Review of New Zealand's Existing Constitutional Arrangements Inquiry

Introduction

1. This submission is from the Treaty Relationships Group of the New Zealand Society of Friends (Quakers) and David James and Jillian Wychel.

2. If there is to be an opportunity to speak to our submission, our contacts are David James and Jillian Wychel.

Summary

3. We make this submission as a predominantly Pakeha group concerned about our future as a nation if we continue to marginalize the indigenous peoples of the land. Our national body, the Yearly Meeting, has recorded its view in 1989 that "The Treaty of Waitangi is a living document, fundamental to the life of this nation, now and in the future." We therefore consider that the Treaty must be central to any consideration of our constitutional arrangements and that future constitutional provisions must more adequately reflect the Treaty and its intent.

4. The purpose of this submission is to examine the place of the Treaty of Waitangi in our constitutional arrangements, balancing historical, legal, political and ethical considerations. Some of us have worked with these issues over the past 17 years as educators. The overwhelming majority of the tens of thousands of New Zealanders we have had in our courses, in local bodies, health providers, community organisations and government departments, have endorsed our approach to these issues as unbiased and illuminating, and many have expressed anger that they were not provided with adequate information about the Treaty and indeed even our history as a nation, at an earlier age.

Specific comments

5. We wish to raise the following matters under terms of reference 1, 2 and 3.

6. The formal legitimacy of government in Aotearoa/ New Zealand depends either on the Treaty (as Sir Geoffrey Palmer has said) or on a "revolutionary seizure of power" beyond

(but not cancelling out) the promises of the Treaty (Simon Upton and Doug Graham, following the reasoning of Prof FN Brookfield). The argument is that such a seizure of power, maintained over a long time and not successfully opposed, leads to a de facto partial legitimacy. An early example was Governor Hobson's claim to sovereignty over all tribal districts including those where the Treaty had not been concluded. Such unilateral extensions of power are sometimes justified by changing circumstances and sometimes not, but they are essentially "might is right" arguments and therefore open to being challenged by counter-revolutions, whether peaceful or not. The recent history of Northern Ireland makes us always aware of the risks involved in such strategies.

7. The political legitimacy of government rests on the consent of the people, but if that is taken as simple majoritarianism, then a minority which has distinctive and constant concerns and interests lives effectively in a tyranny of the majority, and cannot be expected to uphold that position. When that minority is indigenous, numbers some 14% of the population and is proportionately increasing, the nation cannot afford to be complacent about its own long-term prospects. Many present world conflicts arise from just this kind of situation.

The original Treaty bargain

8. The Treaty enabled British (and other) settlers to establish themselves in Aotearoa New Zealand and to live here in peace under the protection and control of the British government. The corollary was that Maori would have their rights and interests recognised and protected, both as individual citizens (Article 3) and as members of functioning hapu/iwi tribal units (Preamble and Article 2).

9. English was a foreign language in 1840, and the rangatira who agreed to the Treaty were agreeing to Te Tiriti o Waitangi (the rendering of Hobson's English draft into Maori by Henry Williams) and the explanations of it given by Hobson at Waitangi or his agents at other meetings through their interpreters. In Te Tiriti and the explanations, as they are reported by eye-witnesses or directly by those concerned, there is nothing to suggest a significant transfer of power from the hapu to the Crown. The logic of what was said by the Crown's agents and by the rangatira, combined with the situation at the time and traditional understandings, suggests not a total indivisible sovereignty vested in the Crown but a quite different pattern, essentially a federal state. No rule of law allows Te Tiriti to be disregarded in favour of the English text, and the contra proferentum principle suggests that it should take precedence over that text.

10. The expected pattern was that the Governor would rule over the settlers as their tribal leader within the areas of land that would be made available to the Queen. Hapu would continue to rule themselves (their tino rangatiratanga) in their remaining territories, something that was so obvious that it was still embodied twelve years later in Section 71 of the New Zealand Constitution Act 1852. When issues arose that concerned all citizens or threatened peace and good order, then the Governor would step outside the interests of his own people and would act impartially for all as "father, friend, judge and peacemaker" (Tamati Waka Nene) or as "steersman" (Nopera Panekareao), in other words as the guarantor of a civil society in which law would replace warfare as the final arbiter of disputes. As Gladstone put it in 1845, when he was Colonial Secretary, "I conceive it to be an undoubted maxim that the Crown should stand in all matters between the colonists and the natives…"

11. If this kawanatanga amounted to sovereignty (a matter which has been vigorously disputed), it was a "thin" (and inexpensive) sovereignty that would operate without interference in the internal affairs of the hapu and their members except where they affected others. This was not solely a Maori perception. From his experience as our first Premier and a leading minister in other governments, Henry Sewell wrote as late as 1863: "It is true [Maori] surrendered to the Queen the 'Kawanatanga' – the governorship – or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs, a right which we never have claimed or exercised, and could not in fact exercise."

12. The clear implication is that Crown authority (kawanatanga) and hapu authority (rangatiratanga) were both to be recognised, and that neither could disregard the other. If we had inherited a pattern of federal government like most other such settler colonies of our kind (Canada, Australia, United States), we would have less difficulty in grappling with this, which is a form of federalism. Ironically, even centralised Britain is moving in the same direction with the Scottish Parliament and the Welsh Assembly to supplement Westminster, while we continue to maintain the notion of 'indivisible sovereignty'.

13. Article 2 of Te Tiriti guarantees to the hapu their political authority (tino rangatiratanga), their economic base (their lands), and all their taonga, which can reasonably be interpreted as their cultural identity. With those guarantees in place, the Maori world should have been secure as a permanent part of the evolving nation. Tamati Waka Nene summarised the same issues when at Waitangi he clarified his expectations of the kawanatanga: "You must not allow us to become slaves; you must preserve our customs; and never permit our lands to be taken from us".

‘A revolutionary seizure of power’

14. During the period of the next twelve years of Crown colony government (essentially rule by the Governor), successive Governors exceeded the mandate of Te Tiriti in several ways. The whole Treaty was constantly criticised by the New Zealand Company and by settler leaders who had arrived under the wing of the New Zealand Company and were well aware that the Treaty was intended to limit the freedom to run the colony and acquire Maori land that they wanted and expected.

15. Meanwhile settler numbers were rapidly increasing from the estimate of 2,000 in 1840, and by 1858 would reach 59,000, overtaking those of Maori, according to that year’s census. The result would be that the governments to be elected under the New Zealand Constitution Act 1852 would consist overwhelmingly of settlers for whom the Treaty had already been history when they arrived, and an unwelcome history at that. The hapu would now have to deal not with a personal Governor but with shifting and basically unsympathetic governments. The vast majority of Maori were excluded from the vote by the requirement that voters should be individual property-holders, and the kawanatanga, from having been a central and impartial authority, was co-opted into the settler society, well out of Maori reach.

16. Section 71 of the Constitution Act, providing for self-governing Native Districts, was never put into effect by the settler governments, so Maori and their hapu were excluded from recognition in local as well as in central government.

17. What followed was the systematic expropriation of Maori land through warfare and confiscation, the operation of the Native Court created to individualise title to Maori land and facilitate (one might say “force”) its sale, and other government measures. On the cultural front, a variety of laws and regulations sought to enforce the assimilation of Maori into settler society, with the measures taken against the use of te reo Maori in schools, even in the playground, as one key issue. Assimilation was an article of faith in the settler world, and remained government policy until the 1970s. Even by the 1880s, the tsunami of settlement had made the Maori world invisible to most New Zealanders except as an occasional embellishment and tourist attraction.

The present situation

18. Recent governments led by both major parties have recognised these injustices, and through settlements and the accompanying apologies have to some extent made

reparation, but have not yet seriously tackled the constitutional issue of the relationship at national level between kawanatanga and rangatiratanga. Slogans have substituted for constitutional debate.

19. It is clear that the “thin” sovereignty of Te Tiriti has become a “thick” sovereignty that exerts near-absolute power over whatever aspects of life and society it chooses. Some of this extension of power was inevitable in changing circumstances and would perhaps not have been contested: some was ideological and racist: some was a simple transfer of British habits into a new environment without critical examination. Whatever the motives, the changes have made it impossible to imagine that we can return in a simple way to the original expectations of the Treaty. The challenge is to find ways to embody the spirit and intent of the Treaty in our current constitutional planning. One guide to this, for example, can be the Draft Declaration of the Rights of Indigenous Peoples, on which our governments have so far been equivocal.

20. It seems certain that to insist on a simple majoritarianism, without protection for the rights of minorities, and in particular for the indigenous people whose rights are based not only on the Treaty but also on indigenous rights in common law, will perpetuate the injustices of the past and will lead ultimately to strife. We have already heard a very senior police officer warning his staff that they could well find themselves dealing with ‘race riots’ in the near future.

21. Other nations face similar issues. Rather than follow the examples of Northern Ireland or Israel, we might take note of the examples given by Alison Quentin-Baxter in her chapter “The International and Constitutional Law Contexts”, in Recognising the Rights of Indigenous Peoples, Institute of Policy Studies, 1998:

22. “Many countries have recognised group political rights as a legitimate way of meeting the concerns of particular groups which fear that they would be neglected or swallowed up if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium… Wherever possible, the group has been given autonomy in matters that concern it. Where autonomy is not possible because the interests of other groups or the state as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power…. [These] ‘consociational’ arrangements have proved a valuable safety valve, reducing tensions among different communities.”

Recommendations

23. In contrast to comments from a number of our political leaders recently, we consider the Treaty to be a living document of critical importance to the future of Aotearoa/NZ and that it must be central to any consideration of our constitutional arrangements.

24. We consider that in contrast to some other nations, our insistence on a simple form majoritarian democracy does not protect the rights of Maori as the indigenous peoples and ways must be found to develop constitutional provisions that more adequately achieve that. There are good models of such constitutional arrangements internationally.

25. Under terms of reference 5, we urge the Committee to design a formal process of consultation with Maori that allows adequate time for thorough consideration of the issues within Maori communities and the genuine consideration of the views that emerge. We would hope that such consultation would take place alongside similar unhurried consideration and debate amongst Pakeha and other communities that are part of the increasingly diverse modern society of Aotearoa/NZ.

2011