THE PRINCIPLES OF THE TREATY DEBATES AND LEGACIES
PROFESSOR JANINE HAYWARD
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>>RINGA HĀPAI: (Te reo Māori). Greetings to all, and welcome to this webinar in the Te Tiriti-based Futures and Anti-racism series on the principles of the Treaty debating legacies with Professor Janine Hayward who I will introduce shortly.

First of all, I'd like to talk you through or show you the community code, our community code for how we conduct ourselves in this hui. I was talking to Janine the other day and we were both acknowledging how passionate people get about the principles of the Treaty and we invite passionate but respectful debate.

And I also want to remind you to use the Q&A function for your questions and, of course, any answers that you might have, rather than the chat. You're welcome to use the chat to send messages to each other, but please use the Q&A, we'll be monitoring that.

So it's my great pleasure to introduce Professor Janine Hayward, she's Professor of New Zealand politics at the University of Otago. Her research focuses, amongst other things, on Te Tiriti o Waitangi and the principles of the Treaty in relation to political representation, local government and the New Zealand constitution. Her research career began at the Waitangi Tribunal and she has continued to provide reports and evidence for several claims to the Tribunal. She is the lead editor of the undergraduate textbook Government and Politics in Aotearoa New Zealand published by Oxford University Press.

I met Janine the other day and I know her to be very open and very warm and also having a great sense of humour. So that's both the formal introduction and the more informal personal introduction, Janine. Ngā mihi nui, ngā mihi mahana ki a koe, Janine, nau mai haere mai ki tēnei hui, tēnā koe. And without further ado I'm going to hand over to Professor Janine Hayward.

>>PROF HAYWARD: Tēnā koe Keith and tēnā koutou katoa. Ko wai ahau? Ko Janine Hayward tōku ingoa, no Ōtautahi ahau, ko tangata Tiriti ahau, ināianei kei Ōtepoti i noho ana. No reira, tēnā koutou, tēnā koutou, tēnā koutou katoa. I want to thank Heather in particular for the invitation to be part of this really extraordinary series of events, this enormous kōrero. I've been watching all day and I've loved it, it's been -- my head is full of new ideas and thoughts about all of these issues. And I'd like to thank in particular those who are

supporting these sessions, so here in particular Charles and Carol behind the scenes, thank you so much for all of your work in getting us ready for this.

So I'm a political scientist, so I talk and think about power essentially, who's got it and who hasn't and how it's used, how it's used legitimately and not so legitimately. And I think the topic today, the principles of the Treaty, is really all about power and it's something that I have thought about for several decades, really, in terms of the research that I do and the work that I've done.

So what I've done for today is to organise a bit of a kōrero around some questions that I think often come up about the principles, and really this is just to try and trigger some discussion that I think is much more important than hearing me talk for the second half of this session. So I will talk for a little bit now and then will open it up, with Keith's help on the Q&A, for some chat.

So where I'm going in the end, here's a spoiler alert for you, is that the Treaty principles, for all that they have done and for how long they have been with us, haven't really touched the Crown's power and I don't think that they ever will because they are essentially a tool of the Crown. And they are most certainly a long way from the guarantees that the Crown made to Māori in Te Tiriti.

But having said that, that would be -- that sounds like a very short conversation to have. So having said that, I think it's important also to acknowledge that they have dominated the landscape for some period of time, and I've been asked to talk about them, so I will do that. And as I said before, I'm happy to do that because I do think they're a really fascinating case study of power, and particularly the Crown's relationship to power in terms of Te Tiriti.

So the first question I want to think about, and for some of you this will be all too familiar, is about when and where the principles of the Treaty first appeared. So it was, of course, in 1975 in the Treaty of Waitangi Act which established the Waitangi Tribunal as a commission to investigate alleged Crown breaches of the Treaty. And that 1975 Act, just to paraphrase, said that Māori could bring claims to the Tribunal that the Crown's actions or inactions were inconsistent with the principles of the Treaty of Waitangi. So that was our first reference. The Tribunal had at that time the jurisdiction to consider those allegations since 1975 only, as we know.

And I think context matters in the sense of when that first reference to the principles appeared. So remember that at this time, 1975, Māori had been gaining significant traction

in their ongoing demands that the history of Crown Treaty breaches be addressed and that the Treaty be honoured. So what the government did in 1975 with that act was take the heat out of the situation, as you might say, by establishing a Tribunal with a very, at that point, limited jurisdiction. Although, of course, after 1985 the Tribunal could consider historical claims also, and I'll say some more about the changes that that brought in.

So the first question really is why not just make the Treaty law at the time in 1975. There's lots of answers to that question, but if we look at the debates in parliament at the time, what was said by the Crown is that it was felt that the differences between the English and te reo versions of the Treaty, te reo Māori versions of the Treaty, meant that, as they said, a literal interpretation was problematic and incorporating the principles of the Treaty instead would get around that issue.

And also, that the Treaty was going to be applied to contemporary circumstances and issues and questions not imagined in 1840. So there needed to be ways to interpret its intentions beyond the specific provisions. And as I said, I'll come back to those assumptions much later when we look at some of the controversy around the principles.

So in 1984 the fourth Labour Government was elected and we know that government to have been a government of huge reforms. And one of the reforms that it undertook was to begin what was really a kind of a trend and incorporating the Treaty principles, first of all into legislation relating to resources and environmental management. So you saw references to the principles in the Environment Act, 86 and the SOE Act and the Conservation Act in 87 and probably, just as significantly, the Resource Management Act that 1991. And there was a variety of ways that the principles were expressed in those Acts and that changed, or had a difference on the way that those provisions to be enforced. So the kind of language that was used was "giving effect to", "having regard to", "taking into account", "acknowledging" and "not acting inconsistently with" the principles of the Treaty of Waitangi.

By the 1990s, the principles are well-established in law and we've got two different things going on, essentially, in terms of how those principles are being interpreted. And I think those two different avenues are quite important also in terms of this power relationship that we see playing out.

So this is the second question. Who decides what the principles are? First of all, is the Waitangi Tribunal, of course, under that 1975 Act. So here what the Tribunal is doing is using those Treaty principles in the Act to judge the Crown's actions or inactions in

relation to Treaty breaches. And that's a very broad, you know, you'd describe it as a sort of a blue skies jurisdiction or authority, and reasonably unique also when you look at other jurisdictions.

So the principles that the Tribunal identifies in its work come from the context of the hearings it's holding to hear Māori grievances, and they're also used in the reports that it writes with the audience of the Crown to inform the kinds of recommendations that the Tribunal makes for the Crown to redress Māori Treaty grievances.

But I think it's important to remember that the Tribunal can't force the government to act through its reports and recommendations, or at least only in very few instances and even fewer times that it has. So I think it's important to recognise that that very broad jurisdiction that the Crown gave the tribunal in terms of the Treaty principles is very much tempered by the Tribunal's recommendations, recommendatory authority.

So the Tribunal has been able to say some very powerful things, I think, from the language of principles, but of course the government hasn't been compelled to act on those, certainly not directly, nor even, in some instances, to acknowledge the Tribunal's findings. So in terms of who's working with the Treaty principles, the Waitangi Tribunal is the first of these actors.

The second is of course the courts. And in this instance what we're talking about are the principles that appear in legislation, like the Resource Management Act and many others, and here those Acts place very specific or much more specific expectations on decision-makers acting in particular capacities and in particular contexts. And here the courts can require the Crown, in its many forms, as decision-makers to act.

And I think the most significant example of this, and it's always raised and with good reason I think, is the 1987 Lands case. So this was from the State Owned Enterprises Act section 9 which said that nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi, and Māori took a challenge that the Crown was doing that, was going to do that in its plans with State land.

In terms of power, I think this is a really extraordinary moment, particularly in the context of the 1980s at the time; when the courts required, on the basis of that hearing, that the government should and must safeguard Māori interests in relation to land, and more remarkably that the government at the time agreed to do so. And I say "remarkably" because we know from more recent examples like the Foreshore and Seabed Act that the government could have chosen to simply amend the State Owned Enterprises Act and

remove that Treaty obligation, or change it to a form that wouldn't limit its authority. But in this case in 1987, it decided not to do so. And the judgment around that has given us much of the language that we use in talking about Treaty principles.

So the Tribunal and the courts, the point I'm making here is, they're doing two slightly different things and they're exercising a different sort of power. But they have shared some of the language and narrative around Treaty principles over the years.

So here's the third question to ask about what are some examples of these principles that we talk about and we hear about, or we have heard about. So when I asked this question of students in big lecture theatres back in the day, when I used to see students in lecture theatres, I would say to them tell me some of the principles you've heard of, what are the principles you know? And invariably they will say partnership and protection is the two that they have most often heard about. And indeed those are two ideas that have very much dominated the discourse about the Treaty relationship through the principles lens. So I just thought I'd dwell on those for a second and then talk a bit more broadly about the development of principles.

So partnership, for example. This describes the relationship between Māori and the Crown, although the term, of course, coming back to that idea about the text of the Treaty, the term "partnership" isn't used in either language version of the Treaty, Te Tiriti or the Treaty, but the spirit of the Treaty is understood to be some sort of partnership. And it's seen to bring with it duties for partners to act towards each other in particular ways, honourably, reasonably and in good faith, for example.

But the courts and the tribunal have talked about this idea differently, and again it comes back to what they can say and have chosen to say. So the courts, for example, have said that the Treaty created an enduring relationship akin to a partnership, "akin", I think, is really important to a partnership, and that each party would accept a positive duty to act in good faith, fairly, reasonably and honourably towards each other.

But the courts have also generally been reluctant to think about partnership as equal shares, and in fact they really haven't said much at all about the relative power in the partnership between the partners. The Tribunal, on the other hand, has said that partnership is based on an exchange and reciprocity and it's provided more expansive views on partnership than the courts. And again, you know, due presumably to that broader jurisdiction it has.

Most importantly the Tribunal does speak of equal status of partners, and so speaks of the Crown's duty to actively protect Māori interests, and also the right of Māori self-regulation as a kind of exchange or a reciprocity. So that's the first of them, partnership.

The other of this idea about protection, or more specifically active protection, this was set out first of all most famously in that 1987 Lands case that I referred to. And here the court said that the duty of the Crown is not merely passive, but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable. And we've heard that phrase repeated again and again in various contexts.

The Tribunal also placed active protection at the centre of its interpretation of the principles from its very earliest reports in the 1980s, and after 1987 the Tribunal drew very heavily on that 1987 Lands case to further develop that idea of the principle of active protection and its recommendations.

So I think what even those two examples draw out or show, is that principles have developed and changed over time. And here what I want to do is just track through. Keith and I were talking about this, that you can see a kind of an evolution of Treaty principles, and, you know, someone like me has gone to great pains occasionally to try and follow some of that progression just to see what's going on in terms of attempts to kind of extend and then possibly restrict our understandings of concepts.

So if we think about the development over time, starting with the Waitangi Tribunal, you can see that in the very early Tribunal reports, the Tribunal was looking at specifically the terms of Te Tiriti. So it talked a lot about to lay a foundation, kāwanatanga and tino rangatiratanga in particular. So it didn't need to go beyond those terms, there was enough to be said simply there. Then that change in jurisdiction in 1985 which allowed it to consider historic grievances and the Lands case in 87, leads to a broadening, in the Tribunal's view, on principles.

So you see the Tribunal begin to speak of principles like protection, mutual benefit, and options. And then in 1991 the earliest of those very big reports, the Ngai Tahu report established an overarching principle of exchange, and you saw this model then be replicated through Tribunal reports throughout the 1990s, and a sea fisheries report was another that contributed to this and it went on to draw out principles of active protection, of tribal self-regulation and also, importantly, and I'll come back to this later, the right of

redress, which was fundamental to the notion of Treaty settlements, and the duty to consult, which I'll look at as a particularly interesting example in a moment.

Then you saw in 2001 something like the Napier Hospital report, again the tone slightly changed. So here you saw four principles that the Tribunal was highlighting, still talking about active protection and partnership, which were well-established by that stage, but also introducing and expanding on ideas about equity and options. They were newer and emerging principles and they were being applied to ideas of social policy in particular.

So the evolution of principles in the Tribunal, I think, you know, can be seen. But I want to switch now to what was going on in the courts around the time of that Napier Hospital report, and I think there's two developments here that are worth noting. Again, they speak to, I think, the interesting power dynamics that sit at the heart of this question of Treaty principles.

The first is the use by the courts, or rather the use of parliament to implement what are called specific measures. So these specific measures are introduced to legislation and they state how an Act purports to have recognised and respected the Treaty's principles or the Crown's responsibilities to give effect to the Treaty. So what does that mean? Well, it means that in something like the New Zealand Health and Disabilities Act in 2000, you see the reference to the Treaty principles. So it says "in order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori", so the part about the Treaty principles is familiar to us, and then it goes on to say "with a view to improving health outcomes for Māori part 3 -- of that Act -- provides for mechanisms to enable Māori to contribute to decision-making on and to participate in the delivery of Health and Disability services."

So here, we not only see the principles of the Treaty, but we also see specific measures, which were, in part 3 when you go to that, it is indeed describing, in the DHB functions, Māori participation in health outcomes. So that is what the Treaty principles mean in this case.

And a second development in terms of the way that the courts are interpreting legislation, is the way that parliament has instructed or tried to instruct the courts to consider the principles through using a separate programme to an Act of parliament.

So in here I want to acknowledge Nicola Wheen, my colleague in law at Otago. We are doing some work on this together currently to try and understand what these changes in the way that the Treaty principles are being handled by parliament and interpreted by the

courts with regard to these separate programmes. So in these cases a law will make reference to the principles of the Treaty, and then those principles will be defined in a separate programme which sits alongside the Act which isn't part of what you would call the parent Act. An example of this is the Crown Minerals Act in 1991. So here, again, you see in the Act it says that "all persons exercising functions and powers under this act shall have regard to the principles of the Treaty of Waitangi." So that sounds familiar to us. But in a programme, attached to the Act, you find a broader -- not broader, a further explanation of how to interpret the meaning of the Treaty principles.

And over the years since that Act was introduced, there have been multiple versions of this programme. It can be changed by an order in council, so it happens not through parliamentary debate, but through a different process. So the programme is constantly being updated. And we've seen that change, so that by 2013 the programme is interpreting the Treaty principles as consultation with Māori. It says that the Crown aspires to consult reasonably and with the utmost good faith in relation to Māori Treaty rights and Crown minerals. So here, despite a reference to the Treaty principles in the Act, the courts are being directed to the fact that in this case those principles mean consultation.

So what I'm trying to show here is that that evolution of Treaty principles can be kind of traced. I find it interesting, because I think it shows a sort of shifting of power dynamics. And what I want to do is to just dig a little bit deeper into this principle of consultation, because I find it a particularly interesting example. So bear with me while I just talk a little bit more about this as kind of a case study or example.

So to oversimplify the evolution of the idea of consultation, it started life in the 1980s as a mechanism to achieve Treaty principles, it wasn't seen to be a Treaty principle itself, in fact it was outrightly rejected as a Treaty principle. Then it sort of waxed and waned in its significance and it came into tension with ideas like active protection. And it's now upheld, in some instances, such as the one I just gave you as almost the primary principle in the relationship between Māori and the Crown.

So just to really briefly map out how that looks. Again, back to this 1987 Lands case. There it said, in that case the court said that it didn't think that you could find a duty to consult on the Treaty at all, it stated "in truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be recognised as implicit in the Treaty."

So the court couldn't draw from the Treaty a notion of consultation in 1987. But it did see consultation as a mechanism to achieve other Treaty principles that it was identifying. So it said the question of consultation is to be approached in a holistic manner, not as an end in itself, but in order to take the relevant Treaty principles into account. So in other words, it was saying how can you achieve active protection without things like consultation.

In 1991 you saw the Waitangi Tribunal pushback against that 1987 view of consultation. The Tribunal emphasised that in some areas, more than others, consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Māori are to be protected. And a tension, as I said, began to develop between active protection and consultation and the relationship between the two.

In 1995 in the Wales case the court held it wasn't permissible for the Crown to try to limit the principles of the Treaty to mere consultation, when its obligation included the principle of active protection. The Waitangi Tribunal went on to say it saw the Crown's duty as extending beyond consultation, that the Crown was obliged not only to consult with Māori but to negotiate with them, to ensure that they retained, that Māori retain sufficient resources for their survival and well-being.

As I was talking about earlier, parliament, the Crown, the government, the legislature, whatever, I would be fussy about my terminology in my class but interchangeably, whatever we're calling that entity, has intervened here, I think, by directing the courts in some instances to limit the Treaty principles to consultation and, as I said earlier, this is some of the work that Nicola Wheen and I are doing to try and understand what's going on in some of these Acts where a programme is trying to limit how those principles ought to be interpreted. And there are other examples, not just Crown Minerals Act, but the Climate Change Response Act 2002 and the Exclusive Economic Zone Act in 2012.

So in summary, we've seen these principles evolve in different ways through the courts and the Tribunal who have different types of authority and we've also seen parliament try to assert its own authority in an effort to control the way that principles can be interpreted in specific cases.

So I just want to shift gears a little bit with that context and think about probably the more interesting questions about the controversy that surrounds the Treaty principles, and

reflect a little bit on perhaps what their legacy has been and what we might expect from them in the future.

So this is an endless and very rich debate, so I'm just going to raise a number of ideas and I hope that we can reflect on these in some discussion. And as Keith said, I'd really like to hear other people's views on the Treaty principles and how they see them.

So at the heart of it, the principles, such as the principle of consultation, clearly fall short of the guarantees made to rangatira in Te Tiriti. To be consulted by the Crown is nothing at all compared to the guarantee of tino rangatiratanga.

So let's go back to the start. The most common justification for the principles when they were first introduced was this idea that with the two different language versions of the Treaty, Te Tiriti and the Treaty in English, we had to find some common ground, and the Tribunal and the courts have discussed this at great length in their statements. So they say things like the shades of meaning between the texts don't matter, what matters is the spirit of the agreement.

Furthermore, that the Treaty or Te Tiriti needs to be applied to contemporary questions and contexts that weren't considered in 1840. So the text of the Treaty is limited in its application today.

So a big part of, I think, the controversy about the principles is that those justifications are very convenient for the Crown, and it is argued by many that the principles allow the Crown to water down its Treaty obligations to Māori to be seen to be doing something but to certainly not be doing enough. Increasingly, there are demands to acknowledge, for the Crown to acknowledge the text of Te Tiriti and the understandings that rangatira had of Te Tiriti. And there is a very strong rejection of the suggestion that we should still be trying to find a common ground somewhere between Te Tiriti and the Treaty, because that common ground doesn't exist, and because the English version was irrelevant to Māori understandings of the Treaty, of Te Tiriti.

So that's one side of the controversy, that the principles haven't gone far enough, but there's another side of the controversy which claims that the principles have gone too far. So here we see a different type of argument emerging, that has demanded that the principles ought to be removed from legislation because nobody really knows what the principles are, and they stretch the intentions of the Treaty too far. And of course we've seen political parties campaign on this over the years, and others invoke a similar sentiment.

So I hope that what I've said here today shows that at least that is not true, that we do know what the Treaty principles are, that these have been extensively documented by both the Tribunal and the courts. And I think what this type of controversy about the Treaty principles is actually about is rejecting the relevance of the Treaty today, which is quite a different type of debate and one that I will largely set aside for the purposes of what I'll go on to say.

But I think there've also been some really interesting debates about a call to incorporate Te Tiriti into law, and here we see all kinds of other concerns and discussions emerge. This is contentious because incorporating the text of the Treaty, and particularly Te Tiriti and more importantly finding ways to enforce that would profoundly challenge the political and economic landscape, which is not something that the Crown would be keen to do.

But on the other hand I think it's important also to hear the voices or recognise the arguments about keeping Te Tiriti out of the law because it is bigger than, or more important than the law, and it would diminish its mana if it was in legislation. Or that it should sit outside the legal framework as an overarching guide, and there are related concerns that if the text of the Treaty, or Te Tiriti, is in the law, it could be changed at parliament's whim unless, of course, it was entrenched, or supreme law and that raises a whole series of other questions.

So where are we, where have we got to with this fairly free-ranging discussion? So just finally some reflections on perhaps the legacy of the Treaty principles and what their future may be for us in terms of the landscape ahead.

I think what the principles have delivered, well, the first answer is they've delivered much less, obviously, than the Treaty or Te Tiriti guaranteed to Māori. But that said, what they have done is given us the language that we use about the Treaty for the past several decades, and some would say that's for good and others may say that's not so good. But regardless, we now have a language of partnership, active protection options, good faith, consultation, redress and so on, that we have used as common currency to progress these discussions.

But I think the principles have also underpinned some important changes in institutional relationships and functions that relate to the Treaty, and this is both through the work of the Waitangi Tribunal and through the courts. So the courts, for example, first of all, unless they're told otherwise, as parliament has done as I've shown you, they're going to

assume, the courts will assume that parliament always intends to legislate in a manner consistent with the principles.

Secondly, as another example of these changes, the Cabinet manual requires ministers submitting new laws to draw attention to the principles of the Treaty. Te Arawhiti and Te Puni Kokiri direct and assist agencies to build an engagement framework with Māori to meet the expectation of Treaty principles. So it has become, in large part, the currency that we use in these discussions and it has shifted our institutions in particular ways.

And I think the principle of redress is really important to reflect on here, and I haven't had a chance to say nearly enough about that. That of course has led to the settlement process, the Treaty settlement process, to restore the honour of the Crown and the mana and status of Māori. And again, there's another whole debate to be had about the extent to which that has happened.

But the remaining question I think is whether the principles will ever deliver more than simply incremental change, and to my mind no, I don't think they will. And that's largely because, you know, you can't get past the fact that they are a tool of the Crown and they can't get at the real issue in Te Tiriti of Crown sovereignty. And I think what you can see happening, understandably, is that other developments are starting to overtake the Treaty principles and are highlighting, as they do so, some of the limitations of the principles for our future discussions.

So these are based on understandings of Te Tiriti itself and the implications of Te Tiriti for Aotearoa's future. And here I just want to finish by reflecting on what the Waitangi Tribunal said in its 2015 Te Paparahi o te Raki report which concluded: "The rangatira who signed Te Tiriti o Waitangi in 1840 did not cede their sovereignty to Britain, that is they did not cede authority to make and enforce law over their people or their territories."

Now you don't need principles to understand what that means. This view of Te Tiriti I think shifts the political conversation and makes the idea of using principles to try and reconcile differences between the texts too limiting for the journey that we have ahead. Tēnā koutou katoa.

>>RINGA HĀPAI: Tēnā koe, Janine, that was astonishing. We've seen some of the questions and the chats coming in, and I think that was such a wonderful synthesis of decades of work and

we've privileged to have you bring that all together in a wonderful sort of history lesson, law lesson and so on; it's astonishing, so many, many thanks.

I wonder if we could start off with being a bit fussy, like you are with your students, about the Crown, because one of the first questions is that we -- the questioner said that we were hearing in an earlier session the Crown is not Pakeha, the Crown is all of us. So the questioner is asking whether you have a view about this and could this be contested by some people who think that the Crown is in effect Pākehā representing the Pākehā State. So I just thought we might get that out of the way to start with before we get into --

>>PROF HAYWARD: Absolutely. I don't know whether the person who asked that person may be one of the five people in the world who know that my PhD thesis was about who the Crown is as the Treaty partner. So I could talk a ridiculously long time about this. So let me just say, I think we use the label of "the Crown" to cover up a whole bunch of things that are going on really.

I mean the Crown has evolved and it has evolved in ways that Māori often didn't agree to historically. So we saw it change from being "Her Majesty" to "settler government", which was enormously problematic in itself for Māori, and we've seen it change its shape, devolve its function, we've seen local governments emerge that have an uncertain relationship with the Treaty because it's unclear whether or not they're the Crown, we've seen the Native Land Court appear and challenge understandings of what the Crown is.

So it's no surprise to me that we're now at a point where we're asking what the composition of the Crown is, who it represents. I do think it's a matter of trying to think about precisely what we mean by the Crown. So if we're talking about the Crown as parliament, as the legislature, parliament in its law-making function, then yes, in a liberal democratic society that does represent all of us.

But I think it's also important that the idea of the Crown as a Treaty partner isn't collapsed in that way, because there has to be some idea of a relationship with Māori and something. And I think some of the work ahead is to try and understand more clearly what that will look like, who that is. Because Māori are clearly part of the Crown now. So it is, once you start to unpick it it does become very confusing.

>>RINGA HĀPAI: Sounds like it's a sort of both/and, you could see it from a political point of view as the Crown is the other, Māori and the other which is the Crown, but there's also the sense of almost a sort of sociological and political point of view that the Crown is us.

>>PROF HAYWARD: Absolutely. It's a symbol that we use a lot, you know, it's interesting how much New Zealand talks about the Crown, where it's used in other countries, it's used in kind of a different way. And here we really have brought it along with us as a Treaty, part of our Treaty language and narrative, I think. But you see it appear also when the government's acting in particular capacities, kind of long-term capacities it will talk about itself as the Crown, it's interesting.

>>RINGA HĀPAI: Thanks for that. And again, I'm aware, as you say, there's a PhD out there to read.

>>PROF HAYWARD: Don't read it.

>>RINGA HĀPAI: There's another question and a couple of questions. Obviously my role is to try and pull some of the questions together, so forgive me if I don't ask every question. But there's another issue about international law recognising indigenous version of treaties. So what are the implications of that, because from a lay person's perspective, you know, an informed lay person's perspective you think well, surely the Treaty falls in favour of Te Tiriti and so that's the only thing we should be talking about. How does that work?

>>PROF HAYWARD: Well, yes, I think so. And I have to be honest, I don't think -- you know, I call on -- I always ask my law students for their understanding of what international law says about treaties and Te Tiriti, and they can say an awful lot about that. To my mind I don't think you even need to look to international law, I think it is -- it simply makes sense to say that if Māori agreed, made an agreement with the Crown, then the version of the agreement that they understood and discussed and debated and put their mark to ought to be the version that is considered. You know, I don't think international law is required to make that simple assessment.

>>RINGA HĀPAI: It may be useful as a sort of co-peg to hang our coat on.

>>PROF HAYWARD: Absolutely, always useful. Always better to have more ways to make the same argument, but yeah.

>>RINGA HĀPAI: We could move into some of the questions about the principles and somebody has talked about confusion of principles, for instance, in the health sector. We sometimes talk about the three Ps, two Ps plus the participation, and then there's some other ones. And you'll be aware that the Hauora report basically said we should move, you know, we find that the current articulation of Treaty principles in the health sector is out of date. Bearing in mind your spoiler alert, and in a way saying well, it hasn't worked for 170-odd years, is it even worth debating principles rather than in favour of returning to the articles of Te Tiriti?

>>PROF HAYWARD: Yeah, I mean I guess that's why I talked about the two kind of aspects that I see to the controversy around the principles. I don't think there's much gained by dismissing them entirely, because they have been such an important part of the evolution of our understanding of these issues. And I think quite apart from the work that the courts have done, there is now just a huge amount of information on the public record through the Waitangi Tribunal's work through this lens of Treaty principles that is invaluable to us.

But I think in terms of where this idea of -- so what do we do with the principles now? I certainly don't think that we should take them out of legislation, because I think that that feeds into an argument that we don't know at all what they are, which I don't think is true. But I think they are going to always be limited in what they can deliver to us.

So I think where that lands us is the question of well do we think about putting something else in the legislation, and there I was talking about the challenges around is it Te Tiriti or the Treaty that goes in as a text into legislation, what would that look like, do we use some other phrase? I mean there's all kinds of discussions about this. To my mind, whatever happens in that space, other initiatives are going to come through, and they already are, that don't really care where we're up to the principles debate. I think what's what the Hauora report is getting at, that we have a shift in thinking occurring which demands much more than just thinking about principles, and you get left behind if you're still in that space. I think it's important to see where they've got us to, but I think you need to be ready to use a great deal more imagination in terms of the journey that we've got ahead that requires something much more than principles.

>>RINGA HĀPAI: Great answer. It reminds me of the earlier answer sort of that both/and perspective, to say we can't ignore the principles because they're embedded in legislation, we can't turn back the clock, as much as we might like to and do things, you know, better from 1840 onwards. But at the same time we need to see the limitations and move forward. And your mention of the debates is referred to in a question about what do you think about the relevance of Treaty principles in the wake of recent Treaty settlements, where there've been some quite innovative actions and agreements with Māori. Is that an example of the way forward?

>>PROF HAYWARD: Well, I think it's an example of what can happen. And I'm pleased that that was raised, because there's so many things that thinking about what I could talk about I had to cut out 50 times more than I left in. And I did take out a reference to some of those more recent settlements that are much more innovative. And again, I think that is because

the Waitangi Tribunal in that more expansive jurisdiction can say things that have, you know, tried to kind of embolden the Crown in its thinking about these things.

But I think it's also important to recognise that the Crown is not, even in those innovative settlements, the Crown is not relinquishing its sovereignty. So even those are not touching this idea of Crown sovereignty that we still -- that still sits centre of this debate, I think, particularly in light of the Tribunal's 2015 report that essentially said rangatira didn't cede their sovereignty to the Crown. So we now have this elephant in the room that if rangatira didn't cede their sovereignty and the Crown is still maintaining its own sovereignty, where do we go with that?

So I think that the recent settlements are exciting, I agree, they're innovations; but they still aren't challenging the Crown sovereignty in the way that I think many are calling for.

>>RINGA HĀPAI: Yes, I think it was Chris Finlayson's response to Ngāpuhi Speaks, that report and basically saying yes, you didn't cede sovereignty but we don't care really, because we can't, because that becomes a completely new dispensation and constitution, in a way.

>>PROF HAYWARD: Exactly, a whole different conversation. I mean I remember that when the Tribunal report was released, I think that was the moment where the Prime Minister made some astonishing comments about New Zealand's peaceful settlement and simply set the whole discussion aside, because that is -- and, you know, it can, so parliament, the government legislature, the Crown, whatever you want to call it, is still very much, can be very much in command of this conversation.

>>RINGA HĀPAI: Are there any other -- again, bearing in mind one of the questions, are there any other developments you see starting to overtake the Treaty principles debate?

>>PROF HAYWARD: Well, I think there are interesting things moving, you know, alongside, and these are in the news. Perhaps not recently Matike Mai, but certainly at the time the report was released, Matike Mai brought a whole different way of thinking about and engaging with these issues, which was disconnected from the notion of Treaty principles. He Puapua, to a certain extent, starts to open up some different types of conversations. I just think there are a number of different ways that we are seeing, and I think more than that, in the kind of kōrero that you hear people having about these issues now, people are moving away a little bit, well, some very much, away from the idea of Treaty principles, that they have much more that they can offer us; and are more interested in thinking about that conversation that the Tribunal opened up in 2015 about what Te Tiriti itself means.

>>RINGA HĀPAI: There's a few people coming in with more comments and questions about working in the education sector and the health sector where there may be nurses or teachers, or whatever, obliged to observe the three Ps. There's almost a sense of what some principles have been enshrined, so they've got to do that. I'm just wondering if that links to your point about that sort of sense of reduction rather than principles opening things up, somehow get codified and then that's only what you have to do. And then that's a sort of distraction from the bigger conversation.

>>PROF HAYWARD: Yeah, perhaps. But I think there is -- I still think there is something to be said, as people find their way into this conversation, there is something to be said for a suggestion as a stepping stone of protection, participation, and whatever the other P is that's gone out of my head, you know, as a place to start. If you can build from that, then you can start to kind of broaden your understandings and imagination. So it's another yes/and/but kind of response, which I'm famous for, that you --

>>RINGA HĀPAI: I'm getting that. That's great.

>>PROF HAYWARD: That you, you know, I think things evolve and I think for some people this conversation is still reasonably new and we are trying to bring a lot of people along with us. And I still think the language of principles can be very helpful for that as a way into the conversation. But I think it's a pity if that's seen to be also the end of the conversation.

>>RINGA HĀPAI: Some great questions, again, comments about, you know, what world views play in understanding the argument and acknowledging the Crown, parliament and even the Waitangi Tribunal are based on European enlightenment -- that's my addition -- frameworks and epistemologies, and that the principles are therefore, by definition, representing Te Ao Pākehā ways of seeing the world.

>>PROF HAYWARD: Well, I mean I think it's no coincidence that the principles came from Te Ao Pākehā basically, that it was the legislature that first imagined this idea of principles and put them into that 1975 Act, so yes.

But that said, again, if you look at the work that both the courts and the Tribunal have done, it has -- there have been really significant and substantial, and sometimes I think quite exciting contributions to that discussion through that lens. In the case of the Tribunal, of course, it hasn't always meant that much changes, but it is still the lens through which some of those Treaty grievances have been seen and judged.

>>RINGA HĀPAI: Another comment that points to the international world, and I suspect I know what your answer might be, but I think it would be interesting to ask the question about

whether you've got any thoughts about how the Treaty, or probably more particularly Te Tiriti, aligns with the United Nations Declaration for the Rights of Indigenous Peoples.

>>PROF HAYWARD: Yeah, I think that's very interesting. I sometimes -- another thing that I find interesting as a kind of a thought exercise is what our conversation would be like without the Treaty at all. You know, the Treaty itself has given us a certain understanding of reciprocal rights and obligations in Aotearoa, and that, I think, in itself has sometimes limited our imagination in terms of what these relationships could look like.

So I think the UN declaration is another way of seeing what this relationship between indigenous peoples and governments means that I think is really useful for New Zealand to contemplate. Because it, again, challenges us sometimes with ideas and ways of looking at that relationship that we don't naturally come to because of our Treaty, because of Te Tiriti, because of our understandings of the articles and the notions of exchange and so forth.

So I think there is an awful lot that New Zealand can learn from the UN declaration, and also from what is going on in some other jurisdictions, where things are being done differently, where the language is different, where the relationships are different, where some things are sort of taken for granted and evolve quite easily and other things seem very difficult, which we take for granted and, you know, have evolved easily. So I think it's really helpful to have an eye to those kinds of international conversations, just to learn more about ourselves.

>>RINGA HĀPAI: Thank you, thank you for that. I'm aware of time and we need to be beginning to wrap up. One of the strengths, I think, of your whakaaro is about power. You really set that up from the beginning, you said essentially that's who you are, you're a political historian and you're interested in power and there was a really strong thread of analysis about power throughout your kōrero.

Just coming towards the end of our time; where would you see that in, say, 20 years' time, you know, people are looking forward to 2040 and some people talk about bilingualism by then and various ideas. As a sort of closing reflective statement -- I mean in a sense it doesn't really matter whether you're going to answer this particular question or what even the question is. But I suppose I would be interested in you perhaps pulling something more together about that analysis based on power, like where do you see it in 18 years' time?

>>PROF HAYWARD: Keith, that's a big question for nearly 5 o'clock on a Saturday afternoon.

>>RINGA HĀPAI: Yeah.

>>PROF HAYWARD: I don't know, but what I hope, I guess, is that what we are moving into now, or could move into, is a time where -- I mean it's just going to sound cheesy, but where we actually have a greater imagination of what our futures could look like, where we can actually learn from and listen, really listen to each other. And here I mean for parliament to really listen to Māori, for the Crown to really hear what it is, you know, what kinds of futures we all imagine for ourselves and how we can achieve those things together.

And I do actually think that a large -- what makes me optimistic is the change in the history curriculum for Aotearoa. So when I first started teaching Treaty politics back in the last century in the late 90s here at Otago, nobody, none of my students had read the Treaty, in fact in the early days many of them would get up and walk out of the lecture theatre when I started talking about it. Today many more of them have engaged with the Treaty before they come to university through school, and I'm grateful to all those historians, history teachers who, you know, give them that.

But there needs to be much more of that, because I really do think our understanding of our history is going to really shape our future. And I don't know how we can get further in this conversation until we do know much more about what's happened and who we all are and what our experiences have been, and what we imagine for ourselves for the future. And when we're not -- when that doesn't frighten us and we can do it collectively.

>>RINGA HĀPAI: A beautiful way to end our kōrero, lovely. I was thinking you're bringing in interdisciplinary thinking, we need historians, we need good historians, we need good politicians and maybe we need some good psychologists to help the (inaudible).

>>PROF HAYWARD: I should think so.

>>RINGA HĀPAI: I'm sorry we're going to have to wrap this up, I'm sure, like many of other sessions, many of us would like this to be two hours, but I do need to close. So ngā mihi nui, ngā mihi mahana ki a koe, ngā mihi ki tō kōrero, ki tō mahi, ki tō whakaaro, tēnā koe, tēnā koe.

>>PROF HAYWARD: Kia ora Keith, tēnā koe.

>>RINGA HĀPAI: So I just need to do a bit of closing to first of all thank our partners, who are many. I don't think the New Zealand government's on there yet, but maybe they'll come to the party next year or two years' time, so thank you to all our partners. And also a little

reminder of future, there's still more to go tomorrow and also the Pecha Kucha marathon for racial justice that's taking place on Monday.

Finally, I want to also want to thank Heather Came, who's a mutual friend and astonishing powerhouse, and so tēnā koe, Heather, for your inspiration for this and your leadership and also personal support. Yeah, I feel very touched by that.

And lastly but absolutely not leastly, thanks to our technical support for this session, Carol and Charles, thank you for facilitating the behind the scenes so that hopefully the front of scenes has been reasonable. So a final goodbye from me, tēnā koe again, Janine, ki a pai o rā.

>>PROF HAYWARD: Hei konā.