New Zealand: Anne Salmond: Te Tiriti and democracy

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A fundamental misunderstanding of Māori belief systems and te reo by some of our leading jurists may have contributed to a landmark Court of Appeal finding that has shaped NZ society for the worse, writes Dame Anne Salmond

In 1987, as New Zealand's neo-liberal revolution was taking off, the Court of Appeal issued a seminal judgment on the Treaty of Waitangi. In this judgment, the Court sought to define the nature of Treaty relationships as a guide for future decision-making.

As one would expect, this judgment was profoundly shaped by its historical context, which included a radical shift of mana over people and land from Māori kin groups to the Crown since the signing of the Treaty in 1840; and its contemporary context, which featured a radical shift of power and wealth from the state to private enterprise in the 1980s, in New Zealand and elsewhere – hence the centrality of 'ownership' and 'property rights' in its concerns.

In the 1987 'Lands' case, the New Zealand Māori Council [NZMC] had taken the Fourth Labour Government to court, seeking a judicial review of its decision-making under the 1986 State Owned Enterprises Act. Under this Act, the Government planned to transfer about 10 million hectares of land and other assets owned by the Crown to State Owned Enterprises [SOEs], government departments that were being corporatised, and restructured as commercial enterprises.

According to Section 9 of the Act, in this transfer the Crown was not permitted to act "in a manner inconsistent with the principles of the Treaty of Waitangi." Fearing that once they were handed over to SOEs, Crown lands and other assets would no longer be available for Treaty settlements, NZMC sought to test this provision in court.

The Court of Appeal upheld their claim, ruling that Crown lands and assets (including Crown forestry and farming operations, airline and railways, telecommunications, postal and power networks) had to be assessed against historic Treaty claims before any transfer.

According to Sir Robin Cooke (later Lord Cooke of Thorndon), at that time President of the Court of Appeal, "this case is perhaps as important as any that has come before a court in this country." After issuing their joint decision, therefore, each of the judges delivered their own judgment. These were informed by extensive research, reading of Waitangi Tribunal reports and affidavits given by distinguished Māori authorities.

Of these judgments, Cooke's has been the most influential. In light of the fact there were two texts of the Treaty of Waitangi, one in Māori and one in English, Cooke declared "the principles of the Treaty are to be applied, not the actual words." He argued that since Te Tiriti in 1840 could not take into account the demands of a "relatively sophisticated" contemporary society, it was "the spirit" of the Treaty that mattered, not "the differences between the texts and the shades of meaning."

In their judgments, Cooke and the other judges defined the Treaty of Waitangi as “a partnership between races” (or between “Pakeha and Maori”, or “the Crown and the Maori race”), one that “creates responsibilities analogous to fiduciary duties” and “requires the Pakeha and Maori Treaty partners to act towards each other reasonably and in the utmost good faith.”

Thirty-five years later, key features of this judgment are striking. First, the English and Māori texts of Te Tiriti are treated as equivalent, when as we know, the English text was a draft written by the Governor-elect, Hobson, his officials and Busby, the British Resident.

Although the English draft was read out at Waitangi, it was Te Tiriti, the Māori text, translated from the English draft, that was debated in Māori and signed by rangatira and British officials almost everywhere around the country. Legally, one would expect Te Tiriti to be regarded as the most authoritative version of the agreements reached in 1840 between the rangatira and Queen Victoria.

Second, instead of reading Te Tiriti in the original, the judges relied on an array of translations into English. In Europe, it would be unthinkable to embark upon the legal interpretation of a significant constitutional document (in French, say, or German) without a sophisticated grasp of its language and historic context.

In New Zealand, however, gaps in linguistic and cultural competence have led to a heavy reliance on the English draft rather than the Māori text of Te Tiriti in Treaty jurisprudence and scholarship, perhaps helping to explain Cooke’s insistence that in a legal context (and unlike other formal agreements), it is the “spirit” and “principles” rather than the text of Te Tiriti that count.

Third, the unshackling of Treaty jurisprudence from the text of the original agreement allowed legal interpretations that significantly depart from the terms of Te Tiriti, including its parties and other key provisions. In the 1987 ‘Lands’ case, for example, the judges’ framing of the Treaty as “a partnership between races” (or between “Pakeha and Maori”, or “the Crown and the Maori race”), cannot be securely traced back to the text of Te Tiriti.

Here, many different parties are mentioned, including Wikitoria, Te Kuini o Ingarani (Victoria, the Queen of England), and nga tangata o tona Iwi (the individual members of her people); nga Rangatira (the chiefly leaders); nga Hapu (the kin groups); te Kawana (the Governor); nga tangata maori o Nu Tirani (the normal, everyday inhabitants of New Zealand; and nga tangata o Ingarani (the inhabitants of England).

In every section of Te Tiriti, too, from the preamble to its three Ture or ‘laws,’ it’s striking that the emphasis is not just on key leaders - the Queen, the Governor and the rangatira, but on ngā tāngata, ordinary people in their personal capacities – the everyday inhabitants of Nu Tirani (New Zealand), and of England, the Queen’s people (the settlers).

Nor is there any talk of ‘races’ in Te Tiriti. Whakapapa is a relational framing of the world as a cosmic network, with a burst of energy that generates thought, memory and desire, aeons of nothingness and darkness, the winds of life and growth, followed by earth and sky, forests, crops, winds, the sea and rivers, and people. All human beings in Te Tiriti are spoken of as ‘tāngata’ (persons); and ‘tāngata maori’ is best translated as ordinary, everyday human beings.

Instead of a racialised, bilateral “partnership between races,” then, (or between “Pakeha and Maori”, or “the Crown and the Maori race” - a framing that lends itself to ‘Iwi vs. Kiwi’ interpretations), the relationships among the parties in Te Tiriti itself are multi-lateral and non-racial – as you’d expect in a whakapapa framing.

In the preamble, for instance, the Queen expresses her concern for the Rangatira, the Hapu and nga

tangata maori o Nu Tirani (the ordinary inhabitants of New Zealand), and nga tangata o tona Iwi (the persons of her Tribe) who had arrived in the country, and were living in a lawless state.

In Ture 1, the first 'law' of Te Tiriti, the rangatira of the various hapū give to the Queen absolutely and forever the Kawanatanga katoa o o ratou Wenua (all the Governorship of their lands), defining the scope of kāwanatanga as stretching across their territories.

In Ture 2, the Queen accepts and agrees to te tino rangatiratanga (full chiefly authority) of nga Rangatira, nga Hapu, nga tangata katoa o Nu Tirani (the chiefs, the kin groups, and all the inhabitants of New Zealand) over their lands, dwelling places and all of their taonga.

As Pita Tipene explained the role of rangatira to the Waitangi Tribunal, "A rangatira is a person who weaves people together. The rangatira is not above the hapu. The rangatira must listen to the hapu, in accordance with tikanga. If they do not listen they will be cast aside.'

In Ture 3, there's an even more powerful focus on ordinary people, both indigenous (maori) and settlers, and their ways of living. In exchange for their agreement to her Kawanatanga (Governorship), the Queen promises to care for nga tangata maori o Nu Tirani (the ordinary inhabitants of New Zealand), and to give to them nga tikanga katoa rite tahi ki ana mea, ki nga tangata o Ingarani (all the tikanga [just and proper ways of living] absolutely equal to those of her subjects, the inhabitants of England).

In the text of Te Tiriti, then, the emphasis on ordinary people is striking. At the time of the Treaty, early European observers often stressed the robust independence of kin group members and their insistence on their own mana, with rangatira securing loyalty and co-operation through generosity and the redistribution of wealth, successful diplomacy in peace and war, and eloquence on the marae.

The settlers arriving from Britain and elsewhere were also impatient of restraint, sometimes to the point of lawlessness, having often fled poverty, loss of land and the repression of ancestral languages and cultures (in the case of the Highland Scots and Irish, for example) in their homelands.

After many years spent in Northland, Henry Williams and his son Edward were acutely aware of these dynamics, and the need to gain the support of kin group members for the Treaty, not just the rangatira. This no doubt explains the emphasis in the text of Te Tiriti on the tino rangatiratanga of tangata maori (ordinary persons), as well as nga tangata o Ingarani (English persons, the settlers), and on the promise of absolute equality for them and their tikanga.

In many ways, Te Tiriti is more in tune with democratic principles than its 1987 legal re-writing. After more than 40 years of Treaty settlements, acute disparities between Māori and other citizens remain. While some politicians describe the Treaty of Waitangi as 'separatist,' 'divisive,' 'racist' and incompatible with democracy, they should not blame Te Tiriti, but look closer to home.

In fact, the 'Lands' judgment owes much to the 1980s neo-liberal context in which it was written, with its emphasis on 'races;' the ownership of 'assets;' the subsequent corporatisation of Maori kin groups (as required by the Crown) as well as government departments; the concentration of wealth and power, and the entrenchment of radical inequalities (the 1% vs. the 99%).

As a result, many 'ordinary' Māori were side-lined in the settlement process and many 'ordinary' non-Māori (Pasifika, Asian and others, as well as Pākehā) were marginalised in Treaty discussions.

Given the neo-liberal context in which the Treaty process has evolved, it is perhaps not surprising that the Ture 3 promise of ngā tikanga rite tahi (absolutely equal tikanga (just and proper ways of

living)) for ordinary Māori was also side-lined.

During the neo-liberal reforms of the 1980s, many Māori families suffered disproportionately, creating inter-generational disparities in health, justice, education, housing and employment. It is ironic to hear neo-liberal advocates, in the name of equality, protesting against the need to address inequities arising from their own philosophies in action.

In the 21st century, as a focus on the pursuit of short-term profit and the industrial exploitation of living systems - land, forests, waterways and the ocean – drive towards fractured societies and ecological collapse, it's timely to revisit the original agreements in Te Tiriti. The promise of 'nga tikanga rite tahi' offers a chance to explore tikanga Māori as well as Western conventions in creating new ways of living in Aotearoa New Zealand.

The Urewera Act 2014, or Te Awa Tupua (Whanganui River) Act 2017, for instance, which include sections in Māori that embrace ideas of land, rivers and the ocean as beings in their own right that 'own' themselves, are world-leading examples. The Government's Wellbeing Budget, and the inclusion of te oranga o te taiao (the wellbeing of the living world) at the heart of new draft legislation to replace the Resource Management Act are other promising initiatives.

Like Te Tiriti itself, such approaches can demonstrate a deep concern for land and sea, and for ordinary people, Māori and non-Māori, with dignity and fair dealing for all. In that way, the spirit of the Treaty might be honoured at last, with tika and mana - justice and honour, and nga tikanga rite tahi, true equality for Māori and non-Māori persons and their ancestral legacies, at its heart.

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P.S.

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