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Treaty Principles: Examining the Interface of the Courts and Waitangi Tribunal

I Introduction

Since its signing in 1840, the Treaty of Waitangi ("Treaty") has been entangled in conflict and tension due to disparities in its Māori and English interpretations. A modern-day adaptation of the Treaty to facilitate its incorporation into Aotearoa's legal system has come through the use of "Treaty principles", which have been extensively within the legal sphere. This essay will analyse and critique three of these Treaty principles; active protection, partnership, and redress ("principles") – and will particularly examine their interpretation, and differences thereof, by the Aotearoa courts and the Waitangi Tribunal ("Tribunal").

Section II outlines the principles under analysis, while Section III explores the Tribunal's application of these principles in relevant cases. Section IV examines the Courts' perspective on these principles, followed by Section V which compares and contrasts these viewpoints. Lastly, Section VI delves into broader implications and provides a more insightful discussion.

II Treaty principles

A Treaty principles origins

The disparities between the Māori and English versions of the Treaty have led to varied interpretations of its terms and obligations. As neither version holds binding legal status, Parliament extracted principles from the Treaty to capture its essence and adapt it to modern contexts. These principles also consider historical context, including discussions at Waitangi in February 1840 and ongoing kōrero over the past two centuries.¹ This ensures

¹ Janine Hayward 'Principles of the Treaty of Waitangi – ngā mātapono o te Tiriti o Waitangi' (20 June 2012) Te Ara - the Encyclopaedia of New Zealand <<http://www.TeAra.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapono-o-te-tiriti-o-waitangi>>.

that the principles reflect the sentiments and expectations of Rangatira and iwi, which may have been overlooked during the formalisation process.

B Principles

The concept of "treaty principles" lacks a defined list in legislation since the Treaty of Waitangi Act 1975. Instead, principles have evolved through court judgments, Tribunal findings, new legislation, and a 1989 government statement, with entities like the Tribunal primarily responsible for their formulation.² These principles, detailed in Tribunal reports and sometimes refined by courts, include Rangatiratanga, partnership, good faith, mutual benefit, active protection, and redress, among others.

(a) Active protection

The principle of active protection is a key tenet of the Treaty, which was initially raised by the Tribunal in its early reports and later affirmed by the Court of Appeal in the *Lands* case.³ This principle imposes a duty upon the Crown to ensure active protection of Māori interests, rights, taonga and rangatiratanga, and this duty is said to remain a government priority. The Tribunal articulated that compliance with this principle extends beyond allowing Māori to freely enjoy their language and culture; it necessitates proactive measures to ensure that Māori maintain complete and undisturbed control over their language and culture.⁴

(b) Partnership

The principle of partnership is another core principle, which arguably best captures the goal of the Treaty. Though there is no exhaustive definition of this principle, both the Tribunal and courts describe the Treaty as forming a partnership between Māori and the Crown.

² Above n 1.

³ Waitangi Tribunal 'The Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal' (n.d) [waitangitribunal.govt <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf>](https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Principles-of-the-Treaty-of-Waitangi-as-expressed-by-the-Courts-and-the-Waitangi-Tribunal.pdf)

⁴ Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei claim* (Wai-9, 1987), p. 135.

Therefore, this principle requires the partners to act toward each other ‘reasonably and with the utmost good faith’.⁵

(c) Redress

Finally, the principle of redress, closely linked with partnership, mandates the Crown to address past grievances against Māori. This was underscored in the Court of Appeal's ruling in the *Lands Case*, where it was acknowledged that the Crown should provide some form of redress based on the Waitangi Tribunal's recommendations, unless reasonable grounds exist for withholding it.⁶ The Tribunal stresses that providing redress for Treaty grievances is vital for restoring the honour and integrity of the Crown, as well as revitalising Māori mana.⁷

III The Waitangi Tribunal's interpretation of the principles

(a) Active protection

Foremost, the Tribunal identifies the principle of active protection as an explicit guarantee, as identified in Article III of the Treaty.⁸ They view the duty as a positive obligation, emphasising that mere abstention from actions that breach the Treaty is insufficient to fulfil this obligation.⁹ Instead, a fiduciary-esque obligation attaches to the Crown to take affirmative steps to safeguard Māori interests and Treaty rights.¹⁰

Over time, the Tribunal extensively deliberates on which Māori rights are encompassed by this principle and hence, necessitate active protection by the Crown. In various reports, the Tribunal has found claimed that the Crown's protection under this principle extends to property rights,¹¹ Māori language and culture¹² and generally any interests guaranteed in

⁵ Waitangi Tribunal *The Ngai Tahu report* (Wai-27, 1991), Vol. 1, pp. 242–243.

⁶ *New Zealand Maori Council v Attorney-General [Lands Case]* [1987] 1 NZLR 641 at 665.

⁷ Above n 5.

⁸ Above n 6.

⁹ Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai-414, 1998) at p.21.

¹⁰ Above n 6, at p.70.

¹¹ Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report* (Wai-27, 1992) at 155.

¹² Waitangi Tribunal *Te Reo Māori Report* (Wai-11, 1986) at 23.

Article II of the Treaty.¹³ The obligation to protect these interests is said to be rooted in the Crown's duty to protect Māori rangatiratanga per the Treaty.¹⁴

The Tribunal asserts that two significant interests covered by the principle are Māori land and fisheries rights. The Ngāti Rangiteaorere Report defines the Crown's responsibility as protecting Māori land, as well as consulting Māori adequately before transferring their lands,¹⁵ as part of the duty to protect rangatiratanga. Furthermore, fishing is a tapu act for Māori, with sacred procedures to fish in a mana-optimising manner. Acknowledging the significance of the issue, the Tribunal confirmed that the Crown must continue to protect Māori fishing rights, requiring consensus from all stakeholders for any changes.¹⁶

(b) Partnership

The Tribunal's view of partnership underscores the responsibility for both parties to conduct themselves reasonably, honourably, and in good faith.¹⁷ Acting in such a manner entails both partners to acknowledge respective interests and authority over natural resources, seeking a balanced approach that ensures mutual benefit, and simultaneously upholding mutual accountability.¹⁸

The Tribunal articulated this in the Mohaka River Report, whereby they construed this obligation as mandating that both Ngāti Pahauwera and the Crown must acknowledge each other's interests in the river. This duty necessitated the Treaty partners to pursue agreements that not only address the Crown's broader public interest responsibilities, ensuring appropriate arrangements for conservation, control, and management, but also protect tribal tino rangatiratanga.¹⁹ In essence, the Tribunal emphasised the importance of striking a

¹³ Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (Wai-304, 1993).

¹⁴ Above n 9.

¹⁵ Waitangi Tribunal, *Ngāti Rangiteaorere Report* (Wai-32, 1990).

¹⁶ Waitangi Tribunal, *Fisheries Settlement Report* (Wai-307, 1992).

¹⁷ Above, n 9.

¹⁸ Above, n 15.

¹⁹ Waitangi Tribunal, *Mohaka River Report* (Wai-119, 1992).

delicate balance that respects both the collective interests of the wider community and the inherent authority of the tribe over their resources.

The Tribunal also outlines that acting in good faith means acting respectfully toward each other. This can be seen in light of the government's historical failure to acknowledge Māori authority by not treating them as equals, coupled with its unilateral approach to exert dominance over Taranaki Māori and disregard their requests for mutually acceptable agreements. Such behaviour was deemed violating the partnership principle by the Tribunal, and thereafter, they recognised the right of Māori to “enjoy cooperation and dialogue with the Government”.²⁰

(c) Redress

The Tribunal has asserted that at times, monetary compensation alone may not adequately address issues in line with tikanga. Consequently, it has mandated that the Crown explore alternative and varied forms of redress to fulfil its Treaty obligation effectively. For example, when the Manukau tribes suffered substantial losses due to certain Crown policies, the Tribunal proposed a combination of compensation, legislative amendments, policy changes, and affirmative action strategies involving tangata whenua to restore the cultural significance of the harbour.²¹

As with the principle of partnership, the Tribunal also recognises that there should be an essence of mutual benefit when providing redress. This was reflected in the Mangonui Sewerage Report, whereby the Tribunal held that in providing redress, Māori concerns needed to be balanced with those of the wider community's.²²

Tikanga principles also largely interplay with the requirement of redress. The concept of puretumu entails pursuing redress, compensation, or gratification. It is founded on the

²⁰ Waitangi Tribunal *Taranaki Report* (Wai-143, 1996).

²¹ Waitangi Tribunal *Manukau Report* (Wai-8, 1985) at p.26.

²² Waitangi Tribunal *Mangonui Sewerage Report* (Wai-17, 1988).

pursuit of justice and the restoration of mana following a tūkino.²³ Therefore, from a Māori perspective, redress extends beyond mere compensation, and encompasses spiritual implications as well. This was seen in the Muriwhenua claim, whereby adequate redress required restoring the tribe's mana by protecting their ancestral ties to the seas and tribal base.²⁴ This aligns with the principle of consultation, where the Tribunal states that iwi should negotiate and agree on redress that addresses their subsistence and economic well-being to restore their mana.²⁵

IV The Court's interpretation of the principles

(a) Active protection

The courts first acknowledge the Crown's positive duty of active protection in the *Lands Case*. They specified that this duty mainly extends to Māori property rights, lands and waters to the fullest extent possible.²⁶ The courts also stress the positive nature of this obligation, and affirm that the duty could not be limited to consultation or mere matters of procedure.²⁷

This duty was later extended by the courts, as to actively protect Te Reo Māori as a taonga. In the context of the *Broadcasting Case*, the Māori's main concern was that the transfer of broadcasting assets would hinder the Crown's ability to fulfil its Treaty obligations to safeguard Māori language and culture.²⁸ The courts, recognising the risk of the obliteration of the Māori culture deemed that Te Reo, an essential element of Māori culture, should also fall within the ambit of taonga, and thus require active protection.

²³ Royal Commission of Inquiry, 'Tikanga Māori concepts' Abuse in Care <<https://www.abuseincare.org.nz/our-progress/reports/from-redress-to-puretumu/from-redress-to-puretumu-4/1-1-introduction-3/1-1-introduction-2/#:~:text=The%20concept%20of%20puretumu%20includes,the%20person%20and%20their%20whānau>>.

²⁴ Waitangi Tribunal *Muriwhenua Land Report* (Wai-45, 1997).

²⁵ Above, n 24.

²⁶ At 642.

²⁷ At 683.

²⁸ *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576.

In the subsequent appeal to the Privy Council, there was a further elaboration on the scope of the duty of active protection. They suggested that the Crown's duty was not absolute, but rather a commitment that could vary depending on the Crown's other obligations and the vulnerability of the taonga concerned.²⁹ Additionally, the Council stated that under the Treaty, the obligation is shared, and "Māori are also required to take reasonable action, in particular action in the home, for the language's preservation".³⁰

(b) Partnership

The courts have used principles of good faith inherent in partnerships from civil law to interpret the partnership principle. However, it is crucial to clarify that the Court of Appeal in the *Lands Case*, did not equate partnership with equal shares or apply business partnership laws. In the *Forests case*, the Court of Appeal emphasised that partnership does not necessitate equal division of assets or resources claimed by Māori. They stated that there may be national assets or resources which, "even if Māori have some fair claim, other initiatives have still the greater contribution".³¹

Furthermore, the courts recognise the significance of actively fulfilling the obligation to act in good faith as a component of the partnership principle. In the *Lands Case*, President Cooke articulated the duty to act reasonably, honourably, and in good faith as being "infinitely more than a formality".³²

Finally, much like the Tribunal, the courts acknowledge the reciprocal nature of any partnership, and apply this in the context of the requirement of both parties to act reasonably and in good faith. President Cooke additionally noted that Treaty principles entail a need for reasonable cooperation from both Treaty partners.³³ In the *Coals Case*,

²⁹ Above n 17, at 513.

³⁰ At 519.

³¹ Above n 3.

³² At 642.

³³ Above n 6, at 664.

the courts further remarked that the Treaty's principles demand genuine efforts from the Crown and Māori to resolve arising issues through agreements rather than litigation.³⁴

(c) Redress

The courts firmly acknowledge that as partners with Māori, the Crown has an inherent Treaty obligation to redress past wrongs.³⁵ The courts' understanding of how this principle ought to be complied with is through a tort-esque "fair and reasonable" lens, whereby a fair and reasonable recognition of and recompense for the wrongdoing is required in determining when and how a Treaty violation is to be remedied.³⁶ In the *Lands case*, the judgement further stated that the Crown is duty-bound to actively address Treaty grievances, especially concerning land, acknowledging its profound importance to Māori.³⁷

Furthermore, it is important to recognise that Treaty breach claims vary widely, often necessitating multifaceted and innovative solutions to achieve adequate redress. The Crown is cognisant of this, and respectively ruled in the *Lands Case* that in certain instances, mere monetary compensation may not satisfy the Crown's Treaty obligation to address Treaty breaches, indicating the need for alternative forms of redress.³⁸ This is particularly the case in land claims, where no sum of money can substitute the duties of kaitiakitanga by tangata whenua.³⁹ This prompted the courts in the *Lands Case* to rule that the Crown must ensure that transferring land to state enterprises was made considering the possibility of land requiring return as redress.⁴⁰

³⁴ *Tainui Maori Trust Board v Attorney-General [Coals Case]* [1989] 2 NZLR 513 at 530.

³⁵ Above n 12, at 665.

³⁶ Above n 6, at 693.

³⁷ At 674.

³⁸ At 717.

³⁹ Te Ahukaramū Charles Royal 'Kaitiakitanga – guardianship and conservation' (2007). Te Ara - the Encyclopedia of New Zealand <<http://www.TeAra.govt.nz/en/kaitiakitanga-guardianship-and-conservation/print>>.

⁴⁰ At 649.

The courts have reiterated the significance of the 'good faith' aspect within the redress principle. President Cooke has articulated the importance of consultation with Māori, and stated that in order to fulfil its duty to honour its Treaty obligation to remedy past breaches, the Crown must discuss options for redress with the relevant iwi. He went further to state that no option can be “foreclosed without agreement” of its Treaty partner.⁴¹

V Analysis of contrasts in interpretations

While the Tribunal and courts generally agree on Crown duties within the principles, differences arise on certain aspects of rights and duties.

Foremost, The Tribunal interprets the principles expansively, aiming to enrich the Treaty's terms with contextual meaning and evolving them to suit modern contexts, largely favouring a pro-Māori stance. In contrast, the courts tend to take a Eurocentric, doctrinal approach, sometimes treating the principles as independent legal tests rather than reflections of Treaty obligations. This divergence in interpretation may lead to legal inconsistencies and undermine Treaty-based decision-making, heightening tensions between Māori and the Crown.

To delve further, this difference is evident even in how the principles are interpreted. Beginning with active protection, the Crown perceives its duty as not absolute, suggesting that Māori should also contribute to protection efforts, whereas contrastingly, the Tribunal views the Crown's duty as absolute. Additionally, while the Tribunal does not see a definitive list of protected interests, the Crown, as seen in cases like the *Lands Case*, seems to imply otherwise by specifying certain interests. These disparities are significant, and potentially affect the strength of protections provided to vital cultural and resource assets for Māori.

Further, regarding the principle of partnership, a significant contrast arises between the courts and the Tribunal concerning the equal status of Treaty partners. The Tribunal

⁴¹ Above n 6, at 530.

staunchly supports the equality of Māori and the Crown, asserting that Māori, as Aotearoa's original inhabitants, hold a constitutional status warranting parity with the Crown. This recognition obliges the Crown to acknowledge Māori's prior existence and constitutional status, upholding their autonomy as far as possible.⁴² In contrast, the courts tend towards a more narrow, traditional interpretation of the partnership principle, often overlooking historical context, likely due to concerns over undermining the Crown's authority.

The divergence between the courts and the Tribunal on the principle of redress is evident, primarily due to their differing implementation approaches. While the Tribunal employs a tikanga perspective and concepts like utu, the courts rely on legal concepts like the 'fair and reasonable' test. This disparity may present challenges, as the Tribunal's tikanga-based approach offers a more culturally and spiritually sensitive view of redress compared to the courts' legalistic criteria.

VI Comprehensive insight and critique

The presence of political influence in Treaty-related matters is undeniable. The Treaty itself is deeply political, and consequently, its principles are inherently political constructs as much as they are legal ones. While this essay has primarily focused on the courts' interpretations of these principles, it's crucial to acknowledge the significant role of the Crown in shaping these interpretations. Political pressure undoubtedly influences the courts' decisions, blurring the line between purely legal interpretations and politically motivated ones.

The Water Case exemplifies this dynamic, where the courts accepted the Crown's assurance of upholding Treaty obligations under the mixed ownership model without critically assessing its credibility.⁴³ This highlights how politics seeps into Treaty matters, challenging the separation of powers in Aotearoa. This overlap of politics in

⁴² Above n 5.

⁴³ *New Zealand Maori Council v Attorney-General [Water Case]* [2013] 3 NZLR 31 at 70.

Treaty affairs raises fundamental questions about the very validity and integrity of these principles.

Critically examining the Treaty principles as a whole reveals significant shortcomings that extend beyond just disparities in interpretation and application between the Waitangi Tribunal and the courts. While these differences are problematic, they are symptomatic of a broader issue: the principles themselves may not accurately represent the true text and intent of the Treaty. This discrepancy raises concerns about the legitimacy and effectiveness of the principles in guiding Treaty-related matters. However, having a single set of principles does provide consistency and a unified framework for addressing Treaty issues, mitigating the risk of misinterpretation stemming from differences between the English and Māori versions of the Treaty.

Yet, a more pressing question emerges: who is qualified to accurately determine the Treaty principles in a manner acceptable to both the courts and the legislature? Operating within a predominantly Western framework, Aotearoa's governance is dominated by Pākehā systems, complicating efforts to establish a credible authority on Treaty matters. This reluctance likely stems from underlying insecurities about relinquishing control, perpetuating a cycle of resistance to meaningful change and hindering progress towards genuine Treaty partnership and reconciliation.

VII Conclusion

There exists a striking parallel between the historical relationship of the Crown and Māori and their contemporary dynamic with the Crown and Tribunal. It's remarkable how, akin to the past, where significant divergence in Treaty interpretation existed between Māori and Eurocentric perspectives, a similar situation persists today. The Tribunal, representing Māori interests, offers a nuanced interpretation and application of Treaty principles, which differs slightly from the more Eurocentric perspective of the Courts.

While the gravity of this disparity may be less pronounced today, notable differences remain in the understanding and application of these principles. This incongruity

undermines a fundamental purpose of the principles – to reconcile disparate understandings and rights under the Treaty.