He Kōrero mō te Rā o Waitangi 2024

Nā Mike Stevens

Ko Kāi Tahu tōku iwi
Ko Kāti Rakiāmoa ko Kāi Te Ruahikihiki ētahi o ōku hapū
Ko Metzger te ikoa whānau
Ko Te Rau Aroha te marae
Nō Awarua ahau
Tihei mauri ora!

During New Zealand's 1938 general election campaign, a parliamentary aspirant stood before a Dunedin audience and laid out a vision for his electorate, and our nation. Key planks of that vision included the establishment of a pool of qualified Māori teachers to work across schools Māori children attended, to teach them te reo Māori. Indeed, the speaker had been introduced to his audience i te reo rakatira, and he had replied in kind. During his stump speech he also called for the establishment of a Māori arts and crafts school in Te Waipounamu to match that earlier opened in Rotorua. In his view, te reo Māori me he toi Māori were not vestiges of a fading past; they belonged to a vibrant future. And this was a very future-looking individual; a perfectly modern man. A county councillor for more than a quarter of a century, twelve of those as chair, a Justice of the Peace, and a successful merchant, he was the first person in his settlement to have a motor car. And the first to install a diesel engine in his commercial fishing boat.[1] He was, in today's terms, an "early adopter"; the sort of historical character in whose light Rod Drury, sitting there, would gladly stand.

So who was this man? What electorate was he standing in? And what political party did he represent? His name was Thomas Kaiporohu Bragg. And he stood for the New Zealand National Party, in the erstwhile Southern Māori seat.[2] Tom Bragg, held in very high esteem by Tā Apirana Ngata, was also one of eleven founding trustees appointed to the original Ngaitahu Trust Board in 1929. Tom's paternal taua, his grandmother, Waa, is represented in that green-

[1] "No Brag About Bragg", *New Zealand Truth*, 25 August 1927, 6.
[2] "Southern Maori Seat", *Southland Times*, 11 June 1938, 6.

coloured pou over there; his maternal taua, Tamairaki, is represented in this red pou here beside me.[3]

Tom believed in democracy, private property rights, capitalism, the rule of law, and self-help. He believed in equality of opportunity. Which is precisely why he further believed in the righteousness of Te Kerēme, the Ngāi Tahu Claim; the utility of a centralised Ngāi Tahu authority; and the enduring relevance of Te Tiriti o Waitangi. He did not consider any of those things to be inherently antagonistic. Nor must we. He instead considered them to be mutually constitutive. So too can we.

Tom's commitment to equality of opportunity was evident in his outline of the material difficulties facing Ngāi Tahu. We were not just poor and struggling by general New Zealand standards, we were the poorest iwi. Our remnant landholdings were especially small and remote. Funds available to North Island iwi for social and economic development were closed to us. We were, in multiple ways, capital constrained. The already long-standing and unresolved Ngāi Tahu Claim was both cause and effect of the misery. It prevented houses being bought and built; farms could not be developed; whānau and villages could not thrive.[4] In highlighting all of this, Tom was thinking "up" from his own place: Rakiura, Foveaux Strait, Awarua, Ngāi Tahu. But he was no iwi-nationalist. We can't all be!

Looking out across the entire country, he argued for employment pathways for Māori into the Public Service. He called for an overhaul and simplification of Māori land law. And, like all good people batting for the Opposition, he finished his kōrero with a crack at the inaugural Labour Government. His specific brickbat? The Petroleum Act 1937 which nationalised New Zealand's oil and gas resources. Tom described this as a 'breach of the Treaty of Waitangi in that it deprived the Maoris of any benefits in the event of oil being found on their properties.' And here we are, in southern Murihiku, nearly 90 years later, thinking our way through new energy development through Te Tiriti. However, we should all be delighted that this is now happening

[3] For more see Michael J. Stevens, 'Thomas Kaiporohu Bragg (1876-1949)', in *Tāngata Ngāi Tahu* (Vol.2), eds Helen Brown and Michael J. Stevens (Christchurch, N.Z.: Te Rūnanga o Ngāi Tahu and Bridget Williams Books, 2022), 46-53.

[4] "Southern Maori Electorate – National Candidate – Address by Mr T. Bragg", *Otago Daily Times*, 27 September 1938, 8.

in more enlightened and collaborative ways. And that is a direct consequence of legislative and judicial developments in the 1970s and 1980s, which gave life and meaning to the "principles of the Treaty of Waitangi." I will return to that point near the end of this address.

So, how did our mate fare in the 1938 general election? Well, three years earlier when Tom ran as an Independent, he came within 42 or 43 votes of unseating the first term member, Eurera Tirikatene. In fact, in that earlier election, Tom's share of the vote combined with that of the National candidate was 174 votes more than Tirikatene received. However, by 1938, the Rātana movement had been formally folded into the Labour Party and the First Labour Government enjoyed widespread support for its social welfare reforms. The National Party leadership also remained tainted by its responses to the Great Depression in the earlier United-Reform coalition. Thus, Tom Bragg, although again the second-highest polling candidate in Southern Māori, lost to Tirikatene by 485 votes. It is nonetheless remarkable, I think, that nearly 30% of a landless, economically precarious people, ten years into a epoch-making global economic contraction, voted for a candidate on the political Right. That is, among other things, evidence of an enduring Tory bloc within Ngāi Tahu, and indeed across Te Ao Māori, about which much more can be said, and should be said, but not today.

At this point though I would like to highlight some attendant whakapapa and hononga. One of Tom's nephew's descendants is the indefatigable Barry Bragg: interim chair of Te Rūnaka o Awarua Charitable Trust. Descendants of Tom Bragg's paternal aunt, Maata, include te Kaiwhakahaere hou o Te Rūnanga o Ngāi Tahu, Justin Tipa, sitting there. And Tom's 1938 campaign hui was chaired by the Puketeraki-raised Pani Te Tau (née Parata). One of her many sisters was Hera Ellison. And the current Deputy Kaiwhakahaere of Te Rūnanga o Ngāi Tahu is her mokopuna, Matapura. And another of Hera's descendants is my wife, Emma, who used to babysit The Rt. Hon. Gerry Brownlee's children! An intimate reminder of our deeply entangled histories, Gerry – and the basis upon which I assume you are only the second-most domineering "Speaker of the House", so to speak, that your dear bairns have endured.

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Three years ago, having been "volun-told" a few weeks earlier that I was obliged to prepare a Waitangi Day address on behalf of Awarua and Te Rūnanga o Ngāi Tahu, I consulted several such addresses that Tā Tipene has delivered over his many decades of tribal leadership. Reflecting on their accumulated wisdom, and that found in his longer form lectures and essays, I suggested in 2021 that his visionary insights, ideas, and sayings would stimulate and nourish as yet unborn generations of Ngāi Tahu, as does Tāwhiao within Waikato Tainui me te Kīngitanga. Two things in the last three or so weeks reminded me of my prediction and its worthiness. The first was seeing you, Tipene, sitting alongside Tūheitia under the mahau at Tūrangawaewae, which was a well-deserved but particularly special affirmation. The second factor was a paper you delivered in 1988, in response to a tono from your late friend and Ngāi Tahu supporter Sir Peter Elworthy.[5] I was a little surprised to not have encountered this paper before now, and saddened, in a way, as to its ongoing relevance, which is to say the juncture that we, all New Zealanders, currently find ourselves at.

Indeed, in an uncharacteristically cynical moment, I was reminded of one of Aldous Huxley's quotes: 'That [people] do not learn very much from the lessons of history is the most important of all the lessons that history has to teach.' Or, perhaps more depressingly, a cartoon I recently saw, which read: 'Those who don't study history are doomed to repeat it. Yet those who *do* study history are doomed to stand by while everyone else repeats it.' Lest I now sound totally defeatist, rest assured I am with Salman Rushdie: '…we are not helpless. We can sing the truth and name the liars.'

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Those of you who kindly listened to my veritable kauhau in 2021 might recall that I outlined, in some detail, the nature and extent of the British Humanitarian movement in the 1830s and 1840s.[6] I highlighted key figures such as the MP Thomas Fowell Buxton and the senior government administrator Sir James Stephen, who, as Tipene has long stressed, embodied

[5] Tipene O'Regan, "A Maori Historical Perspective", Address to New Zealand Planning Council seminar 'Pakeha Perspectives on the Treaty, 23 September 1988. See also https://www.mcguinnessinstitute.org/wp-content/uploads/2019/11/A-Pa%CC%84keha%CC%84-Perspectives-on-the-Treaty.pdf.

[6] To view the text and video see https://ngaitahu.iwi.nz/connect-2/connect/news-and-stories/waitangi-day-address-by-dr-michael-j-stevens-awarua-2021/ and https://www.youtube.com/watch?v=UkRFfUageTo.

the ‘elevated decency’ that gave Te Tiriti much of its form. My key point was that had South Polynesia – these funny islands of ours – been formally folded into the Second British Empire ten or so years earlier than 1840, or ten or so years later, our treaty would probably look quite different, if indeed a treaty came into existence at all. We therefore have a duty, I think, to know something of its total whakapapa: all of the Treaty’s parents, and all of the places they lived: Waitangi and Whitehall; Sydney and Stewart Island, te mea, te mea. I do not say that as some sort of anachronistic Anglophile. My point is that our nineteenth century tīpuna Māori lived in enlarged worlds, and we dishonour their memory and their adaptiveness if we retreat into smaller realms, whether geographical or intellectual.

So, to summarise, the Humanitarian movement had a critical view of what the British Empire was, and an aspirational view of what it could be with a respectful and meaningful place for indigenous people within in. There was however, an alternative vision of a reformed Empire: one that was harder-edged and unapologetically self-interested, with, at best, only performative concern for the rights and interests of indigenous people. One of the best known proponents of this latter view was Edward Gibbon Wakefield. He of the New Zealand Company.

Despite the space between these two competing visions of empire – space that was real and important – their respective proponents agreed on several things. I refer here especially to two big ideas that gave form and function to British imperial expansion in the 18th and 19th centuries, and which continue to shape Anglo-settler societies today. The first of these was the ideology of “improvement” which framed – and continues to frame – ideas and debates about property rights: the ownership and management of natural resources: land, freshwater, marine space, and fish. The second big idea was “racial amalgamation” which framed – and continues to frame – ideas and debates about indigeneity and indigenous rights. However, each competing vision of empire had quite different ideas about the precise meaning of, and the exact interrelationship between, these two big ideas. New Zealand thus became a key arena where those competing visions fought for material form and primacy.

The implications of that contest became more apparent to me last year when I read, from cover to cover, Ned Fletcher’s award-winning book *The English Text of the Treaty of Waitangi*

published by our good friends at Bridget Williams Books. As I did, I was reminded of the American historian and political scientist Louis Hartz and the "fragment thesis" he developed in the 1960s. In very broad terms, this asserts that nations which began as settler colonies of a European nation end up preserving ideologies and structures from the mother country dominant at the time the colony was founded. The European nation then continues to evolve, leaving the colony as something of an earlier version of the European nation – a fragment.

I thus put it to you that these two competing visions of empire constitutes New Zealand's foundational, and enduring, political schism. Moreover, this is not something that maps on to the political divide. Influential people on the Left, and those on the Right, historical and contemporary, can be found on each side of this originary schism. Pākehā New Zealand, in my view, has been – has always been – and remains – split over the nature and extent of any obligations it owes to hapū and iwi.

As I hinted at earlier, Te Tiriti emerged at the apex of Humanitarian power. Thereafter, they and their vision were displaced by something much closer to Wakefield's vision. This was buttressed by what came to be known as Social Darwinism and actualised by a tsunami of outward British emigration to colonies including New Zealand. Even so, colonial administrators and settler politicians in New Zealand were continually obliged to address Humanitarian-derived or Humanitarian-type concerns. This tells us all something very important: that the 'elevated decency' referred to earlier, persisted – and persists – in all sorts of interesting pockets of Pākehādom – and, as I have said, on *both sides* of the political spectrum. Tipene addressed this point in his 1988 article I referred to earlier where he wrote that: 'I want to pay tribute to the Pakeha tradition which I believe Pakeha people should stand proudly on and recognise, and build the future on.' There is, he observed:

> a very powerful, ongoing Pakeha tradition which has been here from the beginning and which is still here which is to do with uprightness and fair dealing and honour. It is that which I believe Pakeha people have to confront in the Treaty – the duty of honour. It is a powerful element of the Pakeha tradition in this society…It may never have been dominant but it has always been present.

That sentiment, with which I fully concur, reminds me of another quote I wish to share today. This comes from award-winning historian, Waitangi Tribunal member, and my friend, Dr Aroha Harris, nō Te Rarawa me Ngāpuhi:

I think we do a disservice to our history if Māori can only occupy certain roles. I can't imagine Māori being on their best behaviour 24/7 while Pākehā were always evil. Colonisation is more complicated than that because humans are complicated and we're all a little bit weird. I don't say that to undermine the history of colonisation but to find a deeper understanding. People's actions matter, but it is simplistic and unhelpful to categorise all the members of a particular group as only ever good or only ever bad.[7]

Āmene!

The key takeaway then? New Zealand's history is complicated, and thus are our politics. Recall then satirist Henry Mencken's quip that 'For every complex problem there is an answer that is clear, simple, and wrong.' Let us therefore be wary of politicians, of any stamp, armed with clear and simple answers to our problems.

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In the 1970s the enduring Pākehā decency that Tipene speaks of, and Aroha gestures towards, worked with practical-minded Māori leaders to repeal the Maori Affairs Amendment Act 1967. For those unfamiliar with this legislation, it was, in numerous ways, the last great push of what I am tempted to call the "*indecent* amalgamationists." However, this "clear and simple" mopping up exercise met with universal Māori condemnation: it was rejected by young and old, radicals and conservatives alike, from Rakiura to Rerenga Wairua. In fact, this protestation, coupled with enormous post-World War Two Māori demographic changes, was arguably the beginning of the so-called Māori Renaissance.

A "coalition of the *decent*" thereafter passed the Maori Affairs Amendment Act 1974 and the Treaty of Waitangi Act 1975: two very important statutes which salvaged and re-centred

[7] "Uncovering the complexity of Māori history", University of Auckland, accessed 5 February 2024, https://www.auckland.ac.nz/en/arts/our-research/storytelling/uncovering-the-complexity-of-maaori-histories.html.

something of the Humanitarian vision. The latter statute's importance was that it introduced the notion of the principles of the Treaty of Waitangi and established the Waitangi Tribunal. This enabled Māori, for the first time, to properly cross-examine those who control and hold power in this country, as Tipene put it in his 1988 paper. When the Tribunal was granted retrospective powers of inquiry in 1985, Māori property became properly protected by the law, not just bound to it. These measures were thus a means of securing equality – both before the law and of opportunity. Uncle Tom Bragg, never a proverbial Uncle Tom, would have been delighted I am sure, had he lived to witness these events.

After some interesting twists and turns, that 1975 legislation led to section 9 of the State-Owned Enterprises Act 1986. A year later, that culminated in the Court of Appeal's famous *Lands* case, which did several important things, two of which I highlight here. First, the Court provided clarity as to what Parliament must have reasonably meant by the phrase 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.' Secondly, the Court's intervention contributed enormously to the intellectual and material basis of Treaty settlements, which is to say the Right of First Refusal mechanism, which has massively capitalised Ngāi Tahu, Waikato Tainui, and sundry other iwi.[8]

There is an inherent contradiction, therefore, when people say they are committed to protecting Treaty settlements, and at the same seek to remove or castrate the principles of the Treaty which made those settlements possible – and which may well be required to maintain the long-term integrity of those settlements. The principles of the Treaty are "the tool that made the tool", as it were, that allowed us to work through the sins of the past, rationally and peacefully, and bring into being a new and better future, for all people who call this place home.

I consider myself very fortunate that on 29 June 2007, 20 years to the day after the five *Lands* judgements were handed down, I spent the day with two of the judges who heard the case: The Rt. Hon. Sir Ivor Richardson and The Rt. Hon. Sir Maurice Casey, both now sadly dead.

[8] See Tipene O'Regan, "Impact on Māori – A Ngāi Tahu Perspective", in *"In Good Faith": Symposium proceedings marking the 20th anniversary of the* Lands *case*, ed. Jacinta Ruru (New Zealand Law Foundation, Wellington, N.Z.: 2008), 45-48.

Tipene was there. My wife was there. Possibly some others present today were there too. But many more people, I think, should read, know, and discuss those five judgements: 'these five great ruminations, these five fine essays', as Tipene rightly called them on that commemorative occasion.[9] Ditto Sir Ivor's and Sir Maurice's reflections on the case two decades later.[10] In the current political climate, and as Te Rūnanga o Ngāi Tahu begins to carve out a considered position in response to that climate, I think three aspects of those reflections are particularly noteworthy.

Number one: both judges comprehensively rejected claims of judicial activism or overreach. The case was, in their view, one of relatively straightforward statutory interpretation (and the application of well-settled principles of judicial review), albeit freighted with significant constitutional and societal questions. The pair expressed surprise, as had their fellow judges earlier, that they were doing anything other than give effect to Parliament's will. Their view was that if they had misunderstood Parliament's will, or Parliament's will had changed, then Parliament was of course free to amend the legislation.

Number two: both judges, in my view, thought that the most significant thing the case did was find that the Crown owed Māori a quasi-fiduciary duty of active protection in respect of Māori property.[11] In other words, a powerful entity in a relationship with a weaker entity needs to deal with that weaker entity reasonably and in good faith, as occurs in various kinds of legal partnerships.

Number three: in 2007, but as early as 1989, all five judges expressed regret at having used the term partnership in their judgements.[12] They had done so for analogous purpose. To make a point. As Sir Maurice noted, partnership 'was used in the judgments as shorthand for the fiduciary relationship and obligations arising under the Treaty between the Crown and Maori.

[9] Ibid., 48.
[10] Rt. Hon. Sir Ivor Richardson, "Deciding the Case: Recollections", in *"In Good Faith": Symposium proceedings marking the 20th anniversary of the* Lands *case*, ed. Jacinta Ruru (New Zealand Law Foundation, Wellington, N.Z.: 2008), 13-18; Rt. Hon. Sir Maurice Casey, "Deciding the Case: Recollections", in *"In Good Faith": Symposium proceedings marking the 20th anniversary of the* Lands *case*, ed. Jacinta Ruru (New Zealand Law Foundation, Wellington, N.Z.: 2008), 19-21.
[11] Casey, 20.
[12] Richardson, 16.

With hindsight it may have been preferable to adopt some other expression of these concepts.'[13] Sir Ivor was more direct: 'Regrettably, in some quarters more was drawn from references in the judgments to "partners" and "partnership" as extending somehow to equal sharing, than was ever intended by the Judges.'[14]

Tipene shared their reservations regarding the use of the term partnership and argued that it 'was immediately put to use as an "anaesthetic" by the State.'[15] I take his point. And I further note, in a Ngāi Tahu context at least, as that is the pae I speak from, that this partnership fixation imposes quite significant carrying costs on our papatipu rūnanga and Te Rūnanga o Ngāi Tahu alike. And it does so for rather nebulous returns, and without the coercive powers thestate has by which it funds its corresponding costs. But worst of all, I think, is that this partnership fixation risks obscuring the inherent power asymmetries at play, which the duty of active protection sought to shield Māori from. But enough of that for today. The food of chiefs may indeed be talk, but one best not ever keep the actual cooks waiting!

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Let me conclude then by endorsing a statement that Tā Apirana's son, Tā Hēnare Ngata, made to the Court of Appeal during the *Lands* case.

'A contentious matter such as the Treaty,' he submitted, 'will yield to those who study it whatever they seek. If they look for difficulties and obstacles, they will find them. If they are prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation.'[16]

Toitū te Tiriti!

Ka huri.

[13] Casey, 21.
[14] Richardson, 16.
[15] O'Regan, "Impact on Māori", 48.
[16] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 673.