

Claims to Treaty and other Rights: Exploring the Terms of Crown-Maori Negotiation

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Introduction

In “The Treaty and Democratic Government”, published in the previous issue of *Policy Quarterly*, it was argued that:

- All political power has limits, with neither the state (or any branch of it), nor any particular group within the state, being able to claim absolute power. Rather, balances of authority within a state are negotiated and re-negotiated over time.
- Claims by any institution (whether governmental or tribal) to possess “sovereignty” reflect historical rhetoric, but our constitutional system is one of government by consent, within limits.
- In this context, ongoing debates about rangatira-tanga (here, broadly meaning more tribal self determination) are a normal and healthy part of democratic process and the ongoing negotiation of the terms of government by consent.

This article delves further into that broad framework by considering the interplay between law and political negotiation, concepts of relationships between citizen and state, the role of rights in political debate, and the effect of concepts of indigeneity on all of these. The broad conclusion is that current legal and policy debates are constantly testing what is different about the state’s relationship with indigenous people, and when, why and how any difference is relevant. The debate must take place, but it needs to be approached with care as it touches on matters that go to the heart of our traditions of democracy and equality.

Is there a special relationship with indigenous people?

There are three main ways in which it is argued that the state has a special relationship with indigenous people in New Zealand: as a result of the Treaty of Waitangi, as

a result of common law doctrines of customary or aboriginal rights, and, increasingly, as a result of a quite distinct fiduciary relationship between a state and indigenous people living within it. Those strands are often inter-woven. A critical tension across all of them is the extent to which Maori can locate their claims in the field of “rights”, and so claim the protection of the courts within the heritage of Westminster democracy. These three strands each need brief discussion.

The Treaty of Waitangi

Whatever the arguments over the exact status and meaning of the Treaty, it is accepted as a founding document for New Zealand, articulating the basis on which colonial government was established with the consent of the indigenous peoples – Maori tribes – and setting terms for the continuity of their chieftainships.

Legal developments since the mid 1980s, and the settlement process for historical grievances, have dramatically changed the recognition now given to the Treaty. The promises in the Treaty and the history of government inaction and direct breach are now much better understood. That history has begun to be addressed. But, however important, the settlement process is essentially backwards looking, concerned with the redress of grievance. The greater challenge today is to articulate and workably implement the ongoing responsibilities that the Treaty may place upon government.

That debate on what that might entail is being played out in many contexts. It is in the forefront in public debate around the stocktake of New Zealand’s constitutional arrangements (currently being carried out by Parliament’s Constitutional Arrangements Committee), in the foreshore and seabed policy, and in the politics triggered by the creation of the Maori Party to contest the next general election. It is implicit in many other policy, legislative and administrative issues that

have a Maori dimension, from climate change and aquaculture legislation to corrections and immigration policy. All are opportunities to raise the question of the balance of autonomy, the role that Maori might have in any decision-making process, and the question of whether there are any rights specific to Maori.

The question in all these contexts is what the basic Treaty promises might mean for ongoing government activity and policy making. There is now a substantial body of thinking and writing, in court decisions, Waitangi Tribunal reports and academic commentary, that can inform those discussions. That thinking has particularly developed through discussion of the phrase, “the principles of the Treaty of Waitangi”. The phrase first appeared in legislation as the guiding phrase in establishing the Waitangi Tribunal in 1975, and has since been used in many other Acts of Parliament.

In developing the content of Treaty principles, both the courts and the Tribunal have in general stepped carefully. Although the Tribunal in particular has made strong statements over the years about the nature of the Treaty promises and the breaches of them, when taken to a conclusion about what is required of the state in a given situation, both the Tribunal and the courts have tended to make suggestions about the process rather than the substance of government decision-making. This can be seen as a manifestation of the general doctrine of deference between the branches of government, or a general awareness of the limitations of the role of the judicial branch in policy making and an acceptance of the need for Treaty-based considerations to be blended with the general governance obligations of the state.

The level of deference from both courts and Tribunal is less when an issue is focussed around individual pieces of property with clearly identified owners, reflecting not only our own ‘Westminster tradition’ but also the heritage of most ‘rule of law democracies’. At that point the broad governance issues fall more into the background and one tends to see greater articulation of ‘rights’ from the courts and the Tribunal.

A key point from the exploration of this strand of activity is the emerging ‘legalisation’ of the Treaty, and the effect that is having on the terms of negotiation for Maori claims for autonomy and resources. ‘Bargaining in the shadow of litigation’ is common in our democracy – and Maori well understand this.

Customary rights

The common law has historically protected the rights of an indigenous people that existed when colonial government was established, and which have not been extinguished by any legal process since. The doctrine is well established in every common law country, but is particularly vibrant in Australia, Canada and the USA. The law has been closely tied to property arguments, rather than more general social issues. Thanks to the seabed and foreshore, New Zealand has heard much about customary rights over the last two years.

The emerging consensus in New Zealand is that there is now limited room for this line of legal reasoning to play out, for five main reasons.

- First, land-based claims have minimal potential for customary rights arguments, given the tiny amount of land that remains in customary title and the settled understanding that transformation from customary title to ‘normal ownership’ extinguishes all aspects of the customary title.
- Second, all claims based on customary fishing rights, whether commercial or non-commercial, were settled with the 1992 Sealord deal.
- Third, the exploration of customary rights over the foreshore and seabed will now take place within a contained legal framework that blends potential customary rights with the wider set of legal rules governing the use and management of this area.
- Fourth, the last remaining geographical context in which the issues might emerge is that of rivers. Court of Appeal comments have signalled that it should not be assumed that the application of English land law will necessarily have removed all customary rights over rivers and significant waterways. But past legislative vestings and other actions are likely to mean that the issues, as they get explored, will prove to be more about historical loss than contemporary rights.
- Fifth, the continued existence of customary rights in New Zealand must face the common law requirement that the claimed rights must not have fallen into disuse. Outside of the areas already dealt with by settlement or statute (eg customary food gathering from the sea), this requirement of continuity is likely to be hard to satisfy.

Customary rights jurisprudence is squarely tied to property and natural resources. But it does link to ‘self-determination’ arguments, because managing property with a degree of exclusivity (the core of ‘rights’) has the potential to give a tribe an economic foundation. Again, one should therefore not be surprised that the language of ‘customary rights’ is becoming integral to the negotiation of rangatiratanga in New Zealand.

Putting aside property rights, there is no significant domestic legal argument at present for the recognition of equivalent customary rights at any broader level of social policy. Debates about the possible recognition of broader rights of indigenous people are taking place in the context of international human rights discourse, and in particular over the merits of the Draft Declaration on the Rights of Indigenous Peoples. It is logical that indigenous peoples everywhere, including Maori, attach great importance to what is otherwise a highly contentious and consequently very slow-moving international discussion.

A fiduciary relationship

The concept of a fiduciary operates in many different legal relationships, including the lawyer-client relationship, a trustee and beneficiary, and a company director and shareholders. The details of the duties differ, but there are some broad principles that allow all those relationships to be described as fiduciary.

- A fiduciary is not self-regarding, but acts strictly in the interests of the relevant beneficiaries.
- The person must exercise independent judgment, as well as meet duties of diligence and prudence in the way responsibilities are carried out.
- A fiduciary must also be open and accountable to the beneficiaries for whom he or she is working.

Does the Government of New Zealand owe Maori a special protective duty, similar to that of a trustee? Put the other way round, as compared with all other citizens, can Maori validly assert any “rights” for treatment and protection, simply by being indigenous?

Internationally, there is an increasing body of literature and case law on the notion of a special fiduciary relationship between a state and indigenous peoples living within it. That development is quite separate from the Waitangi Tribunal’s consistent suggestion that the principles of the

Treaty of Waitangi imply a special fiduciary duty on the New Zealand government to ensure the cultural (and perhaps land-based) viability of every hapu and iwi. The wider body of thinking has largely emerged from North American law and political discussion. But each context is specific and the arguments must be understood within the rest of the host legal system. Thus one should not assume that government fiduciary obligations relating to indigenous peoples are universal concepts that will be easily applied in New Zealand.

The original use of fiduciary language in this context was paternalistic, especially in 19th century United States cases that described the relationship between the state and Indian tribes as like that between a guardian and a ward – the state taking decisions for the good of a vulnerable child-like group. The duties created by courts were therefore strict about the content of decisions, in that they were to be for the benefit of the indigenous people, but had less regard for process and the idea that the ‘beneficiaries’ might have a role in decision making. This genesis is a long way from the contemporary hopes for how the Crown-Maori relationship might develop.

The Canadian courts have declared there to be a special fiduciary relationship between its aboriginal peoples and the state, but have made little progress in setting out its scope or consequences – when it might apply, and how sharp its legal teeth might be.

Both commentators and courts in North America have, however, identified a key difficulty with the notion of articulating a fiduciary duty of the state to a particular group. A fiduciary is bound to act strictly in the interests of the beneficiary group or individual. Yet the government owes responsibilities to the population at large. How can the two be reconciled?

From first principles, the general state-citizen relationship sees the government – through the mechanism of elections for a Parliament – put in office by the people. They give it a political mandate, based on leadership and policies put to the electorate, to govern according to law.

The political mandate is not of course absolute, especially in minority and coalition governments. The mandate is to seek to govern for all, informed by the principles and approach put to the electorate – and it is a mandate to govern according to law. The basic position

was articulated by Edmund Burke, back in 1774, to the effect that the task of an elected parliamentarian was to exercise unbiased opinion, mature judgement and enlightened conscience, for the general good, in the deliberative assembly of Parliament – not to be a delegate for a single party or interest group. One can see a loose parallel here with the broad concept of fiduciary responsibilities.

In matters of general governance it therefore runs counter to first principles of democratic theory for the state to owe a duty of this kind to just one group; the government must make decisions in the general public good. Put differently, general notions of non-discrimination in broad policy areas have come to underlie much of our legal (and political) system. This is completely different from the accepted notion that individuals and groups can have different property rights, and hence protection of those. And so, unsurprisingly, we see an emerging willingness in the court judgments to rely on fiduciary relationships to protect particular pieces of land or other property, but some reticence in using those concepts in any broader sphere.

Is the Crown-Maori relationship a legal or political construct?

This brief survey of the main areas of legal argument over the recent years shows that the boundary between the legal and political is fuzzy, and is constantly being pushed by one group or another. In particular, it is clear that claimant groups, unsurprisingly, consistently talk up this set of potential sources of responsibility into ‘rights’ - firm legal concepts that could create enforceable obligations through courts. This is so for any group seeking to make a distinctive claim, not just for Maori. Thus, parents of children with special needs might seek to found their claims to educational funding in terms of “rights” and the state’s special protective obligations (deduced from the wording of the statute) to provide equal education for all.

Fiduciary relationships, with their foundation in equity, are in the realm of ethical and moral values. This strand illustrates nicely that this debate balances on a pivot point for the involvement of the law. Against the broad context painted by this and the previous article, it is unsurprising that indigenous claims have also turned to what one writer has described as the seductive lure of fiduciary law’s “ample and flexible system”.

If one cannot find a specific doctrine appropriate to the circumstances, but if one is committed to exacting a protective responsibility, the siren song of the fiduciary becomes almost irresistible. If the remedy given by an available doctrine fails to meet the perceived needs of justice in a given case, again the temptation surfaces. So like an accordion the fiduciary principle may be expanded, or compressed, to maintain the integrity, credibility and utility of relationships perceived to be of importance in contemporary society. (Tan, 1995)

The role of the legal system in enforcing responsibilities in these relationships involves delicate and dynamic questions. There are no fixed answers, here or internationally. In a democracy of ‘government by consent, within limits’, this is an ongoing search for a reasonably acceptable balance between the ethical, social and legal that suits practical, political and constitutional considerations – for the time being.

How important are “rights”?

Why does all this matter so much? From a legal perspective the difference is between general claims (moral, ethical or political – however one wishes to describe them), and legal rights that create duties enforceable through the legal system. The first are ‘soft’ responsibilities - the general provision of a climate in which business might operate, or a stable society, or education and health services. Mostly, this is the stuff of general political debate and policy trade-off. But ‘rights’ are more hard-edged, and the holder of the duty will be held legally accountable in some way for their performance. Legal rights are not soft feel-goods, to be acknowledged or given by a cabinet or parliament in the ebb and flow of political influence. In legal terms, rights deserve capitals: a Right is a Big Deal, and can have Big Consequences.

For the government, if something is a right, it can act as a trump in the general round of negotiation and balancing of different group interests that are part and parcel of general formulation of policy. If the legal system declares an interest to be a right, it will carry significant priority in the policy world. Hence, the right to a fair trial requires that significant state resources be given to the provision of legal services for those facing imprisonment but unable to afford legal counsel, and to ensuring sufficient courts and judges so that cases

can be dealt with in a reasonable time. The 'right' has trumped other claims to resources. If the state chooses not to fund such rights, the courts will not convict people accused of crimes.

But whilst rights might trump other claims, the complexity arises in that there are always other rights in play. So the governing system, including executive, legislature and courts, has to find the appropriate balance and limits between competing rights.

The point here is that we should not be surprised to see, or be shy about naming, the same process in Treaty claims as we see across all other issues: that is, the tendency for claimants (or those favouring claimants) to "talk up" the language of rights. As argued throughout this paper, the language is important, as it vitally affects the negotiating process in a democratic government.

To take some specific examples in the Treaty context:

- There is a difference between saying that the relationship established by the Treaty of Waitangi is a fiduciary one, or akin to a fiduciary one. Crown lawyers put great weight on "akin"; claimant lawyers gloss over it.
- Internationally, states have been very cautious about signing up to the terms of the Draft Declaration on the Rights of Indigenous People, whereas the international indigenous community (including a strong Maori lobby) has resisted weakening the "rights" language of the draft.
- There is recurring debate about the way in which Bills introduced to Parliament refer to the Treaty. A dramatic debate in recent years was over the New Zealand Public Health and Disability Bill introduced to Parliament in 2000 (see below). Similar policy debates have taken place over the terms of local government, land transport, education and genetic modification legislation, to name but a few.

In all of these examples, what is being debated is the terms under which claims on the state are to be pursued, and the position of the indigenous claim relative to those of other groups in society.

This is an iterative and highly dynamic process, involving all of the different branches of government. A soft acknowledgement of interests in a policy statement or speech by one part of government might be used as foundation for an argument before a court

to recognise an interest, give it form as a right and provide redress. The court's comments on that issue are used in the policy process to justify a broad reference in the principles of an Act. Which is then expounded upon in speeches and policy documents, which then founds another legal case... And so on, across a diverse range of policy topics and across domestic and international fora. In a developing and highly topical area of policy and law, with few fixed markers, the boundary between political, policy and legal spheres is highly permeable.

This dynamism, and the difficult line between legal and moral values, is not unique to New Zealand, or to Treaty issues. The same concepts have been debated for many years in the context of international human rights, and the question of whether different types of rights require different approaches in law and policy. There will always be questions about whether to characterise issues of this kind as legal, and hence which branch of government is best suited to take the lead on which issues. The baton changes regularly. It is a complex matrix.

Non-discrimination and special interest rights

We have argued that in large measure, Maori are simply doing what every other interest group is doing in the democratic process, namely bidding up their claims as "rights" under various headings (the Treaty, customary rights, fiduciary duties) and bolstering those claims by political representation aimed at furthering their interests. Those who assert the uniqueness of the Treaty will resist a view of Maori as simply claimants amongst many - and there is some force to that, of course. The purpose here is not to argue against all aspects of the special position of Maori groups, or the special place of the Treaty, but to see those claims in the context of an ongoing and largely healthy negotiation in this 'government-by-consent-within-limits' democracy.

But we need to be more explicit about the boundaries between the assertion of non-discrimination as a core value in the political and legal system, and the assertion of any special rights of Maori. To the extent that Maori claims are for protection of clearly defined and already existing property rights, as noted, there is little jurisprudential or political risk. Everyone understands, and the law certainly does, that property rights entitle a measure of special treatment for the holders. This generally does not raise issues of discrimination.

But for very good reasons, measured in war and bloodshed, democratic governments everywhere have, especially over the last half century, endeavoured to create governing systems in which certain criteria are not the basis on which people either claim rights, or are refused such. The initial flashpoints were on race/ethnicity and religion. Wars were – and are – fought based upon special treatment given or refused on such grounds.

The attempt to prohibit discrimination did not occur solely for ‘moral’ or ‘fairness’ reasons, or to pursue colonising agendas. It reflects a deep-seated realisation that basing core policy and government on group rights is a ‘zero-sum game’. People who see the world thus are condemned to play it on its terms. If Jews win, Palestinians lose, etc. Democracies developed non-discrimination laws by exhaustion after centuries of conflict where power was based on certain characteristics. Thus, the attempt was to provide rules for competitive power struggle that gave better chances for all – not just for those who happened to be the holders of the characteristics that held power.

So, by 2005 the world has strongly affirmed the right to be free from such discrimination in successive human rights documents, and has celebrated milestones such as the UN Charter, the Universal Declaration on Human Rights, the successes of the black civil rights movement in the United States, and the ending of apartheid in South Africa. In New Zealand today, this right is affirmed in the New Zealand Bill of Rights Act 1990, and given protection through the Human Rights Act 1993.

The essence of the right, for government policy making, is that any differential treatment between ethnic groups, or the sexes, or age groups, must be for good reason. In the words of the Bill of Rights Act, it must be “reasonably justified in a free and democratic society”.

The principle of equal treatment (or freedom from discrimination) goes to the heart of the values of this society. Its depth was shown by the heated reaction in 2000 to the New Zealand Public Health and Disability Bill as it was introduced: it was read by many as allowing (or even requiring) preferential access to health services for Maori, solely because of race. The Bill was amended before enactment to make very clear that this was not to be a possibility, and related policy changes to this Bill and other parts of government policy clarified that social services generally were to be delivered on the basis of need,

not race. If statistics showed that the two coincided, so that a particular group in society had a clearly greater need for a service, then a targeted service could be provided. But without that concrete data, it was unlikely that differential treatment would meet the Bill of Rights Act requirement of being reasonably justified.

In practice, of course, this is complex. There is regular argument about whether any particular programme is just delivery of the same general service but targeted in a way that increases its effectiveness with a particular population group, or whether it is a programme provided exclusively to that population group – often as part of a claimed Treaty process.

Thus for the last few years, politics has been dominated by a potent brew of race, the Treaty, equality, differentiation, respect for difference, indigenous rights and affirmative action. The fuzziness of the lines between one type of treatment and another, in a complex world with imperfect information, means that there is no perfect solution that will hold for all time. There will always be debate about when different treatment is justified. It is a fine line for any government and society to walk.

Conclusion: distinguishing between law and leverage

This brief article has touched on many topics, and dealt in detail with only a few. It must be left to future pieces to explore such matters as:

- the past, present and future role of the Waitangi Tribunal,
- the swirling arguments about forms of ownership and attachment, both historically and now, including the extent to which it is appropriate to characterise those attachments as modern property rights,
- the types of policy and law where distinction based on ethnicity or indigeneity may or may not be problematic, and
- the consequences and appropriate treatment of different kinds of rights as international and domestic lawmakers give legal force to moral values.

The focus here has been on the broad pattern of engagement or negotiation of Maori claims, and the terms on which the negotiation is being constructed. In the end the messages are relatively simple. These issues

- at the heart of social and political debate in New Zealand – are at once both unproblematic and hard.

They are unproblematic where Maori claims, including self-determination, are seen as integral to the democratic process of negotiation in a rule of law democracy. The legal issues are the same as for all other claimants, and the claiming and framing of “rights” is central to that negotiation. This includes the claimed right to rangatiratanga, or tribal self-determination. In a government characterised by limited and relative degrees of institutional autonomy, it should not be threatening to negotiate special relativity for groups wishing to exercise such. Defining a group and confirming its authority over a specified set of issues or activities is something that Parliament does regularly, whether for professional bodies like Law Societies, for local government, or for incorporated societies and charitable trusts like squash clubs or the RSA.

But the issues will always be hard when the boundaries of differential treatment are based on race. The treatment of different groups of people by the state goes to the heart of some deep social norms of non-discrimination and justice. It is not surprising that their exploration is creating some heat.

By and large, all branches of government within New Zealand have - so far - managed to weave ideas of some special position of indigenous people within the fabric of the general social, legal, constitutional, and political framework of society. But this is undoubtedly a tightrope. There have been some wobbles. Avoiding more will require each step in this area to be taken carefully. A step wrong, on either side of the wire, could be uncomfortable.

To pursue the metaphor, each actor also needs to be aware that they are not the only ones on this particular tightrope. All of this debate takes place in the complex and multi-layered environment of tipping point between social, political and legal zones. The issues bounce constantly between the executive, legislative and judicial branches of government, with action by one often having immediate consequence for another.

Language is vitally important in this ‘claiming context’, as terminology, in particular the use of the language of rights, can push claims from the political into the legal zone. The line between ‘soft’ responsibilities and ‘hard’ legal rights is being debated and pushed every week, as these issues come to the fore.

It would therefore be naïve to see the law as a separate and pure source of absolute propositions, generally, and in this topic in particular. There is no hidden tablet of stone in the judicial common room. It has to be understood that these issues are being explored in New Zealand in a highly dynamic conversation. All three branches of government are taking part in this conversation, as are international fora. All parties to the debate are using all of these fora to promote and defend their own perspectives, more or less consciously.

If this is accepted, it becomes critical that all participants in this national conversation are aware of the use that will be made of any formal utterances, and aware of the overall broad social and political context into which their particular pebble will drop. Precise language is critical. So is basic respect between peoples. We are negotiating both dignity and claim. They deserve respectful, careful and deliberate discussion.

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