On the cultural front, a variety of laws and regulations enforced the assimilation of Māori into settler society. Measures taken against the use of te reo Māori in schools, even in the playground, were one key issue. Assimilation was an article of faith in the settler world, and remained government policy until the 1970s.

The present situation

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 Government has not yet seriously tackled the constitutional issue of the relationship at national level between "kāwanatanga" and "rangatiratanga".

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.

There is no simple way to return 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 can be the United Nations' Declaration of the Rights of Indigenous Peoples, which our government has not so far fully supported.

It seems certain that to insist on the right of the majority will perpetuate the injustices of the past and will lead ultimately to strife. The rights of indigenous people must be protected. They are based not only on the Treaty but also on common law. Perhaps if we had inherited a pattern of federal government (as in other former colonies such as Canada, Australia, United States), we might have less difficulty in grappling with the concepts of federalism implied in the Te Tiriti. Even centralised Britain is now moving in the federal direction by adding the Scottish Parliament and the Welsh Assembly to the Westminster administration. We continue to maintain the notion of "indivisible sovereignty".

Solutions to the problem of acknowledging minority rights exist, e.g., Switzerland, the Netherlands and Belgium. These are based on recognising group political rights and giving autonomy in some matters to minorities. Where that's not possible, because of the interests of the state or other groups, they provide for agreement on major changes, backed by a right of veto.

Recommendations

Quakers consider the Treaty to be a living document of critical importance to the future of Aotearoa New Zealand. It must be central to any consideration of our constitutional arrangements. The present insistence on a simple form of majoritarian democracy does not protect the rights of Māori as the indigenous peoples. We need to develop better constitutional provisions. There are good international models of how to do this.

We urge the Crown to design a formal process of consultation with Māori that allows adequate time for thorough consideration of the issues within Māori communities. This consultation should take place alongside similar unhurried consideration among Pākehā and among other communities that are part of the increasingly diverse modern society of Aotearoa New Zealand.

Te Hāhi Tūhauwiri
Quakers

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For further information on Quakers in Aotearoa New Zealand go to:

www.quaker.org.nz

Te Hāhi Tūhauwiri
The Religious Society of Friends in Aotearoa / New Zealand (Quakers)

Constitutional change in Aotearoa New Zealand A Quaker view

In this country, Quakers are largely Pākehā, but we are concerned about our future as a nation if we continue to marginalise the Māori – the indigenous peoples of this land. Our national body, the Yearly Meeting of the Religious Society of Friends in Aotearoa New Zealand, stated in 1989 that "The Treaty of Waitangi is a living document, fundamental to the life of this nation, now and in the future." We believe that the Treaty and its intent must be central to any consideration of our constitutional arrangements.

The 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. The second view has been reasoned by Prof FN Brookfield and supported by Simon Upton and Doug Graham, who argue that a seizure of power, maintained over a long time, and not successfully opposed, leads to some legitimacy. An example is Governor Hobson's claimed 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. “Might is right” is open to being challenged by counter-revolutions, whether peaceful or not. The recent history of Northern Ireland and Israel makes us aware of the risks involved in such strategies.

The political legitimacy of government rests on the consent of the people. If that is taken as the simple right of the majority to decide (majoritarianism), then a minority which has distinctive and constant concerns and interests lives in a tyranny of the majority. Many present world conflicts arise from just this kind of situation. In Aotearoa New Zealand the Māori minority is some 14% of the population and is proportionately increasing. Our nation cannot afford to be complacent about its own long-term prospects.

Let’s look at the original Treaty bargain

The Treaty enabled British (and other) settlers to settle here and to live in peace under the protection and control of the British government. In return, Māori would have their rights and interests recognised and protected, both as individual citizens (Article 3) and as members of functioning hapū/iwi tribal units (Preamble and Article 2).

English was a foreign language in 1840, and the rangatira (chiefs) who agreed to the Treaty agreed to Te Tiriti o Waitangi (the Māori version of Hobson's English draft translated by Henry Williams). In Te Tiriti and in the explanations of the time, there is nothing to suggest a significant transfer of power from the hapū/iwi to the Crown. What was said at the time by the Crown's agents and by the rangatira, combined with the situation and traditional understandings, does not suggest a total indivisible sovereignty vested in the Crown. It suggests quite a different pattern, essentially a federal state.

The clear implication is that Crown authority (kāwanatanga) and hapū/iwi authority (tino rangatiratanga) were both to be recognised, and that neither could disregard the other.

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. Hapū/iwi would continue to rule themselves in their remaining territories.

This was so obvious at the time to all that it was still embodied twelve years later in Section 71 of the New Zealand Constitution Act 1852 which provided for self-governing Native Districts. But it was never put into effect by the settler governments, so Māori and their hapū/iwi were excluded from recognition in local as well as in central government.

When issues arose that concerned all citizens or threatened peace and good order, then it was envisaged that 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 the Governor would act 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".

No rule of law allows Te Tiriti to be disregarded in favour of the English text. In fact it should take precedence over the English text.

If “kāwanatanga” 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 hapū/iwi.

Article 2 of Te Tiriti guarantees to the hapū/iwi their political authority, their economic base (their lands), and all their taonga, i.e. their cultural identity. With those guarantees in place, the Māori 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 kāwanatanga: “You must not allow us to become slaves; you must preserve our customs; and never permit our lands to be taken from us".

What happened next amounts to a "revolutionary seizure of power"

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.

Meanwhile settler numbers were rapidly increasing from the estimate of 2,000 in 1840, and by 1858 would reach 59,000, overtaking those of Māori 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 hapū/iwi would now have to deal not with a personal Governor but with shifting and basically unsympathetic governments. The vast majority of Māori were excluded from the vote by the requirement that voters should be individual property-holders. The “kāwanatanga” was co-opted by the settler society, well out of Māori reach.

What followed was the systematic expropriation of Māori land through warfare, confiscation, and other government measures. The operation of the Native Court was created to individualise title to Māori land and facilitate (one might say 'force') its sale.