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Needs, Rights and ‘One law for all’: Contemporary Debates in New Zealand Maori politics¹

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¹ This paper develops arguments discussed in the author’s book *Beyond Biculturalism: the Politics of an Indigenous Minority*. Wellington: Huia Publishers, 2007.

Abstract

This paper examines contemporary debates in Maori politics by responding to the argument of the former Leader of the Opposition National party, Don Brash, that Maori public policy is most properly based on 'need' alone because indigenous status offers no 'rights' beyond those of common national citizenship. The paper's alternative argument is that the politics of indigeneity and associated theories of self-determination provide a way of avoiding a general belief that addressing need is all that is required to include Maori fairly in the national polity. It is argued that Maori ought to enjoy rights of indigeneity as the basis of an inclusive, cohesive and fair society.

Cette étude examine certains débats dans le domaine de la politique maorie en répondant aux propos de l'ancien chef du parti National, Don Brash, selon qui la politique publique maorie se baserait le plus aptement sur la notion du seul 'besoin', le statut de peuple indigène ne conférant aucun 'droit' au-delà de ceux qu'accorde la citoyenneté nationale régulière. Nous proposons par contre que la politique de l'indigénéité et les théories de l'auto-détermination qui y sont associées constituent un moyen de parer à une croyance généralisée qu'il suffirait de suppléer au besoin pour inclure avec justice les Maoris dans la politique nationale. Nous démontrerons que dans une société inclusive, cohésive et juste, les Maoris devraient jouir des droits accordés par l'indigénéité.

Introduction

The principal characteristic of contemporary Maori political debate is an ideological conflict over the terms of indigenous belonging to a common national polity. In a popularly received speech in 2004 entitled *Nationhood*, the Leader of the Opposition National party, Don Brash,² reduced Maori policy discussion to an argument between 'needs' and 'rights' as the proper basis of public policy formation and social service delivery. Brash's position was that public policy ought to be

² Although Brash resigned as Leader of the New Zealand National party in December 2006 his ideas have remained influential in shaping contemporary Maori public policy debates.

crafted on the basis of 'need' alone because Maori have no 'rights' above those of common citizenship, which demands 'one law for all' (Brash, 2004). The 'one law for all' ideology responded to a populist fear that Maori demands for autonomy threatened the integrity of the nation-state. Suggestions that New Zealand is a 'deeply divided' society (Maaka and Fleras, 2005: 23) with a crisis in Maori/Pakeha relations, clearly fuel such fear. Public policy debates were characterized by theoretical disagreements between interpretations of liberal democracy which favour assimilation, and an indigenous view of history which focuses on the future with reference to the past (Simpson, 2000: 117). Brash's 'one law for all' view was countered by a commonly held Maori position that: 'We will claim our indigeneity and we will speak of it, regardless of whether people want to see us as 'one people' (Turia, 2006). In short, there was a conflict between political homogeneity and indigeneity as the basis of belonging in a modern democracy.

This paper draws on the politics of indigeneity and its associated principles of self-determination to propose that Brash's arguments were overly simplistic, and that instead, the politics of indigeneity can provide a way to avoid a general belief that addressing need is all that is required to include indigenous people fairly in the national polity. This argument is illustrated by examining the debates, which were not necessarily new, but dramatically highlighted by the *Nationhood* speech.

The *Nationhood* Speech

During the 1980s and 1990s the New Zealand public policy environment was reasonably sympathetic to Maori political aspirations and assimilation was no longer the prevailing Maori policy objective. There was bipartisan acceptance of gradual developments towards greater Maori self-determination, and for restitution for Crown breaches of the Treaty of Waitangi. The earlier assimilationist position returned to prominence in 2004 when Brash became the first political leader in over 20 years to argue coherently and effectively against the notion of collective indigenous rights. The *Nationhood* speech was directed at a general public which had tired of the [Treaty]:

‘Claims disposition, [which] dominated New Zealand politics in the 1990s [and which]... shaped Maori identity-practices and became a powerful force in New Zealand constitutionalism’ (McHugh, 2005: 291). Many New Zealanders, encouraged by a frequently sceptical press, had become impatient with incremental developments towards limited Maori self-determination. Maori had become an official language for example, and could be used in any public context. Maori representation in the House of Representatives remained guaranteed, and there were increasing numbers of Maori educational facilities and primary health providers. Many iwi [tribes] had obtained or were negotiating recompense for land and other resource alienation. The purpose of the *Nationhood* speech was to undermine the security of these measures of limited self-determination. Its underlying message was that Maori had positioned themselves as a competitor whose claims conflicted with national unity, equal citizenship and democracy.

Brash alleged that racial privilege pervaded public policy by according remedial rights to Maori, which amounted to a ‘birthright to the upper hand’ (Brash, 2004). The National party’s immediate rise from 28% to 49% support in a Television New Zealand public opinion poll (TVNZ, 2004), indicated the populist appeal of a position which, in fact, oversimplified long-standing and complicated policy initiatives intended to reduce social and economic disparities between Maori and non-Maori. Brash admitted that these disparities rightly concern public policy. What he was unwilling to do was to locate them in the broader context of Maori cultural imperatives and aspirations. In this way Maori could be categorized as poor people with ‘needs’ not indigenous peoples with ‘rights’. The Government could thus be urged to assert itself as the protector of a ‘nationhood’ which Maori ought to join on the basis of common individual citizenship with no regard to collective claims other than those arising from historic breaches of the Treaty. Such breaches, Brash argued, ought to be dealt with quickly and at minimal cost to the state.

The popularity of these arguments surprised and panicked the Labour led Government. It responded by appointing the first ever Co-ordinating Minister: Race Relations, whose brief was to

satisfy a suspicious electorate that 'need' not 'race' was the philosophical rationale for all public expenditure. The appointment lent weight to the questions Brash had raised, and intensified a public debate about rights, needs, citizenship and democracy.

Indigeneity and self-determination

What distinguishes rights of indigeneity from those of individual citizenship is their collective nature. Group rights are preconditions of individual freedom because freedom is not acultural, and:

In developing a theory of justice, we should treat access to one's culture as something that people can be expected to want whatever their more particular conception of the good. Leaving one's culture, while possible, is best seen as renouncing something to which one is reasonably entitled. This is a claim, not about the limits of human possibility, but about reasonable expectations (Kymlicka, 1995: 86).

The politics of indigeneity claims collective rights in the nation-state on the basis of 'ancestral occupation' (Fleras, 2000: 129), not on need or equality. Its challenge to post-colonial notions of sovereignty and government is concerned with inherent political rights that are distinguishable from either ethnic minority or general human rights claims. Indigeneity becomes the basis of political expression when indigenous peoples perceive a colonial relationship with the state which they did not seek, and do not want as the limiting framework in which their political participation is constructed, and from which subjugated political status is the only possible outcome (Maaka and Fleras, 2005). The politics of indigeneity also arises where

Indigenous peoples do not always see their destinies locked into the wisdom of the state, especially if their sovereignty has been appropriated by colonising powers and their experiences of state control have been marred by dispossession and deculturation (Durie, 2005a: 163).

Indigeneity's foundational premise is that autonomous authority is taken for granted. It is not a gift of a benevolent state. Indigeneity asserts the right to collective identity and to the greatest extent possible, the self-determination of cultural, social, and economic destiny. While it is not concerned with political isolation or with obstructing the rights of others, indigeneity vigorously rejects domination and subjugation as the foundation of political order. It rejects one culture

positioning itself as providing the 'normal' basis for the conduct of public affairs, as it also insists that political participation is a right of peoples as much as it is a right of individuals.

Indigeneity transcends the politics of 'cultural space and social equity' (Maaka and Fleras 2000, 93) to be concerned with language, political participation and citizenship. It emphasizes the right to be different in some senses, and the same in others - the opportunity to live in the modern world while at the same time preserving one's ancient cultural heritage (Fleras and Elliot, 1996: 191). It assumes a transformative function that allows indigenous peoples to consider and assess the terms of their 'belonging' to a wider polity, but also their political status as autonomous peoples who belong both to a national jurisdiction, and to their own communities with independent political status in their own right (Maaka and Fleras, 2005). The purpose of political rights does not, however, lie in those rights per se, but in their capacity to contribute to material, social and cultural satisfaction. For Maori, this means to exercise self-responsibility; and for communities to make decisions against their own criteria and in pursuit of self-defined goals. Further, it is the opportunity to take responsibility for one's successes and failures, and to avoid the passive reception of what is determined by outsiders. Indeed, if it is not indigenous peoples themselves who are responsible for preserving their cultural traditions and bettering their material circumstances then who is? In 2006, for example, a Maori party co-leader, Tariana Turia, remarked to the ACT party conference that 'only we can change' the negative Maori statistical profile:

We are the ones who can liberate ourselves from the situation we find ourselves in. We are capable of unleashing the potential that lies within our people, be they individual or collective (Turia, 2006).

She also argued that the organization of the welfare state traps Maori into dependency and that:

The challenges my colleagues and I are putting to our people and to our communities is that we/they/us all have the responsibility of ensuring that our human potential is not wasted in a cloud of smoke, the mist of "P", the froth of alcohol or the bone jarring impact of a punch (Turia, 2006).

Self-determination has characterized Maori political thought and aspirations since the signing of the Declaration of Independence in 1835 and the Treaty of Waitangi in 1840. It became

increasingly important as Crown breaches of the Treaty became more common from that year onwards (see Orange, 1987). In contemporary Maori politics self-determination is

An *idée force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law (Stavenhagen, 1996: 2).

Mick Dodson's account of the origins of Indigenous Australian self-determination holds equally well in New Zealand.

Time and again indigenous peoples expressed the view that the right to self-determination is the pillar on which all other rights rest. It is of such profound nature that the integrity of all other rights depends on its observance. We hold that it is a right that has operated since time immemorial amongst our people, but it is the right that is at the centre of the abuses we have suffered in the face of invasion and colonisation. The dominant theme of our lives since colonisation has been that we have been deprived of the very basic right to determine our future, to choose how we would live, to follow our own laws. When you understand that, you understand why the right to self-determination is at the heart of our aspirations (1994: 44).

Maori resolve ensures that self-determination, in spite of wider political pressures, remains important to national political debates.

Opportunities for self-determination are, however, necessarily limited by minority status in a pluralist democracy. With these limitations in mind the self-determination that Maori pursue must be practically achievable and consistent with the hopes and aspirations of contemporary Maori in their diversity as well as in their commonalities (Durie, 1998: 4). Self-determination has 'three important dimensions'. It is firstly concerned with 'economic standing, social well-being, and cultural identity' for both individuals and communities. Secondly, it attends to individual and collective 'power and control' for better self-management and decision making over natural resources, including Maori land, the active promotion of good health, good education and Maori language usage. Thirdly, it is concerned with cultural change, as: 'Maori self-determination is not about living in the past' (Durie, 1998: 4). Self-determination, Alfredsson argues, must evolve to meet changing circumstances and objectives. It

has not been and should not be a stagnant phenomenon. Further evolution is likely and it must be admitted that, not surprisingly, the outcome is uncertain. States as the supreme law-makers will continue to preserve their interests in ongoing and forthcoming legislative debates, but that is not necessarily a straitjacket... (1996: 79).

These understandings of indigeneity and self-determination are consistent with liberal arguments that the cultural norms of different groups ought to be respected in public affairs, limited only by the requirements of non-interference with the rights of others and respect for universal human rights. As Laitin points out

Kymlicka's general strategy - that of providing external protections to groups from outside domination and preventing group leaders from incarcerating people within the culture - is a compelling answer to the question of how difference could be maintained within a liberal society (1988: 235).

The practical limits to what Maori might reasonably expect from indigeneity ought to be seen in the context of Kant's doctrine of freedom, which holds that even if a perfect outcome can not come about

the idea which sets up this maxim as an archetype... still remains correct. For no-one can or ought to decide what the highest degree may be at which mankind may have to stop progressing, and hence how wide a gap may still of necessity remain between the idea and its execution. For this will depend on freedom, which can transcend any limit we care to impose (1970: 191).

Freedom is, however, constrained by the 'one law for all' ideology which removes liberal democracy's ability to account for difference. It says to Maori:

You, like the rest of us, are free by virtue of the fact that we are ruling ourselves in common and are not being ruled by some agency that need take no account of us. Your freedom consists in the fact that you have a guaranteed voice in the sovereign, that you can be heard, and that you have some part in making the decision. You enjoy this freedom by virtue of a law that franchises all of us, and so we enjoy this together. Your freedom is realized and defended by this law, and this whether or not you win or lose in any particular decision. This law defines a community of those whose freedom it realizes and defends together. It defines a collective agency, a people, whose acting together by the law preserves their freedom (Taylor, 1999: 267).

This romanticised view of democracy is underpinned by the assimilationist ideal of a mono-cultural polity which, by failing to admit the legitimacy of culturally framed Maori political

participation, obstructs equality. Indeed, self-determination includes the right to be governed by representative government (Foster, 2001: 147) as the basis of full and effective political participation, and a full share in the sovereignty of the nation state. For Maori, one might argue:

Struggles for citizenship and democracy have been guided by the anticipation of a political order which does not arbitrarily shape and constrain choices for individuals and groups. The urge to obtain this order is an urge towards a fuller measure of autonomy (Taylor, 1970: 70-71).

Neither the authority of the Crown nor Parliamentary sovereignty ought to mean that non-Maori preferences must necessarily and always take precedence. That is to say, if democracy is to protect all citizens against the misuse of political power, it must ensure that minority interests do not, as a matter of principle, have always to make way for simple and unbridled majoritarian rule. Majority vote may resolve division, but democracy must always function on the basis of the rights of every citizen. Its guiding principles should be fairness to all, which means that no one group should always be on the losing side (Mulgan, 1989: 80). Democracy's broad potential requires acceptance that equality is not uniformity, and that it is legitimate for equal rights to be expressed with regard to cultural context. Further, while the simple right to vote in general elections may be the principal characteristic of equal political participation, this right does not of itself guarantee political equality which, in fact, becomes elusive when the assimilationist ideal of a mono-cultural polity prevails.

It is from the very idea of self-determination that democracy 'derives its power and significance'. A democratic tenet is that members of the polity should be able to make free choices and that it is the ability to participate freely that legitimises state policy choices (Taylor, 1970: 144). The object of liberal democracy is to protect citizens from 'oppression and depredation' by state functionaries (Bentham, 1843: 47). Tully's conception of liberal democracy is also inherently non-assimilationist, and holds that in addition to democracy affording all citizens free and equal rights to participate in the government of the nation state, it affords peoples the right to live their private lives in accordance with their own choices and responsibilities (Tully, 1999: 437).

Democracy can not assume just one form of participation. If sovereignty lies with the people its political institutions ought to be culturally responsive (Tully, 1999: 437). The democratic political order is undermined if its institutions contain structural impediments to equitable distribution of power among different groups of citizens. Held, for example, asks:

If one engaged in a democratic thought experiment about the proper form of public power, is it likely that one would accept as legitimate the political order in which the capacity for self-determination was shaped by asymmetries of power, unequal life-chances and radically unequal political opportunities patterned by one's country of origin, race, sex and class (Held, 1999: 165)?

Further:

If one did not know one's future social and political position, would one accept a decision-making process in which many life-determining issues were not open to public scrutiny and deliberation (Held, 1999: 165).

Further still,

if people did not know where they would find themselves when the 'social dice' finally fell, would they not seek or choose certain minimum levels of political opportunity and need-satisfaction (Held, 1999: 165)?

Guaranteed Maori representation in the House of Representatives is justified as a collective claim of indigeneity, as well as in terms of democracy's own theoretical basis. Among the tests of democracy's effectiveness is the extent to which its institutions are responsive to the public, while responsiveness is itself a function of an inclusive democratic form. 'It is not a privilege to want to participate equally in the governing process' (Sullivan, 2003: 140).

A guaranteed parliamentary voice for Maori contributes to an inclusive political structure which is a precondition, although not a guarantee of self-determination. It is inadequate to claim a politics of inclusion on the basis that the right to vote is not denied on the grounds of race, for example. Inclusion is illusory in the event of government without regard to differences (O'Sullivan, 2007). Self-determination 'entitles a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its ethnic, historical, cultural or territorial identity' (Daes, 1996: 48).

Self-determination and liberal political theory

Liberal theory might contemplate its primary concern with the individual in collective terms simply because there is a plurality of means by which the individual may choose to conduct his or her affairs. Being Maori is not an alternative to a New Zealand identity but an essential component. This means the autonomy sought through traditional social and political structures is an adjunct to state citizenship, not an alternative to it. At the very least, New Zealand citizenship for Maori implies an equality, or indeed a genuine 'one law for all', which includes recognition of rights to ancestral inheritance (Maaka and Fleras, 2005; O'Sullivan 2007). In this sense, the notion of citizenship can help to establish common rights and obligations, which can then be clarified in specific contexts rather than overridden by indigenous rights.

Indigeneity influences the development of the political order and as Sharp correctly points out:

We no longer have a liberal, individualistic constitution, even though the culture of liberal individualism permeates much of the law of the state as well as its economic practice. The persons who are now represented in the collectivity of the state and its activities are not just individual men and women. They are also, to mention a few, 'Maori,' 'iwi,' 'whanau,' and 'hapu' (1997: 318).

Iwi, whanau (families), and hapu (sub-tribes) are, in fact, intended to protect and promote the liberty of their members. For some, the rights of the group to language, form and purpose of property ownership, schooling, and health care, are necessary preconditions of individual freedom. Yet in affording the state 'a regulatory and coercive capacity', liberal political theory necessarily created 'a force that... [can] deprive citizens of political and social freedoms' (Sharp 1997: 318). Hill argues that:

Scholarly neglect of the coercive power of the state and the interests it primarily represents, and of its hegemonic aims and strategies, has often manifested itself in a lack of understanding of the sheer pervasiveness and intensity of the Crown's assimilationist mission - which prevailed until the last quarter of the twentieth century and perhaps beyond (2004: 67).

If liberalism is 'preoccupied with the capability of persons to determine and justify their own actions, with their ability to choose among alternative political programmes' (Held 1995: 169) it

must logically be concerned with the exercise of these choices in free association with those with whom one has a genealogical connection or shared geo-political relationship to a particular place. Maori can not be free, in a full democratic sense, if they can not choose to live by 'birthright' as Maori. Furthermore mathematical conceptions of equality can not of themselves meet indigenous aspirations because 'equality in unequal context is tantamount to freezing the *status quo*' (Maaka and Fleras, 2005: 243). Equality is insufficient as the ability to express and receive common citizenship rights in preferred cultural form is an essential claim of indigeneity. An ideological tension is thus created for political parties which on the one hand place liberal freedom at their philosophical core, but on the other, harbour a social conservatism which struggles to see the point of difference. Primarily it is this tension which makes citizenship a 'site of struggle' (Maaka and Fleras, 2005: 43) for Maori.

Reactionary and defensive responses to indigeneity could suggest that people are 'perplexed' and 'baffled' by indigenous claims, and reinforce 'the very neo-colonialisms that created a problem in the first place' (Maaka and Fleras, 2005: 29). National integrity does, however, require a high degree of commonality among citizens - 'a high degree of social cohesion' and 'a common identity' (Taylor, 1999: 265). The most important commonality among peoples is a shared humanity from which arises an individual sovereign dignity that is expressed in association with the community to which the individual belongs, and in which an identity is crafted.

Yet the overstatement of commonalities, which was the underlying theme in the prevalent 'racial harmony' explanation of New Zealand race relations in the early to mid-twentieth century, has an exclusionary effect. Overstating commonalities also removes liberal democracy's ability to recognize differences and privileges assimilation, which can only be resisted by conscious effort. At the same time the well functioning liberal state requires a body politic whose members are provided equally with opportunities for political and social participation because: 'Power is always exercised, and political outcomes are always determined, in the context of the relative capabilities of parties'

(Held, 1995: 170). The politics of indigeneity encompasses strategies of resistance 'guided by the anticipation of a political order which does not arbitrarily shape and constrain choices' (Held, 1995: 70-71). It maintains that the stability of the democratic state is enhanced by minimising disparity, not by marginalising any particular group from the body politic.

An Inclusive 'One Law for All'

There are examples in existing New Zealand legislation of an inclusive 'one law for all' which recognize that within one community there are different ways of thinking, based on different traditions and experiences, and that social cohesion is more likely to be maintained when all people perceive that their values carry weight in the political and legal systems. Indeed, it is the attempt to impose homogeneity rather than accept diversity that is socially divisive. The differences between Maori and non-Maori are neither absolute nor antagonistic, meaning that the barriers to self-determination are more ideological than practical. Maori do not seek the disruption of the nation state, nor to disturb the daily lives or way of life of their neighbours; they simply seek respect for their own way of life and cultural values as elementary to their citizenship (Durie 2005b; Maaka and Fleras 2005; O'Sullivan 2005).

Contrary to prevailing populist views, 'the explicit incorporation of tikanga Maori [customary Maori] concepts into formal state law has not been uncommon in the years since 1991' (Williams, 2005: 381). Williams cites changes to the *Adoption Act 1955* as more socially inclusive because they have had regard to tikanga Maori. *Te Ture Whenua Maori Act 1993* 'makes provision for a more collective control of Maori freehold land interests...' (2005: 382). For some Maori this example of legislative development is especially important, for the reason that: 'The defining characteristic of indigenous peoples is... not necessary premised on colonisation, sovereignty, or a prior claim to settlement, but on a long-standing relationship with land, forests, waterways, oceans, and the air' (Durie, 2005a: 137). Section 6 (e) of the *Resource Management Act 1991* requires decision-makers

to 'recognize and provide for... the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu [sacred places] and other taonga [treasures]'.

The inclusion of traditional concepts in legislation can, however, be problematic. Consistent and accurate legislative interpretations of tikanga Maori are not straight-forward. Hohepa argues, for example, that using the word, 'whanau', in the *Children Young Persons and Their Families Act 1989* involves modifying Maori concepts to make them fit Western legal precepts, and relinquishing Maori control over Maori intellectual property. On the other hand, he recognizes that if Maori do not define concepts such as whanau for legal purposes then 'it will be done in a detrimental way by others' (Williams, 2005: 382). When the state accommodates Maori traditions some surrendering of cultural ownership is required. But when such accommodation occurs, the Maori sphere of influence encroaches, although only in small incremental steps, beyond the exclusively Maori context, which is 'part of the creative tension that will inevitably arise as the two streams of law begin to flow together and sometimes mingle. In some areas of law tikanga Maori seems to have assisted the general law to move towards more inclusive social values' (Williams, 2005: 382).

Ultimately, however, Maori public policy outcomes reflect the on-going re-balancing of power relationships between the Crown and Maori as least as much as they reflect agreement on points of moral principle. It is always the Crown that holds the 'upper hand' in these relationships. While that 'upper hand' is not used against Maori interests as a matter of course, it is certainly true that when space is created for Maori voice and authority it is never with Maori interests alone in mind. As 15% of the national population, Maori are sufficiently numerous to make the well-being of both Maori and non-Maori interdependent. Maori economic security, especially, is essential to national economic security and prosperity.

Conclusion

Incremental developments towards Maori self-determination were sharply curtailed in 2004 in response to Brash's popularly received agenda-setting speech. The question of whether Maori are

individuals with needs or peoples with rights set culturally and politically homogenous citizenship against indigeneity as the basis for membership of the modern liberal democracy. Yet it is clear that liberalism was co-opted by Brash to support an assimilationist objective. If liberalism is to ensure individual freedom it must recognize group rights. People whose group membership is fundamental to their identity can not be free without access to their language, property and culture. Brash's 'one law for all' did not propose equal citizenship; rather it exaggerated differences between Maori and other New Zealanders, showing that the claimed impediments to self-determination are primarily ideological.

'One law for all' might, from a more considered perspective, mean that Maori values and tikanga have a place in the national public life. Social cohesion, too, is more secure when all people believe that their value systems are respected in the public realm. Indigeneity is not concerned with new and additional rights. It simply seeks the protection of inherent rights, and citizenship ought not imply denying equality to indigenous peoples. What the politics of indigeneity therefore provides is a way of thinking about Maori policy which transcends the narrow and supposedly acultural notion that to address 'need' is all that is required to include Maori fairly in the national polity.

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