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Recognition of Maori rights is not a short cut to apartheid

Recent remarks by DOUG GRAHAM about legal rights that belong only to Maoris have set talk-back radio alive with cries about a separate system of justice, or worse. As Mr Graham explains, the rights he is talking about are well recognised and limited.

For about 1000 years before European settlement Maoris had enjoyed all that this country offered with abundant food available in the sea, rivers, and lakes, birdlife, and an exceptionally productive soil.

'Those who claim that this is a form of apartheid have little idea of apartheid.'

When the settlers arrived [they] found sustenance for all the people and then some, and there was little risk of the new settlers impacting too negatively on the Maori inhabitants. Indeed Maoris welcomed the settlers into their midst and recognised the benefits and opportunities that co-existence presented to them.

But of course the newcomers had a quite different background and culture and often viewed things differently. Their concepts of ownership were based on individualisation rather than communal ownership. Alienation of property rights was total and in perpetuity, an idea that was foreign to Maoris.

The British Government gave clear instructions to Hobson that Maori rights and interests were to be protected and that they were to be treated fairly at all times. Accordingly, Article 2 of the Treaty of Waitangi confirmed and guaranteed to Maoris their lands and fisheries for so long as they wished to retain them.

What those rights actually were was not defined but whatever they were they were known as "customary rights" or sometimes "aboriginal title". They quite clearly existed and equally clearly were confirmed by the treaty.

As the settler numbers increased and soon represented a majority of the population, tensions arose between competing interests. The inherent cultural differences became critical.

In a parliamentary democracy what the law will be is finally determined by the Parliament but until Parliament speaks the common law applies, as interpreted by the courts. If the court decisions are unacceptable, then Parliament can enact legislation to declare what the law is to be and from then on the courts must apply the new law.

Sometimes Parliament will take away rights and extinguish them and, if it does, then that is that. So when Parliament enacted land laws in the last century it is generally accepted that customary rights or aboriginal title to land was extinguished.

But sometimes Parliament not only does not extinguish customary rights but it confirms them in legislation. The **Fisheries Act**, for example, **specially preserved Maori fishing rights in the sea** and this was the case until 1992 when the relevant section was repealed after the Sealord settlement.

For freshwater fishing, however, **the rights are included in the Conservation Act** and these still exist resulting in the recent "trout decision".

Occasionally they are quite specific. For many years regulations have existed which permit Ngai Tahu to take mutton birds from certain islands off the coast of the South Island as they had done for centuries before colonisation. These rights given to Ngai Tahu are not shared by the rest of us.

So where pre-European rights have not been extinguished it is likely that they remain. Clearly they do where, as in the case of mutton birds, Parliament has specifically recognised them. Thus while the law applies to all, the law recognises that some have different rights to others.

There are few areas today, however, where customary rights or aboriginal title still exist and in all critical areas, such as the criminal law, we are all subject to the same rules.

Fishing and food-gathering rights are rather odd exceptions and have been preserved because of the cultural importance placed on them by Maoris.

When negotiations take place between Maoris and the Crown to address valid grievances Maoris have over the actions of the Crown, it is essential that matters which are important to Maoris are addressed carefully. After all the total redress package is often only a fraction of the loss suffered and if the settlement is to be durable then Maoris must feel that all their concerns have at least been heard and considered.

In the Ngai Tahu negotiations the rights to take food were of the greatest importance. It was not a matter of giving them some new rights. They already existed. But rights are not much use if they can not be exercised and in the case of mahinga kai or food gathering places some access issues had to be resolved.

So the concept of nohoanga reserves was developed. These are camping rights on Crown land near rivers and waterways but back from the marginal strip which gives public access to the river.

These reserves can be occupied by Ngai Tahu for up to 210 days each year and they are about one hectare in size. Where they are has to be agreed between Ngai Tahu and the Crown.

While they grant exclusive rights to Ngai Tahu to occupy the sites this is rather like exclusive rights granted by the Department of Conservation to those holding concessions over parts of the DOC estate. It is intended they will provide access to Ngai Tahu so they can exercise their acknowledged fishing rights.

The Government has to act in the best interests of all New Zealanders. We are not all the same and in these quite limited areas the traditional rights of Maori can be accommodated without causing inconvenience to others.

Those who claim that this is a form of apartheid appear to have little idea either of apartheid or the way our law has developed over the years. If these fishing rights are to be extinguished by Parliament, then the consent of Maoris would be required unless it was necessary to take them away in the national interest and, in any event, full compensation would have to be paid.

This is not something to be done lightly. As Chief Edward John said at the First Nations Summit of British Columbia in Canada: "When Government asks us to agree to surrender our title and agree to its extinguishment, they ask us to do away with our most basic sense of ourselves, and of our relationship to the Creator, our territory and other peoples of the world. We could no longer do that without agreeing that we no longer wish to exist as a distinct people."

Surely some recognition of the special status of Maoris is unobjectionable and is likely to lead to a better understanding between Maoris and non-Maoris. The resolution of grievances is in the best interests of us all.

+ Doug Graham is the Minister in charge of Treaty of Waitangi negotiations.