

Waitangi and Indigenous Rights: Revolution, Law & Legitimation

Reviewed by Bryan Gilling

Waitangi and Indigenous Rights: Revolution, Law & Legitimation

F.M. Brookfield

Auckland: Auckland University Press, 1999.

The acquisition of power and sovereignty by one country over another is a revolutionary act. The institutions, constitution and legal system of the one is overthrown and supplanted by the newcomer's, as indeed they largely are in an internal revolution also. However, whatever the degree of the revolution's de facto control, seldom is this on its own perceived as conferring *legitimacy* on the new situation, institutions and systems. As people strive for certainty and fairness, societies seem to have an inbuilt resistance to such radical change imposed on the foundational building blocks of those societies.

F. M. Brookfield (Jock), Emeritus Professor of Law at Auckland University, has devoted a large portion of his academic career as a constitutional lawyer to the problem of the legitimation of the power and control acquired as a result of revolutions. This book applies his understanding to the situation in New Zealand following the acquisition of sovereignty by the British Crown in 1840.

Brookfield agrees with those who consider the Treaty of Waitangi to have been a valid constitutional instrument—a treaty in international law at the time—rejecting its late nineteenth-century dismissal as a 'simple nullity' in those terms. However, that conclusion is modified by another that is rather more controversial; that the Treaty is no longer in force because the chiefs with whom the agreement was contracted no longer exist as an international entity due to either the Treaty itself or the subsequent assertions of imperial power. He instead categorises it as now being a major component of New Zealand's internal public law.

Analysing the contradictions and inconsistencies between the three articles of the Treaty (setting aside the constitutionally less pressing oral 'fourth article' guaranteeing freedom of religion and the chimerical four 'articles' currently fashionable amongst the ill-informed in political/state service circles), Brookfield critiques various commentators' efforts to reconcile them. He interacts with a wide range of individuals and opinions, treating everyone—even when he disagrees—with a courtesy and respect that is all too rare in scholarly discussions (or indeed in others concerning Treaty matters).

In accordance with international practice, the Treaty must be interpreted *contra proferentem*, against the drafter, the Crown, where there is ambiguity. Central is the debate over the use in the Maori version that the large majority signed of the terms 'kawanatanga' and 'tino rangatiratanga', compared with the 'sovereignty' appearing in the English translation. He is adamant that it is impossible that Maori intended the full transfer of sovereign power that the Crown claimed and enforced subsequently.

Returning to the 'revolution': Brookfield shows how the signing of the Treaty set in train an effective revolutionary seizure of power over New Zealand—not on 6 February 1840, but on 21 May when Hobson issued proclamations of sovereignty on the grounds of cession for the North Island and discovery for the South. This gave the British monarch in Parliament the supreme legislative power over New Zealand and all in it. Brookfield contends that this seizure, though now of long standing, still requires legitimation. Not only that, but, to the extent that the Crown took more than Maori were intending or prepared to cede, that too was a revolutionary act relative to their customary law; in effect, he says, 'a large scale robbery'.

This was only the first and largest revolution in New Zealand's history. A second occurred in the mid-nineteenth century when Maori resisted the imposition of Crown sovereignty and were suppressed. (The characterisation of the New Zealand Wars as merely 'Land Wars', though having emotional appeal, has never been accurate or adequate.) Brookfield identifies a third, when the Crown in right of New Zealand separated from the Crown in right of the United Kingdom, a break up of the old imperial unity which may have existed until the 'quiet revolution' of the Constitution Act 1986. Confusion endures with, for example, the personal identity of the monarch remaining the same for both. This has practical outworkings, for example perpetuating the understanding amongst many Maori that they contracted their agreement with the person of the monarch and their resultant antipathy to republican proposals.

Brookfield's analysis raises many issues, even if he cannot answer all of them. He believes that some legitimacy has been achieved to date for Crown sovereignty, conferred in three main ways: the partial observance of the Treaty, the simple passage of time, and the provision of at least some benefits to Maori through Crown rule.

Yet further steps must be taken, he argues. Basic constitutional reform is necessary in conjunction with the remedying of specific grievances. Central to the reform must be the recognition of the promised tino rangatiratanga in some kind of qualified autonomy, since no autonomy was ever provided, even under the supremacy of Parliament. If possible, some provision should also be made for reserved territories, and in the coming new republic there should

be constitutional entrenchment for bodies of both tribal and national Maori self-government.

This analysis and proposed developments beg all sorts of additional questions, of course, such as the nature or relevance of tribalism in an increasingly urbanised society. Or, can reforms of such a nature be achieved in the face of counter trends, such as increasing globalisation or the passing into foreign ownership of segments of the New Zealand nation-state? There are already many debates about the difficulties of incorporating Treaty-related provisions in legislation and agreements involving overseas interests.

This well-written and thoughtful book should be pondered at length as a significant contribution in the debates over the shape of New Zealand in the twenty-first century and its existence as a constitutional monarchy or republic.