What difference does a Treaty make (in Aotearoa New Zealand)?
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Introduction

Aotearoa New Zealand's Te Tiriti o Waitangi/Treaty of Waitangi (1840) is commonly cited as a paradigmatic model of a treaty between Indigenous peoples and a colonial state. It is also cited as an exemplar of the difference a treaty can make to the recognition and protection of Indigenous peoples' rights. But does it live up to this reputation? The answer is of course not simple. Legally? No, not really. Politically? Maybe, but only when combined with other important factors such as the relatively large size of New Zealand's Indigenous Māori population (roughly 15%).

Te Tiriti o Waitangi/The Treaty of Waitangi

There is the Treaty text in English and te Tiriti text in te reo Māori, the Māori language, and they say quite different things. In short, in the Treaty, Māori chiefs cede sovereignty to the British Crown and are guaranteed full rights of ownership of their lands, forests, fisheries and other possessions, as well as receiving the rights and privileges of British subjects. In te Tiriti, Māori retain their rangatiratanga (chieftainship/sovereignty) but cede kawanatanga (governance) to the Crown. Māori retain their authority over their taonga (treasures, including intangible). Historical record and scholarship indicate that Māori were told, and understood, that they were not ceding their authority, and the Crown would govern only the settler population, which Māori had been seeking. While the Treaty/te Tiriti were signed by over 500 Māori rangatira, or chiefs, many did not sign it. Despite that, the English text of the Treaty was one of the bases on which the English asserted sovereignty over Aotearoa New Zealand.

Comparatively, te Tiriti is a unique agreement between Indigenous peoples and a colonial state in that it was explicitly about governance and, arguably at least, the transfer of (some of) it, rather than the more common peace and friendship treaties and land treaties found in North America. It is also later in time than many other "Indigenous treaties" and reflects English colonial policy at the time i.e., a sensibility that sovereignty must be ceded rather than assumed, which was less common in earlier times.

Respect for Māori Rights

At the outset, it must be said, the proof is in the pudding. Despite its guarantees, te Tiriti o Waitangi did not stop, or mitigate against, the impact of colonisation and colonial policy on Māori. Māori lost land rapidly not long after colonisation, including through confiscation, meaning that Māori retain less than 5% of land in Aotearoa New Zealand today. Cultural loss was aggravated by policies prohibiting the use of te reo Māori and, in the post-war environment, urbanisation. Today Māori are the poorest, most incarcerated, unhealthiest of New Zealand's population.

The Legal Position

In constitutional rhetoric te Tiriti is often referred to as New Zealand's founding constitutional document. In a literal sense, this is true: it is at least partially constitutive of the state now known as New Zealand. However, New Zealand does

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not have a singular written constitution and Te Tiriti has little legal force in Aotearoa New Zealand.

By the late 1880s, when colonial authority had become a political reality, te Tiriti was declared a simply nullity in New Zealand courts to the extent that it purported to cede sovereignty because Maori could not cede what they didn't have i.e., "no body politic existed capable of making a cession of sovereignty not could the thing itself exist."[1] Moreover, in the same case, the courts refused to hold the Executive to account for its actions in dealings with Māori lands holding that to be non-justiciable issue because the courts could not examine acts of state.[2] By 1940, New Zealand courts held that the Treaty is unenforceable unless incorporated into legislation. This remains, fundamentally, the legal status of the Treaty today.

Since the 1960s and the so-called Māori renaissance, which extended into the early 1990s, the Treaty has acquired greater legal influence albeit incrementally and randomly. Parliament has incorporated te Tiriti *principles*, not the text of either or both versions, into a number of statutes. Where a statute includes a so-called "Treaty clause", typically a requirement to have regard to or act consistent with the Treaty principles, the courts have taken a wide view of the principles, including, for example, partnership, active protection etc, to restrict Executive action.[3] There have been a few cases in which te Tiriti has coloured the interpretation of the law despite there being no express mention of it in applicable legislation.

The Waitangi Tribunal was established by legislation in 1975 to inquire into allegations of breaches of the Treaty principles. In 1985 the mandate of the Waitangi Tribunal was extended to authorize it to inquire into historical breaches back to the 1840. The Waitangi Tribunal is often, rightly, held out to be a standard in the adjudication of Indigenous peoples rights globally: it has literally thousands of claims lodged with it, and its reports are based on indepth research and analysis taking into account the perspectives of relevant Māori groups. However, its recommendations and its reports are not binding and the Executive does not comply with them unless it so chooses.[4]

The Political Position

While largely ignored for a century, it is difficult to accurately capture the influence of the Treaty politically, culturally and socially in the heart of New Zealand society today. Policy directed at Māori is often framed under the auspices of the Treaty and Treaty rights are used as a euphemism for Māori rights in everyday vernacular. When issues arise with the Government's compliance with Māori rights, protest is often galvanized around the defence of te Tiriti. In short, while precise knowledge of the te Tiriti, its meaning and its importance, is sometimes woefully inadequate, te Tiriti remains an animating source of public discourse.

Government rhetorically strives to comply with the Treaty, which is reflected in policy and also in governmental process. For example, any bills that impact on Treaty rights must be brought to the attention of the Attorney General and Departments must assess implications of bills on Treaty settlements (see below). More formally,

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[1] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

[2] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

[3] *New Zealand Maori Council v AG* [1987] 1 NZLR 641.

[4] One of the most glaring examples of non-compliance is the rejection of the Waitangi Tribunal's report on Maori rights in the foreshore and seabed leading to massive protect by Māori (and others in support).

ministers must bring to the attention of the Executive as a whole any aspects of bills that have implications for, or may be affected by, the Treaty.[5]

The government initiated its Treaty settlements policy in the late 1980s and early 1990s. Settlements are negotiated agreements between "large natural groupings" of Māori and the Crown and, at least according to the statutes that implement them, provide full and final redress for historical breaches of the Te Tiriti. They commonly include financial redress, cultural redress and a form of apology and agreed historical account. Some iwi have profited financially (despite the financial settlement constituting only roughly 2% of the financial loss suffered), and also culturally, from settlements.[6] However, the basic foundations of Treaty settlement remain troubled. The Government is both adjudicator and party to negotiations in that it sets the policy for Treaty settlements and holds the power, it will not negotiate rangatiratanga (sovereignty/self-determination) or Māori rights to subsurface resources and private property is not available for return. Moreover, the large natural grouping policy has been consistently criticized as contrary to, and problematically undermining, Māori forms of organization.

Stargazing

The basic difficulty with legal and political recognition of the te Tiriti, as opposed to its principles, is that it has the potential to undermine the foundation of the state. It is clear that the Crown's claim to sovereignty over Aotearoa New Zealand if based on the te Tiriti (and there are no other grounds to *legitimately* or *legally* claim sovereignty) is at best tenuous. This is a point made by many political and legal scholars, especially Māori. Mikaere, for example, analyses the 1835 Declaration of Independence and the Treaty, and promises made by Crown officials to Māori, to argue that they,[7]

> reveal a clear Maori intention to create a space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatiratanga. This reaffirmation of Maori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapu for a thousand years would retain its status as first law of Aotearoa: the development of Pakeha law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Maori.

The Waitangi Tribunal similarly found recently that Northern iwi (tribes) did not cede their sovereignty under the Treaty,[8] which has been undermined by governmental responses. The courts struggle with this conundrum in that they are at times tasked with applying Treaty principles, yet their existence is premised on the assumption of the legitimacy of the legal transfer of sovereignty from Māori to the Crown. This means that New Zealand's basic constitutional settlement remains shaky, and perpetually in question.

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[5] New Zealand Cabinet Manual (2017): https://www.dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf.

[6] One example is Ngai Tahu: http://ngaitahu.iwi.nz/.

[7] Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Maori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2 ed, Oxford University Press, Auckland, 2005) 330.

[8] Waitangi Tribunal *He Whakaputanga me te Tiriti — The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014).