

More contributions needed to debate over Maori sovereignty

Aside from the pronouncements of some radicals (assiduously lionised by the media) and the threats that issue in reply from the ghetto of radio-talkback-land, there is scarcely any public debate about the lightning rod issue of Maori sovereignty.

Any debate there is goes on in broom cupboards, but it is the big sleeper that niggles away at New Zealand.

As a Minister, I am supposedly pulverised by political correctness into sheepish silence. And in truth, I have spent the last 10 years on the sidelines, watching the issue emerge. Fence-sitting, if you like. Except that there hasn't been much of a fence to sit on. Nobody knows what sovereignty means. Now, at last, the fence is starting to be built. I've been particularly struck by two contributions to the debate.

The first is the view of sovereignty from Moutoa Gardens (for which I am indebted to the "Dominion" which translated and published it some weeks ago). It was an elegant and seamlessly argued piece that read more like a law school honours essay than something declaimed on the paepae. It describes the relationship of iwi with the land. For those who have not seen the piece I shall summarise it as best I can:

The relationship of a tribe with the land from which it springs is said to be a *legal* one that creates rights and obligations designed to safeguard custom, culture and lore. The rules of each iwi regulate the relationship between people and that between people and the land. Each iwi has sovereign authority to decide what that relationship is — one iwi can't impose its law on another (and that goes for iwi pakeha as well).

The most striking thing about this law is the absolutely exclusive, privileged knowledge that is needed to interpret it. It is not open to debate, interpretation or amendment by outsiders. Nor can it be suspended as a matter of political convenience by insiders. It operates with religious determinism.

It is best that I quote the central passage: "Papatuanuku (Mother Earth) is the mother of all her mokopuna, and all are responsible for her protection. And because there will be many future mokopuna, no-one has the legal right to permanently alienate or 'own' the whenua (land). One cannot sell forever the land, for that is to deprive future generations of their mother: parts may be gifted for others to nurture, but the iwi always retains the authority of ultimate tangata tiaki (custodial people). One cannot give one's mother permanently into the care of another.

"It is an idea that is spiritually incomprehensible and legally impossible. Indeed, to maintain that such authority can be ceded or given away

Things that are spiritually incomprehensible and legally impossible are, conveniently, impossible to debate with outsiders, writes SIMON UPTON on the contentious but little aired issue of Maori sovereignty raised by the Moutoa Gardens occupation.



misreads the political reality that no rangatiratanga (sovereignty) ever has or had the right and authority to do so."

Things that are spiritually incomprehensible and legally impossible are, conveniently, impossible to debate with outsiders. Such is the essence of tribalism everywhere. It's not uniquely Maori. I'm sure that my own distant forbears, somewhere in the fens and marshes of Northern Europe, claimed an equally immutable spiritual bond with earth and sky — and the allegiance of all borne within the womb of the tribe to defend it. It was, and is, profoundly corporatist, particularist, and conservative.

There's an echo of this in the pronouncements of contemporary deep ecology. The spiritual and biological oneness of all living things inspires quite a few New Age political visions.

However, if anyone thinks that iwi law is a local expression of some global covenant of the peoples with Nature they should think again. It involves an assertion of political power — sovereign authority — that is scarcely a recipe for happy families. The uncomfortable truth is that in exercising such sovereign power, iwi leaders (and in this I paraphrase Sir Hugh Kawharu) traditionally made war, exacted retribution, consumed or enslaved those iwi they overwhelmed, and generally exercised power over life and death. And so it was with iwi pakeha in pre-modern Europe.

So do we throw in the towel and succumb to sovereign authority ordained by Papatuanuku and interpreted to us by Ken Mair? I'm sure that in some law school, somewhere, there's a thesis explaining the inescapable legality of just that. There's just one problem: to be able to claim sovereign power, you have to be able to exercise it. And, whether by law or by practice, that sovereign exercise of power by iwi has been superseded.

That brings me to the second piece of writing that has challenged my thinking — Professor Jock Brookfield's valedictory lecture to the Auckland University Law School. You will not find, in this lucid and

disquieting reflection on the Treaty of Waitangi that closes a distinguished academic career, any saccharine intonings about partnership or biculturalism. Professor Brookfield simply asks what, in practical terms, sovereignty means and who has exercised it since 1840.

He notes that, almost from the outset, the British Crown made claims to sovereignty over the whole country "when less than that had been ceded to it, on any understanding of the matter." For a start, not all iwi signed. However, even in respect of those who did, the customary legal orders of iwi were, in time, overtaken by the actual power of the Crown wielded through Parliament.

Professor Brookfield does not need to provide an answer to the vexed question of how much sovereignty was yielded by Article I of the treaty granting the Crown kawanatanga (governorship).

It was almost certainly less than full sovereignty in the minds of the signatories. What ever legitimacy the Crown failed to derive from the treaty it acquired through the effective and durable assertion of power.

To put not too fine a point upon it (and Professor Brookfield does not) the British Crown, and subsequently the New Zealand Parliament, effected a *revolutionary* seizure of power (or, at least, what ever power was ceded under the Treaty). As Professor Brookfield grimly notes, "revolution rests upon what is *done*, not what is legal, or necessarily moral or just." It was, he suggests, as revolutionary a seizure of power as the Taranaki Maori seizure of power over the Chatham Islands.

The moral — and it is scarcely a fashionable one — is that sovereignty is not just a matter of assertion or legal justification: it is a matter of the practical exercise of authority. In the early years of New Zealand some iwi could, effectively, continue to assert their authority. Their almost total isolation from a weak colonial administration saw to that. However, the passage of time and the effective extension of government power have made the idea of parallel sovereign states within the same land practically and politically unworkable.

Professor Brookfield's conclusion — and it is a conservative but not illiberal one — is that the passage of time has inevitably legitimated in some measure the revolutionary extension of the Crown's power. That does not render the treaty meaningless — it still speaks. However, the claim to some unbroken thread of pre-existing legal sovereignty fails.

So where to from here? The Moutoa Gardens solution is an assertion of sovereignty that, carried to its logical conclusion, is revolutionary. The Brookfield solution is a written constitution protecting both treaty rights and individual rights and freedoms. I'm not sure that I share this prescription, which its author describes as "millennial." It runs against the grain of our constitutional tradition that has, through the sovereign pre-eminence of Parliament, avoided a litigious and self-consciously rationalistic view of nationhood. The debate that is needed to produce a constitution could leave the nation even more divided at the conclusion than at the outset.

For my part would muddle forward from the status quo. That is not the counsel of complacency it might sound. For sovereign authority to be effective and durable, those governed by it must have sufficient grounds to acquiesce. If the social, material and spiritual condition of sufficient people become intolerable, then authority will be shrugged at or openly challenged. Ungovernable societies cease to confer sovereign authority on their governments. That is as true of parts of Los Angeles as it is Ethiopia.

New Zealand is a country mile away from that. However, neither Parliamentarians nor Maori leaders can ignore the fact that the fabric of a viable society depends on some shared notions and values. Those values have to make contemporary sense to the very great majority of New Zealanders.

Talk of spiritual incomprehensibility and legal impossibility is a romantic and revolutionary withdrawal from the debate. Talk about the impossibility of private title to land and you will invite a revolution.

We can look to the gods, to lawyers and to historians for all we're worth, but the only people we can turn to for a solution are those of us here today. The future is in our hands. What ever inspiration or despair our ancestors may cause us, we are not responsible for them, nor are we dictated to by them. We have to cope with New Zealand in 1995, with the treaty as it still speaks in 1995, and the world as it rushes in on us in 1995. Impossibility is a disengagement we can ill afford.

■ Simon Upton's column appears fortnightly, alternating with a column by David Lange.

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