Let us be fair and informed

Bishop Peter J. Cullinane DD

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The difference between a claim to privilege based on race, and the claim to rights based on indigenous status and recognised by the very existence of the Treaty, has been blurred.

We all have a vested interest in the future of Māori-Pakeha relations. Recent events have made it even more important that we require of ourselves, of our politicians, and of the media, objectivity and fairness in identifying the issues.

Looking to the future, the late Justice Paul Temm QC told a NZ Law Society Seminar in 1989 that what we have going for us is: the extraordinary patience of Māori New Zealanders and the tremendous sense of fairness of Pakeha New Zealanders It is reasonable to say that when New Zealanders know what the facts are, they always try to do what is fair One of our difficulties is that Māori New Zealanders know the facts of our history because they and their families have lived through them. Pakeha New Zealanders are generally quite unaware of Māori complaints and frequently show their lack of knowledge by asking somewhat plaintively: what's the Māori on about?

It is precisely this situation that Dr Brash seems to have taken unfair advantage of. It is one thing to stimulate honest, constructive debate around the real issues. It is another to appeal to the fairness of people while blurring the issues, which only leads to people talking past each other. Let us look at four examples of how the issues have been misrepresented through blurring, in political speeches, in the media, and in the public discussion.

Special Treatment

To ask whether Māori should get special treatment, or to suggest that they should not, is bound to appeal to all fair-minded N.Z.ers who dislike privilege, and especially privilege based on race. And Dr Brash has consistently spoken of special treatment based on race. That is not the issue. No claim to special treatment is being made on the basis of race. Certain rights have been claimed on the basis of historical realities.

Whether we like it or not, this country had been home to the Māori people for a long time before the Europeans arrived. On this basis they had the rights that belong to any indigenous people. The British acknowledged these rights by entering into a Treaty with them.

When the Colonial Secretary asked Captain Hobson to seek out a Treaty with the 'Natives', he gave this explanation: I have already stated that we acknowledge N.Z. as a sovereign and independent State admission of their (Māori) rights is binding on the faith of the British Crown. The Queen disclaims for herself, and for her subjects, every pretence to seize on the islands of N.Z., or to govern them as part of the Dominion of Great Britain, unless the free and intelligent consent of the Natives shall first be obtained.

The difference between a claim to privilege based on race, and the claim to rights based on indigenous status and recognised by the very existence of the Treaty, has been blurred by Dr Brash, by the media and by the polls. Of course, it gets the predictable applause of all who dislike privilege based on race.

Treaty Rights

The rights of the indigenous people would have involved obligations on the new-comers even if there had been no Treaty. Given, however, that Māori's rights were recognised in Article 2 of the Treaty, we need to look at another fudging of terms that goes right back to the Treaty itself. It is the difference between the right to govern and the right to sovereignty.

Legal argument over these terms is certainly justified, and there is no doubt that the Treaty lacks the normal requirements of a legally drawn-up document. But we cannot leave it at that. The legal doubts only give more point to the moral question what are our moral

obligations given that the Treaty is as it is?

Moral obligations are always wider than what is defined in laws. In this case, the moral obligation requires us to look at the intent and the purpose of the Treaty; why the Treaty was entered into, and what the parties were hoping to achieve by it. Those intentions are revealed in a number of ways: What Hobson explained to the Chiefs he was asking for, and likewise what the Chiefs understood they were exchanging, has been outlined by historian Claudia Orange in an affidavit prepared for the Court of Appeal of New Zealand in 1987: At the Waitangi meeting of 5 February, for example, Hobson explained that he was seeking Māori assent to British jurisdiction or authority over British nationals in N.Z. This was conveyed by the word kawanatanga (governership). Colenso's pencilled and abbreviated notes record this explanation, and a Pompallier letter confirms that it was authority that Hobson asked for, not sovereignty.

What then did the Chiefs think of Article 2, that left them rangatiratanga? Chieftainship, its literal translation, was a far cry from possession of the English text. A glance at the 1835 Declaration of Independence is instructive for it indicates that rangatiratanga there expressed Māori sovereignty or independence. Since this was not being asked for by Hobson, but actually guaranteed, Māori might naturally have drawn the conclusion that at most they were being asked to share some of their authority with a British administration which might more effectively deal with British nationals than Busby had. Putting it in European terms, it was a Protectorate-type relationship that was being presented at Waitangi, one in which power and authority would be shared.

The preamble to the Articles of the Treaty shows that the need to govern was the principle reason for the Treaty.

Article 1 of the Treaty the Māori text which was signed by Hobson shows that what the Chiefs ceded was governership, for which the word kawanatanga was coined. The Māori word for sovereignty or chieftainship in Māori society is expressed by the terms rangatiratanga and mana. Neither of these words is used in Article 1. Instead, tino rangatiratanga was used in Article 2 where the Māori text said: the Queen of England confirms and consents to give to the Chiefs, the hapus, and all the people of N.Z., the full chieftainship of their lands, their villages and all their possessions

The English text elaborates: the Queen of England confirms and guarantees the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession...

The French Catholic Bishop Pompallier, who had participated in the proceedings made the following entry in his diary: Their (the Māori) idea is that N.Z. is like a ship, the ownership of which should remain with the N.Z.ers (Māori) and the helm in the hands of the Colonial authorities.

These sources and other contemporary sources reveal the intent of the Treaty, which the Chiefs entered into in the full spirit and meaning thereof final clause of the Treaty. The other signatory's moral obligations equally include honouring the spirit and meaning of what was intended, whatever the legal ambiguities.

Clearly, what Māori ceded was authority to govern kawanatanga. What they did not cede was ownership rangatiratanga of all that was theirs. O ratou taonga katoa means everything they value, which included their lands and customs, culture, spirituality and health practices.

Given what we know about the intent of Article1, and the intent of Article 2, it is deplorable that the concepts governship and sovereignty continue to be fudged.

One People
A third area of blurring surrounds the slogan one people. It might suit some, according to their vision of a modern, efficient economy, to want N.Z.ers to be homogenised into one

people. Over a very long time this might yet happen, but it cannot just be decided by one partner to the Treaty. The Treaty was an exchange between two parties involving obligations that were intended to carry over into the future all three articles would be meaningless otherwise. That is the basis of a kind of partnership. And, yes, Māori can be members of the same nation and other at the same time. They are the other party to the Treaty on which our one nation was founded.

New Zealand's position is not strictly comparable to that of nations which did not have a founding Treaty, and we need to take our place in the community of nations in ways that are true to our foundation.

True integration of Māori and Pakeha actually presupposes acceptance of each other's identity. That is how it differs from assimilation and homogenisation.

One law for all
A fourth area of fudging is deplorable for its naivety, i.e. the references to one law for all and treating everyone the same.

When people's disadvantages have resulted from historic injustices, redressing them is a matter of justice. The injustices included the land confiscations, and the serious social and economic deprivations that resulted from the confiscations. These included poorer living conditions, greater vulnerability to sickness and disease, and no financial resources for participating in the new cash economy. To these can be added what happened to Māori in an education system geared primarily to the needs and assumptions of the dominant culture, right up till the 1940's.

In the face of the resulting inequalities, it would be unjust to treat all N.Z.ers the same. That would simply perpetuate the inequalities.

Is it so difficult, even for political leaders, to see the difference between, on the one hand, treating everybody the same, and on the other hand, aiming at equality of opportunity? The media, too, must bear some responsibility for propagating this simplistic equation between the same and equal.

So much for examples of how the public debate is not helped by the blurring of terms, which are unnecessary and avoidable. Even if this mostly happens out of ignorance, it is hard to avoid the impression that some of it is culpable.

We need honest and constructive discussion of the real issues, e.g.
- how the partnership is to be lived out in a democracy;
- how, in the pursuit of a modern, efficient economy, the governership ceded in Article 1 is to be exercised in ways that respect the rangatiratanga guaranteed in Article 2;
- how the rangatiratanga guaranteed in Article 2 can be exercised in ways that are credible, transparent, not exaggerated, accountable, and accepting of the governorship ceded in Article 1.
- how the work of the Waitangi Tribunal can be stream-lined.

The only things that should be excluded from the discussion are misrepresentations:
- special treatment based on race is a different issue from a special position resulting from the facts of history;
- governership (kawanatanga) does not mean the same as sovereignty (rangatiratanga), and didn't to the chiefs at the time;
- integration (which respects people's cultural identity) is not the same as assimilation (which doesn't);
- same does not mean equal, and the same treatment can perpetuate inequality.

Honouring the Treaty calls for genuine goodwill on both sides. It was the late Paul Temm who said: I suggest that the reasonable way to spell out the concept of partnership is not to act out of fear and apprehension, but in a way that is based on justice and on fairness, so that each partner acts reasonably and in good faith towards the other. As the Court of Appeal has

said this calls for careful research, rational positive dialogue, and above all, for generosity of spirit.

All the facts of the matter show a need for the honour of the Pakeha to be restored.

But if you would restore the honour of the Pakeha, you must first restore the mana of the Māori.

The legal status of The Treaty of Waitangi

Building right relationships between Māori and Pakeha for the future cannot be achieved by denying the past, or by down-playing the role of the Treaty. Failure to honour it fully could only make matters worse. What will be needed are goodwill, adjustment and time.

In 1989 Chief Justice, Sir Robin Cooke said: It is obvious that, from the point of view of the future of our country, non- Māori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Māori people for past and continuing breaches of the Treaty.

On the side of Māori it has to be understood that the Treaty gave the Queen government, kawanatanga, and foresaw continuing im-migration. The development of New Zealand as a nation has been largely due to that immigration. Māori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in the democracy now shared.

Efforts to diminish the significance of the Treaty are not new, and have actually given rise to the strongest evidence that the Treaty was intended to be taken very seriously and had long-term implications:

In a letter to Governor Fitzroy, the Colonial Secretary ordered him to fulfil the conditions of the Treaty of Waitangi scrupulously. This Treaty was similar to other treaties which the British Crown entered into with indigenous leaders in the Pacific, Africa and Asia, and to which the British government felt bound in good faith.

This attitude of the British Government never changed, and other governors were given similar messages.

There have been judgements made by N.Z. Courts, including one that in 1987 involved the full bench of the Court of Appeal, all of which confirmed the binding nature of the Treaty.

The one contrary judgement by an N.Z. Court delivered in 1877 by Judge Prendergast was overturned by the Privy Council in 1901. The late Mr Justice Paul Temm QC said Prendergast had based his judgement on international law which had no application in the matter, instead of following two centuries or more of colonial law which governs the legal relationship between the Crown and its native subjects.

Rights and obligations which derive from the Treaty take their legal force from laws passed by N.Z. governments. The 1975 Treaty of Waitangi Act, which set up the Waitangi Tribunal, is an example of governance being exercised in support of Article 2 of the Treaty.

It is simplistic to blame the Tribunal for racial tensions. The tensions were already there precisely because their causes were not being adequately addressed.

The Tribunal has exposed the underlying causes of these tensions and helps N.Z. governments to find ways of remedying injustices. Paul Temm said that without the Tribunal, Māori New Zealanders would be in the unequal bargaining position that they have been subjected to for far too long.

Statutes requiring consultation with Māori in their own right are further examples of taking seriously the ongoing partnership established by the Treaty. When Māori are consulted on matters such as health, conservation and resource management, it is not a privilege based on

race but a way of recognising the partnership entered into through the Treaty. Of course, it would be simpler and quicker not to do so. Governments and business could just get on with what they believe is best. But the government represents only one party to the Treaty, and the partnership consists of two.

Whether or not we need special provisions for consultation should indeed be calculated on the basis of need. But is need to be understood in narrowly materialistic terms, or does it include all the essentials of human well-being?

Māori have a deep need to know that the guarantee given them in Article 2 of the Treaty still holds. And Pakeha need to know that at the end of the day they have acted honourably.