 'extended to Te Ika Whenua in the case of its rivers' (WT 1998: 121).

The Tribunal expressly agreed with the decision in *Te Runanganui o Te Ika Whenua Incorporated Society v A-G* (above) that the Treaty had not 'preserved or assured to [Maori] any right to generate electricity by the use of water power' (WT 1998: 128). However, it considered that the Treaty development right gave Te Ika Whenua a right to the full use and development of its rivers (WT 1998: 128). Echoing its statements in *Te Arawa Representative Geothermal Resource Claims* the Tribunal indicated that such use and development of taonga might include generating electricity.

Following the cases discussed above and its own reports, the Tribunal held that the claimant's right to develop its interest in its rivers was not exclusive. The changing circumstances of the settlement of New Zealand and 'the general contemplation under the Treaty that there would be a sharing of the resources upon which

settlement depended, have led to a reduction of Te Ika Whenua's proprietary interest' in its rivers (WT 1998: 126). In such cases the principles of the Treaty require the Crown to 'ensure that its Treaty partner is able to partake fully in that process [development]' (WT 1998, 129). As noted above, this may involve some sort of priority for Maori development of traditional resources, at least where they have retained a substantial interest in the resource.⁸

In the *Te Ika Whenua Rivers Report*, the Tribunal's comments clearly come within the first level of the development right, namely traditional resources and taonga covered by Article II. However, in the *Radio Spectrum Final Report 1999*, the Tribunal specifically acknowledged a Treaty right to development at all three levels. The report concerned claims challenging the Crown's policy regarding the management of part of the electromagnetic spectrum used for telecommunications and information technology such as the internet, cellular phones, video links and video conferencing (WT 1999). The claimants specifically argued that the Treaty right to development extends to all three levels (noted above) and that the Crown's policy would be in breach of the Treaty right to develop the electromagnetic spectrum, a taonga of Maori (WT 1999: 30).

The Tribunal had no hesitation in upholding the third of these levels stating, '[t]he Treaty as a whole provides support for the Maori right to develop as a people' (WT 1999: 30). In addition it held:

While it has been generally accepted that there is a development right (which includes the use of technology unknown in 1840) for properties specified in the Treaty, such as land, forest, and fisheries, there has been little agreement over the unspecified 'other properties' or taonga. The Crown accepts the development right for specified properties, such as fisheries, and some taonga, such as language and culture (WT 1999: 41).

The Tribunal found that the radio spectrum was a taonga: 'Maori had traditional knowledge of and used parts of the electromagnetic spectrum' (for example, for sight, hearing, and navigation by the stars, together with the tradition of Tawhaki climbing the heavens) (WT 1999: 41). In line with previous decisions, the Tribunal held that Maori have a right to develop this taonga 'through technology that has subsequently become available' (WT 1999: 42). The Tribunal therefore upheld the first level of the development right.

Relying on the reservation of Maori rangatiratanga under Article II of the Treaty, the Crown's fiduciary duty and requirement for active protection, and the principle of mutual benefit, the Tribunal also:

... accept[ed] the second level of the claimant counsel's submission that Maori have a right under partnership and the other principles specified above to the development of resources that were not known about in 1840 ... (WT 1999: 42).

Because the Tribunal held that the electromagnetic spectrum was a taonga used traditionally in 1840, strictly speaking it was not necessary for it to uphold the second level of the right. Although Maori in 1840 had not known of the frequencies used for modern telecommunications, this may be seen as an extension of the use of a traditional resource, using new technology, in the same way as the Treaty right to develop fisheries extends to new fishing grounds and species not known in 1840.

This result, however, goes against President Cooke's statements that Treaty rights cannot apply to matters 'remote from anything in fact contemplated by the original parties to the treaty' (*Ngai Tahu Maori Trust Board*: 560). The use of electromagnetic energy for telecommunications was surely far from the minds of those signing the Treaty. With respect, such a test must be treated with caution in the context of a right to development. Apart from being but a guess, only attributing the right to develop

those things that might have reasonably been in the minds of those signing the Treaty may limit the Treaty development right (even at the first level) in a manner inconsistent with the principles of the Treaty. Under this test many contemporary developments of even traditional resources and taonga may well be excluded from the right to development.

Having said this, in both *Tainui Maori Trust Board* and *Ngai Tahu Maori Trust Board* President Cooke commented that the spirit of the Treaty could require some kind of priority right be given to Maori development of certain resources (in the first case coal, a form of taonga, and in the second whale-watching, analogous to a taonga). This suggests a limited acceptance of the second level right, namely the development of resources not known, or perhaps used, in 1840.

Conclusions: A Far-Reaching Treaty Right

The Waitangi Tribunal has clearly accepted that the Treaty contains a right to develop traditional resources and taonga (the first level), to take part in the development of resources not known of in 1840 in partnership with the Crown (the second level) and for Maori to develop as a people (the third level). In contrast, the courts have taken a more conservative 'and somewhat muted approach' (WT 1998: 120) suggesting only a limited acceptance of the first level right and, indirectly and even more tentatively, acceptance of the second level right. The acceptance of the second level right, albeit with reservations, raises questions about the application of the Treaty development right to resources not valued by Maori in 1840, such as gold, and resources not discovered in 1840 such as petroleum. Potentially such resources will be subject to the second level right, that is a right to develop them in partnership with the Crown.

Both the Tribunal and the courts have indicated that the development right is not exclusive but is constrained by the proper exercise of the Crown's kawanatanga and contemporary circumstances. Having said this, the right extends at least to some kind

of priority for Maori economic development, the extent of which will depend the resource and the situation. It is likely to involve Maori as owners, joint venturers and managers, for example, rather than as mere consumers (WT 1999).

Significantly, the recognition by the Tribunal of the electromagnetic spectrum as a taonga of Maori suggests that the Treaty development right may prove to be extremely far-reaching, even if confined to the first level. Because Maori used parts of the spectrum and a spiritual relationship with it in 1840, it was held to be taonga. The same could be argued for much of the natural world. According to Maori cosmology, all of the natural world is linked by whakapapa (genealogy or descent) and was a taonga of Maori over which they exercised kaitiakitanga (guardianship). If the Treaty development right can extend to the use of taonga in new ways, taking advantage of new technologies, then the Treaty right to develop taonga could extend to almost any natural resource-based development (although not species introduced since 1840). In this context, the outcome of the current flora and fauna (Wai 262) claim warrants attention. Already the Tribunal has upheld the right to develop taonga such as fisheries for economic gain, rivers and geothermal resources to generate electricity, and the electromagnetic spectrum to generate radio signals and other telecommunications. Just how the right to develop taonga such as culture and language, and indeed the right of Maori to develop as a people, might manifest in the future remains to be seen.

In conclusion, the Treaty right to development, even if limited to the first level, is likely to have a very wide application and continue to impose substantial obligations on the Crown to provide for and foster Maori development. Moreover, if the Waitangi Tribunal is correct in upholding the right at all three levels, then the Crown has much to do to ensure that Maori are able to take part in the ongoing development of New Zealand as a nation and to develop as a people within that nation.

Notes

¹ For example see *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 (CA); *A-G v New Zealand Maori Council* [1991] 2 NZLR 129 (CA); *New Zealand Maori Council v A-G* [1992] 2 NZLR 577 (CA); and see for example the following Waitangi Tribunal reports: WT 1987a; WT 1987b; WT 1991; WT 1996, WT 1998a; WT 1998b; WT 1998c.

² Note also the comments of Cooke P in *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, 663; 'What matters is the spirit [of the Treaty]. ... The Treaty has to be seen as an embryo rather than a fully developed and interpreted set of ideas'.

³ The case concerned the transfer from the Crown of certain lands in Tainui's tribal area to third parties, and the right to mine coal to Coalcorp (a state-owned enterprise) was contrary to section 9 of the State-Owned Enterprises Act 1986 and the principles of the Treaty of Waitangi.

⁴ The case before the Court of Appeal concerned judicial review proceedings seeking a declaration that the relevant Minister not approve plans for the transfer of certain dams used for generating electricity. The dams were situated on rivers over which the appellants had outstanding Waitangi Tribunal claims. The case turned on the Court's jurisdiction under section 8 of the Judicature Amendment Act 1972 and was unsuccessful on the facts.

⁵ Although note the court's express caution that this case may prove to be of limited precedent value.

⁶ Note that this argument is in line with the principle that the Treaty confers in the Crown the ability to govern without 'unreasonable restrictions on the right of a duly elected government to follow its chosen policy' (*New Zealand Maori Council v A-G* [1987] 1 NZLR 641: 665-666 per Cooke J (as he then was)). This indicates that the right to develop traditional resources will be limited by contemporary circumstances such as conservation or species management legislation (See also *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553; WT 1993b: 101).

⁷ This claim involved a challenge to the legislation that gave the New Zealand Kiwifruit Marketing Board a monopoly to export kiwifruit.

⁸The Tribunal went on to suggest that where, in the proper exercise of kawanatanga the Crown decided that tangata whenua should not be involved in development of a resource in which they have a significant interest, then compensation must be paid for the use of the claimant's interests in the rivers.

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