

Understanding Treaty Issues Today

Extracts from a talk to 'Top of the South' 5 May 2024

By Anne Pōtaka

“Let us assimilate”, said the shark to the whitebait. But the whitebait turned out to be difficult to swallow.

Assimilation was once official Government policy in New Zealand, as it has been in Australia, and in some other colonised countries. Each country has had different circumstances and thus has had different results. Here in New Zealand, we have the Treaty of Waitangi; the bone that stuck in the throat – and still does.

Assimilation as an official Government policy did not last long in New Zealand but other measures were taken to acculturate Māori into European ways; in language, religion, law, and other social norms. So as Māori became more and more outnumbered, they had to adapt to the new culture; the new world view. But underneath, the old culture; the old-world view; the old certainties about themselves and the world remained. Thus it is with all cultures and peoples who have been colonised, for however many years – think of Ireland and, more immediately, Palestine.

Authority is the key. Who, meaning which culture, has the authority? How much is the authority shared? How much, in a modern, representative democracy can it be shared?

Fair-minded Pākehā don't want to appear racist but don't always understand how Māori, as individuals or as a group, can claim special rights in a democracy in which they are only about 15 or 16% of the population. Does democracy mean strict proportional representation, or can special needs and interests be addressed? To some extent of course Mixed Member Proportional representation (MMP) does do that, and in several countries as well as in New Zealand 'affirmative action' is taken to address social disparities or special needs.

There are two types of rights - individual rights and group rights. Some indigenous people in the westernised liberal democracies of New Zealand, Australia, Canada and the United States signed a treaty. Treaties involve group rights. For example, Canada's written Constitution includes the 'Rights of First Nations'.

In 1966 the United Nations adopted two Covenants that dealt with group rights. These apply to all its member countries, not just those that have been colonised. One Covenant is about civil and political rights, and the other is about economic, social and cultural rights. An example of a cultural right is that of a particular group to act in a certain way, for example to worship, associate or express themselves culturally, unhindered by outsiders. Treaty rights are in this category. Examples of the other type of group right are the rights of a class of people in society; the rights, for instance, of trade unions, of children, of prisoners, and of commercial groups. These are legal rights that operate to ensure a smooth running and just society. Individuals can hold both a group right and an individual right.

Successive Governments here in New Zealand have put in place significant initiatives to address Māori rights as a group. One example of this is the right to speak Te Reo. Māori language has become an official language; consequently it has become more visible in public life, even in Parliament. Many in the New Zealander public however have been uneasy at this change, have seen it as undermining the culture they're used to, as being undemocratic. This chorus of public unease and suspicion about the visibility of Māori language came around the same time as a perception of governmental high-handedness over covid mandates. These public concerns gave some political parties in the recent election a significant voter base which resulted in them gaining considerable power in a governing coalition. Now some of the parliamentary acts and judicial judgements taken over many years to address Māori disadvantage are being challenged by these parties and arbitrarily overturned.

The inflammatory term used recently to describe initiatives to give Māori some say in public affairs was 'co-governance'. This became a particular flashpoint for public unease, with terms like 'separatism', 'apartheid' and even 'a take-over by Māori elites' having wide currency. At that time Tāmami Kruger, negotiator with the Crown for the Tūhoe tribe and their land in Te Urewera said, "Co-governance' is not our term, 'Mana Motuhake' (self-determination) is. So, we are committed to washing away dependence on the Crown and raising the maximum authority for Tūhoe people. I don't see co-governance as the answer. But I think it is the next bus-stop in a journey that has to be made. It's everyone's journey. It's like gravity, you can't defy it. It's on its way". So, he goes further than so-called 'co-governance'. What has been said for many years by Māori is, "we want to row our own boat". But rowing their own boat has been too hard for the Government to agree to and is seen to present difficulties with an ethnically mixed population widely dispersed over the country.

There has, however, been a recovery of cultural and societal cohesion, particularly over the last 40-50 years, made possible by positive Government responses to Māori protest. Two things in particular have pushed the Government into implementing these changes. The first was the vigorous protest led by young, educated Māori in the late 1970s and early 1980s who said that the terms of the Treaty had not been honoured. And in the State Enterprises Act in 1987 the Court of Appeal said the Treaty expressed a 'fiduciary' relationship, a partnership based on an actual relationship between the Crown and Iwi Māori. As such, Iwi Māori should be allowed to participate more in decisions that affected them. And, because one Treaty partner had become significantly stronger than the other, the power relationship had become unbalanced, so protection of the other partner's rights was necessary. Affirmative moves in education, in health, in broadcasting, and in Iwi development were among initiatives to address years of cultural domination.

Another thing that made the Government take action to address Māori concerns was the United Nations Declaration on the Rights of Indigenous People. After some hesitation, New Zealand signed this in 2010. One of its clauses asserted the right of indigenous people to self-determination – Tāmami Kruger's 'mana motuhake'. While this United Nations Declaration was not legally binding, it was not a good look for New Zealand to ignore it, especially after other countries, including the United States and Australia, had signed it. While 'self-determination' or 'mana motuhake', for an indigenous population was very hard to implement in any country, it was particularly so in New Zealand with its integrated population. So, the Government ignored it. Instead, consecutive Governments agreed to Māori having inclusion in some areas of environmental management; those areas particularly important to Iwi to whom it had belonged. These were the lakes, rivers, mountains, parks, forests of their traditional tribal rohe or area. Waikato and Whanganui rivers, Rotorua lakes, the volcanic cones in Auckland, Te Urewera National Park, and Taranaki, Aoraki, and Ruapehu mountains are some of the prominent ones. These are now managed by joint Boards comprising representatives of Government and Iwi and sometimes Local Bodies. These co-management arrangements have been successful and have not raised a lot of public protest. However, having tribal representation on local Councils has. This was when the term 'co-governance' rather than 'co-management' came into widespread use. The mandatory inclusion of Iwi representation in a public body was seen by many as undemocratic.

The last Labour Government came up with He Puapua; a five-point action plan to implement the terms of the UN Declaration on the Rights of Indigenous People:

1. Establish Māori Electoral Wards
2. Establish a Māori Health Authority
3. Reform the educational curriculum, particularly regarding teaching New Zealand history
4. Reform water infrastructure through Three Waters
5. Instigate land reform, especially including Iwi management in Conservation Land.

The new Coalition Government moved quickly to either dis-establish, water-down, abandon or (In the case of Māori Electoral Wards) call for a referendum on these initiatives to include Iwi Māori in the more general management of the country. However, the most far-ranging move to take authority from Māori is ACT's Treaty Principles Bill. It proposes to replace the Principles of the Treaty of Waitangi, as determined by the Court and which now find expression in many Acts of Parliament, and to replace them with a new translation by the ACT Party. If Parliament accepts this (National has said it will not support it past the first reading), it will go to a public referendum. If the majority of the public agrees, all references to the Principles of the Treaty will be deleted. The agreement between the British Crown and Māori will become an agreement between the British Crown and all New Zealanders.

Then there is the constitutional issue. New Zealand does not have a written Constitution. Our unwritten Constitution consists of Acts of Parliament and Court Decisions taken over time and what is known as Common Law - that inherited from Britain. If we had a written Constitution, with the Treaty of Waitangi defined as Aotearoa New Zealand's founding document in it, as has been suggested for some years by academics and legal experts, it could not be redefined arbitrarily by ideologically driven Governments. At this time, however, the constitutional issue would appear to be held over for its necessary inclusion in the future debate about New Zealand becoming a Republic. What this will require is determining what the text of the Treaty says, not just the principles inferred from it.

Returning to the initial quote from Tāmami Kruger, if shared decision-making, either termed as co-governance or formally expressed in a legal Principle is so difficult for the public to accept or the Government to implement, the fulfilment of his hope of self-determination for Tūhoe seems a long way off. But I would add, watch this space! Things will move on from here. Neither Māori nor many Tauīwi nor the Parliamentary Opposition will be silent. I think we have come too far.

The full transcript of this talk can be found by logged-in viewers on the Quaker website. <https://quakers.nz>