What do Treaty clauses really mean?

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After the American War of Independence, the British government of the day did not want any more colonies. They were expensive to found, costly to develop and, once on their feet, showed their gratitude by demanding their independence. They were not worth the effort.

In this attitude it was supported by the "Manchester School" of "Little Englanders". This stance initially also suited the missionaries who saw British annexation and subsequent settlement of colonies as unhelpful to their efforts to Christianise indigenous people. Through the Church Missionary Society, to which many British MPs belonged at the time, including the highly influential Lord Glenelg and James Stephen, to two key people at the Colonial office, they had a big influence on British colonial policy.

Unfortunately for the missionaries in New Zealand, however, unauthorised and disorganised settlement started to occur regardless, i.e., before annexation. They became increasingly alarmed over the lawless and unrestrainable behaviour of the whalers and traders at the Bay of Islands and its very negative and compromising impact on their missionary efforts. They soon changed their tune and started pressing the British Government to provide some basis for action against these lawless elements.

For its part, the British Government was in two minds — it did not want to go as far as acquiring New Zealand, but it did want to oblige the missionaries. So it tried an ineffective series of half-measures (e.g., appointing James Busby as British Resident in 1832, but without any real authority) before finally, and very reluctantly, agreeing to the annexation of New Zealand as the only legal way of bringing effective British law and order here. The feeble efforts of the French and the machinations of Edward Gibbon Wakefield and his New Zealand Company had very little influence, if any, on the British Government's decision to acquire New Zealand. They were side issues.

PROCLAMATION

Having reluctantly made its decision, the British Government knew that, in terms of international law and convention, such as it then was and as it then stood, the only legal way it could actually acquire "sovereignty" over New Zealand, in the absence of a mechanism for full Maori consent, was by "annexation through proclamation", and its successful subsequent enforcement if necessary. British sovereignty was therefore extended over New Zealand, in the strict legal sense, by Proclamation on May 21, 1840.

But though this procedure was necessary, the British Government did not want to simply walk in, as it were, and take over, even if it could have, which would have been very difficult if Maoris had resisted at the time. In deference to rather vague and idealistic but mostly undefined ideas at the time about "native sovereignty", Lord Normanby, the Colonial Secretary in 1839, preferred to do it with as much Maori "consent" as possible — hopefully at the outset with as many chiefs as possible, but, if necessary, on a tribe-by-tribe basis with the remainder over a period of time. This process was largely achieved by the initial signings that took place at Waitangi on February 6, 1840, and by those that were progressively added over the following 18 months as the Treaty was taken around New Zealand. Most chiefs signed on behalf of their iwi.

The problem Normanby and his counsel, William Hobson, had with regards to obtaining "consent" as the basis of British rule in New Zealand was that there was no one central sovereign authority (ie, no paramount chief over all of Aotearoa or no universally acknowledged Maori King) with which the British Government could formally deal or "treat" — rather a large number of often mutually hostile and frequently warring tribes spread throughout New Zealand.

So the British Government decided to do the next best thing — to go through a process as close to full and proper treaty-making as it could as the moral basis, justification and precursor for the legally necessary step of actually annexing New Zealand by proclamation. In a very difficult and complex situation, the British Government acted with the best of honourable intentions.

Although British sovereignty was legally or technically extended over New Zealand by way of annexation through proclamation rather than by the Treaty, there was never any intention on the part of the British Government to deceive Maoris. The British Government intended the Treaty of Waitangi to be regarded as a Treaty, as the basis for British rule, and for its provisions to be honoured. When in 1843 the governor of the New Zealand Company, Joseph Somes, made, in his frustration over its terms, scathing and sarcastic remarks about it and Maoris to the British Government, the then Colonial Secretary, Lord Stanley, replied very tartly: "I am not prepared to set aside the Treaty. I entertain a different view of the respect due to obligations contracted by the Crown . . . and my final answer to the demands of the (New Zealand) Company must be that . . . I will not admit that any person or any government acting in the name of Her Majesty can contract an . . . obligation to despoil others of their lawful and equitable rights."

And, of course, from the Maori viewpoint (which had no knowledge of European or internationally recognised legal conventions or mutually agreed requirements for the extension of sovereignty at the time), it was the Treaty itself, not the Proclamation, by which British rule was officially and formally extended over New Zealand. For this reason it is upon that basis, the Treaty itself, rather than the Proclamation, that I will examine the question of "sovereignty" and its related issues.

Before I do that, however, it is necessary to make some reference to the earlier setting up of the "Confederation of the Northern Tribes" and its "Declaration of Independence" in 1835, a declaration which is the basis of some confused and illogical activist and radical Maori expression at the present time. The Confederation and the Declaration of Independence were largely the creations, not of the chiefs themselves, but of James Busby, the British resident. He devised them to resist the outlandish claims of the Frenchman, Baron De Thierry, rather needlessly as it transpired, and in an attempt to provide some basis of authority for dealing with the law-

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less whalers and traders in the Bay of Islands at the time.

Even if it is (or was) assumed or accepted that the Confederation and Declaration had legal validity and established a broad and even recognised "Maori sovereignty" over the far north of Aotearoa (as distinct from the individual chieftainships that existed over tribal or iwi areas everywhere else), the point is that "Maori sovereignty" was fully surrendered five years later to the Crown by the Confederation and its participating chiefs at, or following, the initial signing of the Treaty of Waitangi on February 6, 1840. Those activists and radicals who incorrectly claim "Maori sovereignty" and "independence" today, on the basis of the 1835 Declaration, together with those who seditiously threaten future violence in an attempt to attain it, are trying to reverse the historical order of events as they occurred from 1835 to 1840. History of course cannot be reversed. Nor can these activists and radicals also, hypocritically, as they are prone to, claim the advantages and rights Maoris received under Clauses 2 and 3 of the Treaty without acknowledging the complete surrender of sovereignty that occurred in and with Clause 1.

In and by Clause 1 of the Treaty (using the translation of the Maori version back into English by Sir Hugh Kawharu), "The chiefs of the Confederation and all of the chiefs who have not joined that Confederation give **absolutely** to the Queen of England **forever the complete** government over their land." The use of the word "government" in this translation to translate the Maori word "kawanatanga" instead of the word "sovereignty", as used in the English version, does not weaken, in any way, the surrender of sovereignty involved in this clause, because "government" or "governance" can only proceed from the possession of sovereignty. To surrender "government", as the Confederation did in 1840, is therefore, *ipso facto*, by definition, to surrender independence and sovereignty, and that is what the chiefs of the Northern Confederation did on February 6, 1840, and other rangatira followed their lead in the 18 months following that day, during which time the Treaty gathered the signatures or signs of the great majority of Aotearoa's chiefs.

SURRENDER

It is particularly important to note that the Maori version of Clause 1 refers to Kawanatanga "Katoa". Katoa means "all", and the phrase therefore means all, not just some part of the sovereignty or governance. So Maoris did in fact by Clause 1 of the Treaty effectively surrender to the Crown the entire sovereignty that they either held, or presumed they held, or were presumed by others to hold. If Maori sovereignty ever existed in any form, it was quite clearly, and in their own language in unmistakable terms, comprehensively surrendered to the Crown by the Treaty. It cannot therefore, *ipso facto*, have existed since that time and it cannot therefore, *ipso facto*, exist today. It follows that the Crown's judicial system, like sovereignty itself, is indivisible and covers everyone, Maori and non-Maori alike. None of us have any choice but to accept its jurisdiction, whether we like it or not, or to suffer the quite legal consequences of failing to do so. There is therefore no legal basis for separatism and any claims for Maori "self-determination" in any fields such as education, health, etc, must depend, as it has and does, on the Crown willingly delegating its authority, which it can revoke at its pleasure, accordingly.

Those activists, radicals and others, who today challenge the Crown's sovereignty or advance claims for various forms of "Maori sovereignty", ignore, and have to ignore, the clear wording of Clause 1 and put their whole emphasis on Clause 2. By doing that, they inevitably misinterpret it. Clause 2 guaranteed Maori the undisturbed possession of their lands, forests, fisheries and other treasures (taonga). Under Clause 2 they could also choose to "alienate" (sell) their land to the Crown. In the Maori version of Clause 2, possession is described as "tino rangatiratanga", and in the Sir Hugh Kawharu translation back into English that is accurately translated as "chieftainship". The "chieftainship" highlighted in Clause 2 is of course "preceded" by the "sovereignty" or "governance" surrendered to the Crown in Clause 1. Chieftainship is therefore automatically subject to the laws of the land in the same way as any other form of ownership.

It is in fact upon the "precedence" of sovereignty or government over chieftainship that the Crown is then able to guarantee, through Clause 3, to all Maoris all the rights and privileges of British subjects — democratic rights, including those enjoyed by radicals and activists, which their ancestors simply did not possess or enjoy under traditional chieftainship and which they would still not possess and enjoy if that traditional chiefly authority were still the basis of effective governing authority in New Zealand. Without the "precedence" of Clause 1, the Crown could not in fact have guaranteed Maoris, or anyone for that matter, such rights.

"Tino rangatiratanga" in Clause 2 clearly does not mean Maori sovereignty. It means chiefly or tribal (iwi) possession or ownership of, and control over, unalienated or unsold Maori land, forests, fisheries and other treasures (taonga). As such it specifically confers on iwi all the normal rights of ownership and possession in the European sense, including **subject to the restrictions imposed by the laws of the country**, the right to use and manage, or not, one's land and assets as one chooses, or in accordance with customary traditions, customs, values and preferences or "tikanga". It also confers, in respect of their land, forests, fisheries and other taonga a **special status**, below that of sovereignty, but above that of normal or conventional ownership, but still **subject to the laws of the land**.

This has been well recognised in recent statutes, such as the Resource Management Act 1991, which quite properly provides for special opportunities for consultation with, participation by and, where appropriate, delegation of decision-making authority to iwi with regard to natural resource management. It exemplifies the active consultation, political participation and possible delegation implied, if not specifically stated as such, in Clause 2 of the Treaty. That principle has, again quite properly, also been increasingly observed in recent times in various areas of our health, education and social welfare systems.

TWO PARTIES

The Treaty was signed by two parties – the Crown and the Chiefs. It can, if one likes the analogy, be described as a partnership arrangement. But nowhere does it provide, nor has it ever provided, for an equal partnership with the Crown **in terms of sovereign power sharing**. The Treaty provides for one indivisible sovereignty (Clause 1), equal democratic rights for all, Maori and non-Maori alike (Clause 3) and, by inference, a special consultative participatory or delegatory role as appropriate in decision-making for iwi, as against any other definable cultural interests in New Zealand society (Clause 2). It does this in special recognition of the "tangata whenua" status of iwi in their tribal areas. That is what "tino rangatiratanga" can be legitimately claimed to mean in the overall context of the Treaty, and the events and processes that led to the establishment of British rule over all New Zealand.

If this is what people mean when they refer to the so-called "partnership provisions" of the Treaty of Waitangi, then that is a correct enough interpretation. Unfortunately the use of the word "partnership" has been misused by latter-day activists and radicals. It has been grist to their mill. Some confusion in recent years would have been avoided if the correct term – "consultation, participation and delegation provisions" – had been commonly used instead. The notion of "partnership" taken by activists and radicals in recent times to mean equal power-sharing between Maoris and the Crown (at the expense of the democratic rights of all New Zealanders) and the right to direct negotiation between iwi and central Government (rather than regional or local government which is also an integral part of "Kawanatanga" or "governance"), is but the latest in a long line of incorrect interpretations of the Treaty, each fashionable for a period.

During its history, three major interpretations of the Treaty have held sway for longer than others. "Assimilation", initiated by Sir George Grey, was the first. It was wrong. "Integration", which stood for decades, and almost saw the disappearance of Maori culture, was next. It was wrong also. Each had its day, and now we have "partnership". It is having its day now. In a few years another concept will undoubtedly surface and be lauded and pampered with the same diligence that some academics are heaping upon "partnership" now. Hopefully, in the end, the actuality of what the Treaty actually and simply says, free of labels and slogans, will prevail with a burst of overdue human and academic common sense.

It is, of course, perfectly true that the system of justice has not always or often to date been fair, or as fair as it could and should have been, to Maoris, but the solution to that problem does not lie in disillusioned and frustrated Maoris attempting to ignore it, which they cannot, as Moutoa has shown, but with the help of those non-Maoris who want to see fairness and justice prevail, in working together to ensure that this happens. This will not be achieved if illegal action continues to alienate the potential pool of European good will and assistance.

Justifiable land and other claims arising from questionable past land acquisition practices, such as those sanctioned by land commissioner Spain and native land purchase officer Donald McLean, and unjustified confiscation following the land wars of the 1860s should now be settled as quickly as possible through the Maori Land Court, Maori Appellate Court and the Waitangi Tribunal, all of which exist as potentially potent weapons in the interests of fairness and equity on the basis of the Crown's sovereignty. The solution to the present log-jam of unresolved claims is for more and better resources to be made available to these institutions so that they can process their workloads more efficiently.

ALIENATION

The push for Maori sovereignty is not new. It first appeared in the 1890s in two forms – as the "Kauhanganui" (King) movement and the "kotahitanga" (Maori Parliament) movement. One of the greatest political dangers for Maoris in incorrectly pushing the notion of tino rangatiratanga as Maori sovereignty today is that the alienation it will automatically produce among the bulk of non-Maoris will enormously strengthen the hand of those, at present a minority, who want to see New Zealand turned into a "republic". Even strong monarchists will increasingly weaken in their resolve to retain the Crown as Head of State if revolutionary threats about Maori sovereignty persist or grow.

While legal and constitutional opinion differs on the matter, I and many others with a strong background in constitutional history are convinced that any change from New Zealand as a "monarchy" to New Zealand as a "republic" will, despite legislation currently on the books, inevitably undermine the "constitutional" basis upon which such legislation rests and therefore both the constitutional standing and applicability of the Treaty itself. This is especially likely to be the end result in a situation where, with significantly increased Pacific Island and Asian immigration in the meantime, New Zealand will have become much more multicultural and without the protection of a respected Treaty, the privileged status it confers on Maori as "tangata whenua" could be exposed to strenuous challenge.