



Transcript - Episode 12 White Noise Podcast: Treaty Myths with Dr Luke Fitzmaurice-Brown

**Intro Music * White Noise soundtrack*

Luke Fitzmaurice-Brown:

The common message can be that Treaty is not something to be afraid of in that if it upholds Indigenous rights nobody else loses.

The pitch is not uphold Māori rights because it will benefit you, but it does benefit you.

**Intro Music *White Noise soundtrack*

Jaynaya Dwyer: Hello and welcome to the White Noise podcast, the podcast of the Indigenous Law and Justice Hub at the Melbourne Law School. I'm Jaynaya Dwyer. I'm a lecturer in the Hub. I'm a non-Indigenous woman from Wurundjeri Country in Naarm - I'm sharing a conversation today that I had as part of our travels to Wellington in Aotearoa New Zealand as part of the Hub subject, *Indigenous law in Aotearoa and Australia* – the Hub team was there with a group of wonderful JD students where we're learning about Te Tiriti o Waitangi and the manner in which Tikanga Māori, Māori law and custom is considered by the common law and thinking deeply in conversation with people there for a couple of weeks.

This is a conversation I had with my colleague and friend Dr Luke Fitzmaurice-Brown, Senior Lecturer at the Law School at University of Victoria Wellington. Luke writes and teaches on Te Tiriti o Waitangi, Child Protection and Children's Rights – and is presently doing strong advocacy to protect Te Tiriti of Waitangi at the times when its terms have become subject to renewed scrutiny and political opposition. Our visit was at a busy time for the colleagues working on Indigenous rights in Aotearoa just after the historic Hikoi – a march through Aotearoa – calling to honour the treaty – so we wanted to get together at this important

time to explain a little more about the importance to te tiriti o Waitangi and what we might learn from whats happening in Aotearoa at the moment.

As you come on the road with me hear the noises of building construction, sirens at one point. Folks listening in Australia you'll also hear lots of te reo Māori – Māori language words, expand your legal vocabulary a bit. You can see the show notes for a helpful glossary.

**Intro Music* White Noise soundtrack*

It's a pleasure to be here. Welcome to you, Luke.

Luke Fitzmaurice-Brown: Kia ora.

Jaynaya Dwyer: We'll acknowledge the tangata whenua that we're on. The land of Te Atiawa, Taranaki Whanui. Acknowledge your people Luke, Te Aupouri. And also acknowledge that once we've recorded this podcast, we'll be editing and putting it together and working as we do each day on Wurundjeri country in Naarm. Lands of the Kulin nation that always was and always will be Aboriginal land. So It's a particularly important time to be over here. As students and teachers of law in Victoria learning about Treaty. In Victoria, negotiations of a treaty have just begun under a really innovative and hard fought treaty framework. And we're saying that 250 late is better than never. In Aotearoa, the Te Tiriti o Waitangi signed in 1840 significant political pressure and attack at the moment in a manner that we'll talk about a bit further today. Interested to talk a little bit with you, Luke about what lessons we can learn across jurisdictions of someone who's doing really important academic work. As always our first question on the podcast. Who are you? Who's your mob? What are the values that drive you and your work?

Luke Fitzmaurice-Brown: Kia ora Ko taranaki te maunga ko te au te awa. Ko te Aupouri te Iwi. Ko Luke Fitzmaurice-Brown toku ingoa. So my name is Luke. Thank you again. It's very nice to be a part of this. And my mob are Te Aupouri, so we're an Iwi from the far north of Aotearoa, or we would call it Te Hiku o te Ika which is the tail of the fish. So kind of the south in our view, worldview, if we were to put it that way. That's on my mom's side, from my dad's side, my

Whakapapa, or so my ancestry is mostly Ireland, bit of Scotland, bit of Norway in there as well. So from all over, but here in Aotearoa from Te Aupouri.

In terms of the values that bring me to the work, or that drive the work. I think it's this belief from a research perspective that there are kind of bigger questions to be asked about things like Māori rights and colonization and things like that. I used to work in government and enjoyed it at times but ended up feeling really frustrated that it was not our job to look at what to me became quite obvious underlying questions or the elephant in the room when, so I was working in the child protection system and I'm sure we'll get on to that a bit. But overrepresentation of Tamariki Māori, Māori children in the child protection system is a colonization problem. And it was not our job to talk about colonization. And I realized that research spaces and academic spaces could be this place where we can ask those bigger questions and Kuapapa Māori research, so Māori-centred Māori-led research, could be this way to ask those in a way that kind of respects our agency as Māori, addresses big problems that we're facing, but also upholds Māori worldviews, Māori values, reconnects us, those sorts of things. I realize that the frustrations I had in one job could be channelled into this other job.

And that led me to this path of being an academic. Then the students I get to meet and get to work with and get to teach but also get to learn from are just the most remarkable group of people that it's a real privilege to work with them and particularly Māori students, but not exclusively, there's this real hunger to learn about Treaty issues from non-Māori students, as well. That's a real privilege because I know that their impact will be greater than any of my colleagues or myself and just being able to be a part of that is quite special.

And so it's this unique job where you get to follow your nose and ask big questions and also invest a bit in the next generation who will do that and all of those things can happen in this Kaupapa Māori space, much of the time, which is what brought me here and is still what I find really rewarding.

Jaynaya Dwyer: Yeah. Unlike in Australia, a treaty underpins the relationship between crown and Indigenous peoples in Aotearoa in 1840 the Treaty of Waitangi was signed between crown representatives and over 500 Māori leaders.

What do Australian audiences need to know about te Tiriti at the outset of our conversation today?

Luke Fitzmaurice-Brown: I think the most important thing is to recognize that Te Tiriti o Waitangi acknowledged Māori sovereignty. So we call it tino rangatiratanga in Te Tiriti o Waitangi. You'll hear other terminology like mana motuhake is another te Reo Māori term that's sometimes used, but tino rangatiratanga is the term in te Tiriti. That has been, that recognition that Māori never ceded sovereignty has been a constant battle for Māori that continues to this day because one of the myths about the treaty and honestly about our whole country is that the treaty was a treaty where Māori ceded sovereignty to the British, the Queen, and that did not happen. But there is an English translation of Te Tiriti o Waitangi that is held up as equivalent to the document - That was signed by a few of the Māori leaders who weren't offered the opportunity to sign it in te Reo Māori.

But nowhere in the country did or would have, Māori agree to cede their sovereignty to the Queen. And so, much of the work nowadays is about overcoming this myth that many of us have been raised on, that there are two versions of the treaty. One of them cede sovereignty to the British, one of them retains Māori sovereignty, and we need to figure out what to do about that.

We don't really need to figure out what to do about that because it's quite clear from a Māori perspective that Māori never ceded sovereignty. So, the treaty has a few other features that gives the crown the right to govern their own people, though in context, it probably is limited to the right to govern their own people rather than govern Māori, given that tino rangatiratanga is preserved by the treaty. And it also extends to Māori the rights and privileges of British subjects as the kind of quid pro quo of allowing the British crown to have a presence here in Aotearoa. From a Māori perspective, the real motivation for that was partly to form an alliance with the British, but also because British settlers were running amok in New Zealand, and Māori had, it was a challenge to control them, and English settlers or English authorities didn't really have the legal authority to do so either.

So signing the treaty from the Māori perspective was a way to say, “yes, you can sort your own people out. That is fine. You can have some form of ongoing presence here, and we can have some ongoing relationship that retains our sovereignty and allows you to be here at the same time, and it can grow from that.” But that didn't happen, as we know, the subsequent decades, and now two centuries almost of colonization have led to assertions of British sovereignty, and we're still unpacking some of those myths nowadays.

Jaynaya Dwyer: Yeah, this kind of cession myth, so embedded in colonial ways of thinking because many Indigenous people will often say there is no way to cede your land, relationship to land under Indigenous knowledge systems.

Luke Fitzmaurice-Brown: Yeah, yeah. Yeah, exactly. So there are a few quite practical reasons why the session of sovereignty is very unlikely and that Māori outnumbered British 40 in many parts of the country where te Tiriti was signed. There were single figures of British settlers. I've heard in Ngāti Kahungunu territory, which is most of the east coast of the North Island. There were six British settlers at the time, and that's one of our largest Iwi. So, the idea that all of them got together and decided to cede everything to these six people is unlikely. But as you say, in our own Tikanga so our own Indigenous knowledge, that's not really possible anyway.

And I think that's probably something we have in common with many Indigenous peoples, is that you can't just sign away your relationships and obligations to the land and your relationship with the land and your relationship with each other. It's not this formal version of sovereignty that can just be traded away or signed away. That's not how our relationships with land, and that being the source of our authority, that's not how it works. And I suspect that there are familiar aspects of that, as you say, with lots of Indigenous peoples everywhere.

Jaynaya Dwyer: So, when we speak about Te Tiriti, we do that intentionally referring to the Māori language text not the English draft, which says something quite different. And now we speak about te Tiriti as a document of constitutional significance for Aotearoa, in absence of a written constitution here.

But yesterday, speaking to our class in this law school building, this old government building you shared with the students that we're meeting in the building where the treaty was left to rot,

which stuck with me, referring to this time of decades where non-Māori had broadly forgotten that they were living here by virtue of a treaty relationship, and the original document was left to wear away a little bit. It's an important reminder that treaties are living relationships, which need to be honoured and upheld. From the time where te Tiriti was lost in the backrooms here, could you share a little of the history of the resurgence of treaty thinking in Aotearoa?

Luke Fitzmaurice-Brown: Yeah, so modern, as you say, Te Tiriti o Waitangi itself was left in the basement of this building. So we're recording in the old government buildings, which was the seat of Parliament for a long time, the cabinet sat here. Most of the civil service sat in this building for almost 100 my understanding. The treaty was in the basement, and it was nibbled away by rats. Some people may have seen a picture of Te Tiriti that's kind of got the corner has worn away.

Jaynaya Dwyer: A little bit worse for wear.

Luke Fitzmaurice-Brown: Yeah. That's because this building did not take good care of it. It's interesting now to kind of sit in and work in a building where these things happened and there are these, reminders of our colonial history in this building, which at the same time is now populated often by these incredible Māori students and Māori laws and non-Māori students learning about Māori law, and so this building is full of contradictions, which makes it an interesting place to work. But in terms of the resurgence of Te Tiriti o Waitangi in our laws and policies, as you say, the treaty was ... relatively early on, it started to be ignored by the crown.

Not in the very first early days. There are court decisions throughout the 1840 which say it's a bit late in the day to start claiming that you have sovereignty here, the British Crown - and so these are crown judges. saying, "no, of course, the treaty still has some force, of course, that needs to be respected."

But by around the 1870 so there were very large-scale land confiscations in the 1860 In that time in the 30 or 40 it was signed, the landscape had changed quite significantly, and the events of colonization had ramped up significantly.

So by the 1870s there are court decisions saying the treaty is a simple nullity. It doesn't have any legal force, it doesn't have any weight, it's not the foundational governance mechanism in this country, and courts can just ignore it. Fast forward a very long time to around 100 years later in the 1970s the treaty really re-entered public consciousness, public debate was brought back onto the agenda. Largely by Māori activists and advocates.

The big societal change that had happened in between was following the World Wars, so in the late 40s the Māori population rapidly urbanized. We went from overwhelmingly living in rural areas and in our traditional areas to overwhelmingly living in the cities. It's one of the fastest urbanizations of a population in history, apparently. And with that led to a range of issues where Māori were discriminated against in the cities in a way that when we had just been living in separate worlds was less obvious. In housing policy and social policy and welfare policy, soldiers returning from World War Two were often gifted Māori land in ways that Māori were not eligible for themselves.

So there were these huge inequities in that post World War two period started to emerge. The downstream consequence of that was this wave of advocacy and activism in the 1970s building on from there. And we had things like the Māori land march and the te Reo Māori petition to Parliament and then push for political change for the government to respect Te Tiriti o Waitangi. We had the Waitangi Tribunal created as a result of that. We then had in the 1980s the Waitangi Tribunal, their jurisdiction was made retrospective, so they could look into historical issues, as well. And it's been the last 40 years where te Tiriti has been back firmly in both the public consciousness and then in the kind of legal and policy conversation as well.

So increasingly legislated for in specific ways within our laws, our resource management laws, other environmental laws, the Conservation Act, the Children, Young Persons and Their Families Act, so our child protection legislation increasingly featured references to Te Tiriti o Waitangi. At the same time, the courts started to interpret Treaty Principles. Sometimes that was positive. Other times that approach has been based on that myth about two versions of the treaty and needing to find a compromise through that apparent problem, which is not actually a problem. But that's what we're left with.

And all of those things really have in some ways put Te Tiriti back on the map and been really useful, and in other ways sometimes involved compromises that if we'd really been upholding Māori sovereignty the whole time, we wouldn't have had to make, but that's been... Some would say that's been necessary. Others would say that's been a concession, but that's where we're at now. So nowadays, until very recently, Te Tiriti o Waitangi was generally seen by both centre right and centre left governments as important to uphold. We've seen more laws passed with treaty references, and we've also seen the historic treaty settlements process come through, and that's begun to change in the last year or two. Although a lot of that stuff given that that history of the treaty and law and policy is now fairly well embedded.

So the current changes, I'm hopeful that we can weather some of those because we've seen the treaty locked into our policy settings and our legal settings and our public consciousness as well.

Jaynaya Dwyer: Yeah, public consciousness, particularly important. It's a tight three articles and a preamble that do a lot of incredible work in setting out this relationship. As I've been here, though, I've been thinking a lot about this central tension or perhaps a contradiction in constitutional norms here in stating both a commitment to Te Tiriti and to parliamentary sovereignty. Te Tiriti making guarantees to Māori of respecting rangatiratanga, sometimes translated a self-determination or sovereignty, and parliamentary sovereignty then providing that there can be no limitation on legislative power of parliament, that courts can't invalidate legislation passed by Parliament or interfere with that legislative process. *So how does this work or not work?*

Luke-Fitzmaurice-Brown: Yeah. So parliamentary sovereignty has been the thing which has ultimately kind of been the biggest inhibitor of tino rangatiratanga over the past 184 or slightly less. Given our Parliament was not fully established in 1840 it works the same way ostensibly here as it does for you guys and in the UK, where parliament is sovereign and parliament can pass whatever law it likes. It's slightly different here and that because we don't have a single

written constitution, we don't have... our highest court can't strike down legislation or say that it's unconstitutional.

The version of parliamentary sovereignty we've had in New Zealand for much of our history has been relatively unfettered compared even to our closest neighbours or most similar countries. That ultimately has inhibited the exercise of tino rangatiratanga. But in the last the idea that as an interpretive tool, te Tiriti gained, has got more weight from the courts, that it sits alongside Tikanga Māori, so Māori law generally, that idea has continued to grow and become more accepted.

My view and the view of a few public law scholars is that we're no longer at a point where if Parliament really decided to pick that fight, they would unequivocally win. And so the most obvious example that's currently being discussed is the Treaty Principles Bill, and I'm sure we'll talk about that a bit more.

But the Treaty Principles Bill is essentially Parliament attempting to completely rewrite the treaty. And one of the issues that it has raised is that if you do this and it looks like it probably won't pass, but we don't know that for sure yet. But if you do this, if you essentially pass legislation that says, "No, the treaty doesn't say that anymore, it says this. You thought it said, A, it actually says B." The Supreme Court might say, 'well, it actually says A, your legislation does not change the physical text of what was signed in was agreed more broadly.' If Parliament were to pick that fight, it might test our actual limits?

Jaynaya Dwyer: Forces a moment.

Luke Fitzmaurice-Brown: Yeah of the limit of parliamentary sovereignty. I think they won't, partly for that reason. But there's some suggestion and it's a bit academic, but it's interesting. There's some suggestion that given the increasing importance of Te Tiriti in our laws, we no longer actually have the completely unfettered version of parliamentary sovereignty that we might have thought we did. All that said, parliamentary sovereignty is still probably our strongest constitutional norm.

So there might be a bit said between the different branches of government if it came to a head like that, but ultimately our constitutional arrangements and our version of democracy,

currently, do give Parliament a lot of power, and they do still have that power over Māori and it would possibly trump the legal exercise of tino rangatiratanga. Although, as we know, and as you know, that version of sovereignty is a lived version of sovereignty that won't just go away because Parliament says it did.

Jaynaya Dwyer: Yeah, and this is where your writing comes from, the idea that where there might be partnership, the crown is talking to Māori Iwi as a minor partner in that relationship. Then let's talk about tino rangatiratanga. A lot of your academic work is around this principle as an underlying theme, which is central because it's what is guaranteed to Māori in Te Tiriti. You wrote in a recent chapter titled "A Treaty Breach Born of Hostility to the Promise Itself", that here in Aotearoa, the long arc of history bends towards rangatiratanga. Like other language about Indigenous rights, rangatiratanga is a term which is sometimes used with integrity. Other times expressed in a manner that's limited, contained, rearticulated, redefined, as the case might be, so indeed, recent political discourse here are seeing politicians try to claim that rangatiratanga is something which can be for all people of New Zealand.

How would you like to see people understand Te Tiriti's guarantee of respect for rangatiratanga?

Luke Fitzmaurice-Brown: Yeah, good question. And good observation that it can be coopted. I think ultimately to use that term with integrity, it can only be a collective concept.

So there are aspects of rangatiratanga, rangatiratanga comes from the word Rangatira, which is leader. The -tanga being the suffix that turns it into an action. So the exercise of rangatiratanga is leadership which takes care of the collective wellbeing of the people. So obviously, there's kind of an individual element of the wellbeing of those people, but ultimately, rangatiratanga is something that can only ever be held collectively.

In part because it has to be exercised collectively and in part because in a Tikanga perspective, again, it's a form of authority that comes not just from a formal title or role, it comes from the land itself. It comes from ancestors. It's in part earned in exercise, and it's in part inherited and

passed down through our Whakapapa. Its source can only be collective and its exercise can only be collective.

And I think also that's the value of expressing it in Te Reo Māori and in Māori terms and in Māori worldviews because sometimes I think it's useful to use terms like sovereignty and self determination, and they tap into different ideas which are adjacent and share a lot of similarities, but we've seen that language of sovereignty be coopted. We've seen that language of self-determination be coopted because the word self is in the title. There's a clue that it's ripe for that reinterpretation.

Whereas rangatiratanga only really makes sense in a Māori worldview, which is a collective worldview. When politicians ... there's an example this year of a particular political party trying to coopt that language and say, "everyone has rangatiratanga. I as an individual have rangatiratanga". They didn't actually get very far with that effort because it's nonsensical in te Reo Māori and they were laughed out the door with that. For the most part, they've stopped pushing that particular line. They still say it's all about the individual. It's still about a very classical liberalism view of politics and of the world, where the individual is everything. But if anything, that was an illustration of that argument not really sticking because it's just so fundamentally... it doesn't make sense in Te Reo Māori and in a Māori worldview. So the idea that our self-determination as Māori is a collective one, I think is really important to the whole concept, and phrasing it with words like rangatiratanga is a really useful way to drive that home.

Jaynaya Dwyer: Yeah.

You've done some really important work around looking at on-the-ground expressions of rangatiratanga, how it's understood today and particularly some work around the COVID checkpoints, I was wondering if you could share a little on that.

Luke Fitzmaurice-Brown: Yeah. We did a little research project just after the lockdowns where during the lockdowns and in the early days of COVID here, the borders between different

regions were shut, we weren't allowed to travel. It was the early days of full lockdown, and a number of Māori communities set up checkpoints, roadside checkpoints, especially in isolated communities, where it was already the rules that you weren't allowed to travel.

So they set up checkpoints to help enforce that really, and monitor that. In some places, they were what I'd call soft checkpoints where they were just checking in with people. Those sometimes turned into a bit of public health campaign and messaging around that. In other places, they were more hard checkpoints where they just said you can't come through here. Those actions, and this is partly what the research found, were grounded in a sense of rangatiratanga and a sense, they were grounded in Tikanga as well, so grounded in our own Māori world views about keeping each other safe, about our collective wellbeing.

Māori have a longer memory than governments which come and go. So there were stories from elders about the mass graves in 1918 Spanish flu, we remembered what happened last time. We still have those mass graves, and we call them urupa in parts of the country where we knew that our communities were vulnerable to pandemics because of our experiences. So these communities set up these checkpoints. They worked in collaboration with each other to do so. They were sharing resources, sharing ideas, even down to the mechanics of sharing project plans and registers of rosters and different things like that - the nuts and bolts of it were happening.

Eventually, in many areas, they came to be supported by the police as well. And this was largely legislative to say you can't travel between the regions, and the government was just way slower to be able to do anything about that than Māori communities who on the ground through this sense of both self-determination, but also collective wellbeing were able to just pop up. And one of the things we found was that it's a really useful and interesting example of treaty partnership in part because it was a Māori-led initiative which came to be supported from the crown.

In part, because what was grounded in our own world view and our own Tikanga, of course, we had the right to do this - We didn't have to ask for permission because this was about our wellbeing. In part, because it was not scary for the people in those communities, Māori and non-

Māori, it was clearly about keeping those people safe, and a number of those people were quite grateful for that. And in part, because it was this illustration that rangatiratanga is not something that just disappeared for 150 years and has now popped back up - It's been this lived practice for that entire time that predates the treaty as well. The treaty did not invent rangatiratanga, it just acknowledged it.

And so, the idea that you could take action to protect your people grounded in your own sovereignty whether or not the government likes it, and in this case, the government came to the table, and it worked really well, so it's a useful example of that as well. It's just a very concrete thing which we're trying to illustrate through the research of these ideas like rangatiratanga and Treaty Partnership are sometimes quite abstract for people who have not heard about this before, might be a bit fearful. Actually, in that case, it was just about keeping communities safe. And that's useful because I think the more local you make it, the more it starts to make sense for a lot of people.

Actually sometimes it just about keeping your river clean and actually sometimes about making sure that your healthcare system is delivered in a way that treats you as a whole person and looks at you in the context of your family as well. These aren't scary ideas when you start talking about individual people in individual communities, not that it's all about the individual. But that they get dragged into these political conversations sometimes which turn into fear mongering, and the uncertainty becomes weaponized.

Whereas with the checkpoints, it was like, here's a concrete action people took to keep other people safe. Everyone benefited from it, even the police enjoyed doing it at times. Those sorts of conversations about Indigenous self-determination, I think are really useful because they helped to demystify it for people and make it a lot more concrete and less theoretical.

Jaynaya Dwyer: Such important academic work to be drawing attention to, those stories. We are visiting now we're going to talk about the moment of political pressure that's going on. As you've shared, the treaty doesn't have freestanding legal enforcement - the way it's imported into the State legal system is through statutory interpretation and also through these Treaty Principles clauses that are now scattered across the legislation of Aotearoa New Zealand.

We're visiting at a time where this relationship is under pressure. In particular, the government has made a decision to introduce treaty principles legislation, which the Waitangi Tribunal has reported seeks to redefine te Tiriti in a manner which has no resemblance to the text and is conspicuously silent on Māori rights and interests and rangatiratanga, warning that if it is enacted, it is a revolutionary constitutional change, that will be the result.

We should say the bill has been introduced by a minor party in the coalition government and the Prime Minister has said, it will be introduced to this first reading and committee stage only, without intention to pass the legislation. Obviously, a huge amount of harm is already being done through that. You've done some very strong advocacy around this and you're saying that the bill and the resulting Waitangi Tribunal report is a reminder of the need to respond to actual problems and not imagined ones.

What are these problems the bill is imagining or fabricating?

What do you see as the biggest problem with this legislation?

Luke Fitzmaurice-Brown: Yes, I think there's a few things from a legal perspective. The bill misrepresents the idea of what the treaty principles are, which are a tool that governments have used, the Waitangi Tribunal has used, and the courts have used to... The courts originally called it "find the spirit of the treaty." The spirit of the relationship between Māori and the crown. In my opinion, they've got that wrong sometimes and they've got it right other times, but generally, this 'what does the treaty mean for our current context or in this particular policy issue'. What does it mean for this particular thing?

The idea that subsequent courts and subsequent cases have then reinterpreted or built upon those based on the doctrine of precedent. The previous court said this, we're going to apply it to this particular context.

That's been a very incremental process, but more to the point, it's been a very orthodox process. That's how the common law works all the time. There's nothing at all radical about, our higher courts expanding on what the treaty might mean in this particular context.

Jaynaya Dwyer: That's their whole game. The whole time.

Luke Fitzmaurice-Brown: That is the point of the institution.

The first part of the myth of the Treaty Principles Bill is this whole idea of uncertainty. “We can't leave it to the courts to make our laws.” We don't leave it to the courts to make our laws. The courts are doing what they have always done for better or worse. Parliament chips in, and they would say clarifies that from time to time, that's a pretty normal process. In this case, it's being weaponized against Māori in order to erase Māori rights and to erase Te Tiriti o Waitangi. That's the first thing. That's the misrepresentation of the legal aspects of all of this. This is just a very normal process which one political party is trying to use.

The second thing I think and more to the point is there's this politics of resentment, where the myth being propagated is that the increasing recognition of treaty rights in the last 40 come at the cost of non-Māori, which is just not remotely true. We see that with the ongoing inequities across almost all policy areas. One high profile example that some politicians have rallied against is a Māori health authority, which was set up in the last three or four years to try to reduce inequities in Māori health. That's now being weaponized by politicians as Māori getting special preference in health care systems and getting bumped up the waitlist and those sorts of things.

The statistics for Māori life expectancy are that Māori people still die seven years earlier than non-Māori people. The idea that the Māori health authority was set up to give a group special preference just doesn't play out, that we somehow have these special rights that non-Māori people don't have. It would be lovely if we were all equals. This is the claim of some politicians, “we should all be treated as equals”.

That would be nice. It will be very nice if my Māori relatives did not die seven years earlier than my non-Māori relatives. But on average, that's not the case. That's the other political aspect of it is that the incremental progress that has been made is now being weaponized against Māori into this anti Māori sentiment, and as a result, the claim is made that we need to pass these laws, pass these policies to get rid of these measures which in part are just about reducing historical inequities.

The Māori Health Authority has subsequently been dis- established by the government with legislation passed under urgency, with no consultation, and no alternative plan to reduce Māori health inequities. There are a few aspects to this. There are other examples of this myth that Māori people somehow have special rights and that the treaty is responsible for that, and we don't like the special rights part, so we need to get rid of the treaty parts as well. And that's on top of the just misrepresentation of what the courts are even doing in the first place and what Parliament has done and what the Treaty Principles even are.

Jaynaya Dwyer: Yes, a lot gets done in the name of greater legal certainty when you might say it's a redefinition toward a different outcome. And while there's a lot of attention on the Treaty Principle Bill, as you said, with the Māori Health Authority and other measures, there's a broader range of legal changes eroding the Te Tiriti relationship. To quote a wonderful barrister friend of yours Natalie Coates, “while focusing on the bill, there's a broader attempt at the death of the relationship by 100 cuts.”

So a couple of weeks ago, you participated in this huge hikoi, march where a huge number of people, very conservatively reported at 40 thousand but likely many, many more, stood against the bill and related changes, calling for the treaty to be honoured.

What do you see as important advocacy at this moment?

Luke Fitzmaurice-Brown: Yeah, it's been an interesting time to be a legal academic because there's a need to be doing advocacy and work which feels like it's defensive. There's bills passing through parliament which remove treaty provisions in our laws, or there have been quite a few various examples of that. The Māori Health Authority being one of them, our child protection laws being another. We've had a treaty provision removed from our corrections legislation, several other examples.

So in my actual job, it's felt like part of the job is to kind of express dissent to all of those, even though a lot of them have felt inevitable and there have been small concessions along the way

as a result of, not my advocacy, but everyone's collective efforts to express opposition to that. And just raising awareness of those processes, making them accessible to people, alongside that, though, is the Hikoi.

Which in part was about this treaty principles bill currently going through Parliament, but was not just about that, and I think that's one of the things that made it quite unique is that really for the last year, also, there's been this kotahitanga movement, we call it, which is like a Māori unity movement, where right at the start of the year, Hui was called by the Kingitanga, the Māori King movement, now the Māori queen, as her father has passed away this year. That is a call to kotahitanga.

Where all through the year, we saw thousands of both Māori and non-Māori, but in those particular meetings, mostly Māori, where 10 turned up to that first one and they thought it would be two or three, and the more people than have ever been to Waitangi on Waitangi Day turned up. There were 50 or 60 Then these other Hui throughout the year, where collectively, we have been able to meet and talk and non-Māori have been invited to those.

The Hikoi here in Wellington ... to Wellington, it started up in the far North made its way down here over the course of about ten days. Partly reflected the Treaty Principles Bill, and partly was opposition and anger to what Parliament is doing, but it is also partly this broader moment of Māori collective solidarity and kotahitanga and unity. Joined by non-Māori .

So, we last had a Māori led protest movement this big about And I saw a comment about the comparison of that to this. That was in 2004 in response to what Parliament was doing about the Foreshore and Seabed law. Comparing that to the current moment, asking someone who had been deeply involved in that movement, what they thought about this and what they thought the differences were. They just said unequivocally, "it's non-Māori people also participating this time around".

That Hikoi was as big as it was in part because of this Māori kotahitanga movement. But in part because non-Māori people are also seeing this as an important cause and an important moment, and all of that is bigger than what Parliament is doing. So part of my work this year has

been the defensive stuff, trying to stop a bill, or just try to sometimes even just be a witness and express opposition.

But actually, what I think gives it life and what the broader movement is about, are these bigger picture things in this bigger moment, almost of collective consciousness for ... there was an explicit handover earlier in the year from this group of older activists who called themselves the OGs who were real active in the 1980 and since then, who explicitly handed on the baton to a younger group of activists. And it's been a really cool moment for some of that stuff. And that's much bigger than what the government is doing right now.

Jaynaya Dwyer: Yeah, and this consciousness of the treaty is for everyone. It's good for everyone. You mentioned the Māori king, Māori queen now, and reminded me of, as I understand it, that's a movement too, or was formulated as a coming together to render Māori structures more visible to the crown and kind of create an avenue for advocacy and kind of links in with the conversations we've been having about the Voice at home.

How do you collectivize and make yourself, create structures to create a conversation back to government today. And what have you noticed about those kind of conversations happening here now as a unity movement? Is there conversations about how do Māori collectively speak to government?

Luke Fitzmaurice-Brown: Yeah, I think... It's been a fascinating moment for all of that. And in many ways, really encouraging that as Māori collectively, we're now re-looking at these mechanisms to come together collectively in ways which reflect our own Tikanga and are on our own terms, but also are expressed in a way that speaks to government or speaks to policy making processes or those sorts of things, where relevant.

That's really hard to do both of those things because the instinct from some people, and I don't mean this as a personal criticism, is like let's have a Māori Parliament. I don't think they mean "let's perfectly replicate what our current parliament does". But using that sort of language is like, "why would we do that again?" At times, that's been the tension.

There's this instinct to come together and have a collective voice, but we need to do that in a way that actually doesn't just try to be another version of the crown, and that's not a criticism of the Kingitanga movement because they've been really important throughout their history and this year in particular. But that's the ongoing challenge to try to find that and try to find that also in ways that work for all of us as Māori. Many of us are very disconnected from our Whenua, our land. Many of us have never been home or don't live home in our traditional areas. We don't all have our Reo, our language. That's coming back, but actually in a lot of ways, there's still a long way to go with all of that. So you also can't make this hyper traditional thing that is exclusionary, and Tikanga is not exclusionary, so it wouldn't actually ever exclude people, but those are all the tensions in creating these institutions of how do we bring people in? How do we... I don't have any of the answers to that. But how do we do that?

This year has been an example of all of that. I think part of it has been a realization that simply populating the structures of government with more Māori people will not automatically lead to change. In the last term of government, it was well celebrated that there were more Māori cabinet members than there have ever been, and some of those people are great. There are now more Māori cabinet members still. This current government has a high proportion of Māori cabinet members. The current Parliament has a high proportion of Māori MPs, and it is the most regressive anti-treaty, anti-Māori government we've had probably in 100 years.

So that has not automatically solved the problem. And I think part of what we've seen this year is the limits of that diversity focused push for more Māori in parliament. I don't think having more Māori in parliament is a bad thing. I think that's good, but it's not enough. That building, and for the podcast, I'm pointing across the road to Parliament, is not where we get our rangatiratanga from. It's not sourced in there, that is not a place built where it can be exercised.

That's an important place, but we need to find these other spaces. So, the Māori Parliament language is now the most recent iteration of that conversation is Te Whare o te Rangatiratanga. So, a house for rangatira and a house for Rangatiratanga. Which I mean, is maybe what those people were talking about all the time when they talked about a Māori Parliament. But it is a slight evolution on how we talk about that.

Intended, I think, to reflect the fact that that has to be an institution and a space, which looks like us and feels like us and reflects our Tikanga and then can interact with parliament and can interact with whatever other institution it needs to. But not just by trying to mimic it.

Jaynaya Dwyer: Mmm. Through all of this, you're working in legal education, seeking to instil respect for treaty thinking between Indigenous and non-Indigenous legal orders. Australian legal academics have been looking over here with interest as new legal education requirements are being introduced. That says, all graduates need to study Tikanga Māori, Māori law and custom. These changes to legal education come following a series of Supreme Court cases, particularly Ellis, where the Supreme Court here has said that Tikanga Māori forms part of the values of the New Zealand Common law, giving room to practitioners to bring Tikanga cases before the court through avenues that weren't there before for all New Zealanders and not only Māori.

As you previously told me, the way the court is going, that's just what you need to be a good lawyer here now.

We've been working together on a project considering broadly the role of non-Indigenous people in curriculum indigenization, and how we navigate distribution of labour of this work with respect, integrity, and contextual specificity.

What motivates you to be involved in legal education at this time?

Luke Fitzmaurice-Brown: I think it's seeing this group of students come through who just have these incredible insights about the world. Māori, and non-Māori, but that looks different for different groups. For example, people now talk about the Kohanga Reo generation, and Kohanga Reo are Māori language immersion preschools, which began to be formed in the 80s and have been a really important part of the te Reo Māori language reclamation process. We now have that group of kids and older who came through in the 80s, 90s and 2000s and fluent te Reo Māori speakers in law schools.

We have our first MPs who are from the Kohanga generation. Students, young leaders, and incredible Māori students and graduates who grew up immersed in their Tikanga, never lost it, never lost their Reo, can just walk comfortably in both worlds, and it's very cool. And it's cool to be a part of their education, and it's cool to bring that, have a small role. I can't teach them anymore about Tikanga than they already know. I'm still learning some of this myself and reconnecting myself.

So that is not the group I'm trying to teach about Tikanga. Alongside those are a whole group, two other groups actually. One group is this whole group of non-Māori students who are just really enthusiastic about learning about Tikanga. And for that generation, these changes are uncontroversial. This is not a scary [thing]. We see some pushback to the efforts to teach Tikanga in law schools.

The pushback almost entirely comes from a much older group of people who I think are fearful, and I'm not sure they would express it in that way, but their world has changed. If they're afraid that the world has changed they're not wrong. They have reason to be fearful in that sense. But for everyone else, this is nothing to be fearful of. This push towards understanding Māori legal orders is just a part of our law.

I think the position we're in as Māori in that there is some commonality to our laws and our Tikanga across the whole country and across all different Iwi, is definitely not homogeneous. And it has to vary in different places to be real because it comes from those places. So there's no kind of singular blueprint of all Māori law, but there are common features across all Iwi. And so that puts us in a position to be able to teach some of those commonalities as a single coherent legal system.

Students just aren't afraid of that and are eager to learn it and are eager to learn about te Tiriti and bring slightly less baggage with them in terms of the myths they might have learned about those things at school, although there's still some, there's still unpacking of those to do in the classroom. That really gives me hope for this whole journey of starting to teach Tikanga in law schools, and that students are just ready. It's not that hard, it's not that scary for them and is just another part of their learning, and it's often the most unique and interesting and rewarding

part of their learning. It's actually harder for the academics to keep up. And I include myself in that category most of the time. In that this is new for the rest of us, and it's new for the legal profession getting to grips with what this means in their work. And we are sometimes scrambling, even when we're enthusiastic about it ourselves.

The work is in equipping ourselves to teach it and to help facilitate that learning. Students, law students from a legal perspective, are starting from a blank slate with this. The law they're learning is law infused with Tikanga and Tikanga is just part of the law. And I think sometimes as academics, we miss that for them, this is not this big, hairy, scary, difficult thing. This is just what they're here to learn, and it's cool.

Then the third group of students, which I alluded to, I spoke about the Māori students who are really fluent both in their language and their culture, and non-Māori students who are enthusiastic, for the most part. There's also this group of Māori students who are disconnected and on some level, they are disconnected from their culture, so they might not be fluent te Reo speakers. Or they might be the first in their family to go to university or... those are separate things. But there's this group of students who for whom university becomes a place to reconnect, and they meet some of those other students who are more fluent. In many cases, those other students who are fluent in their te Reo, for example, might not feel entirely comfortable in an academic institution and fair enough, to be honest, that's a whole other can of worms.

But there's a group of those students who feel very Māori, but don't feel very academic, and a group of those students who kind of get the academic stuff, they might have done well at school, but don't feel as Māori. And part of the job, I find most rewarding is trying to show them that they're both wrong.

That those Māori students who understand the academic world, but don't feel as connected to their culture are just as Māori as the rest, and those who are completely fluent in their culture, but don't really get the academic world or think they don't are also wrong because the things that those students bring to the classroom and the depth of multiple knowledge systems that they are holding is just remarkable. Part of the job is to support both of those groups of students

in different ways, I think. And all of that is wrapped in with this current project of making our law curriculum more Tikanga consistent and really just recognizing that this is the state of our law now and how do we learn more about that and how do we teach more about that? And each of those groups of students connects with that differently, but for the most part, all of them are really eager to undertake that.

Jaynaya Dwyer:

From all of this Luke, what reflections would you offer for the Victorian Treaty process just at the inception of our own negotiations back home?

Luke Fitzmaurice-Brown: I think it's possibly, and I can't speak exactly to your context right? But my feeling is that the common message here and there can be that treaty is not something to be afraid of. In that if it upholds Indigenous rights, no one else loses, and that first and foremost is the most important thing Indigenous people's rights deserve to be upheld in and of itself.

But further than that, actually this in many cases can be good for everyone. Can be good for Indigenous and non-Indigenous peoples. The COVID example that we spoke about, the checkpoints example was an example of the expression of Māori rights in a way that benefited everybody in those communities. When it comes to our treaty rights to the environment, for example, the exercise of Māori rights is protective of our environments. That is a good thing for everybody.

The people involved as I alluded to at a very local level, who are not talking about politics or constitutions, but are talking about how to protect their river, love the exercise of Māori rights and treaty rights, whether they're Māori or non-Māori healthcare systems which are treaty consistent, look at people more holistically and look at the whanau. Child protection systems, which uphold Māori rights view those problems as needing to be solved with whole families, not just by viewing a child in isolation. Correction systems that are treaty consistent, look at the underlying causes of offending and try to fix those and restore the harm done to victims. Like in time after time after time, the exercise of Māori rights and treaty rights is good for everyone.

Occasionally, I am a bit weary of singularly justifying it in those terms because actually, our rights just deserve to be upheld. The pitch is not, "please uphold Māori rights because it will also benefit you", but it does benefit you. That is an obvious and significant impact of upholding te Tiriti here in Aotearoa and I think that that helps persuade some people and helps make it less scary for some people. Then the way to further that also is to make it more tangible for people, to make it more local for people. I think more non-Indigenous people see tangible examples of the exercise of Indigenous people's rights, benefiting those people and benefiting others, the better it is. The more we let this become an exclusively political conversation, the more room there is for fearmongering and misinformation. But the more we make it a tangible concrete thing happening in your community, the less scary it is because once people see it happening in front of them, they realize it's not scary.

I think it's for you in Victoria and Indigenous peoples there to walk that for yourselves, and it's not for us here in Aotearoa, especially on Indigenous communities to say, we've figured this out, go and do it. We clearly haven't figured it all out. There's clearly some big issues currently. But if any of that is useful, I think it's really useful to have that dialogue and be sharing those things because self-determination has to look like those communities doing it for themselves. But sometimes these Indigenous solidarities can be a part of that.

Jaynaya Dwyer: Thank you so much, and so looking forward to continuing this conversation and dialogue, Luke.

If people are in Aotearoa, they can make a submission on this bill and they can follow your Instagram, Dr Luke Fitzmaurice-Brown and get all of the information about what they need to do from there and keep abreast of the developments. If you want to follow along from home in Australia too, you can look at that account as well as all of the resources that we're going to put in these show notes. Thank you for listening to the White Moise podcast from the Indigenous Law and Justice Hub. We'd love to hear your feedback on this episode.

Otherwise, see you next time.

Luke Fitzmaurice-Brown: Kia ora.

Outro music



Jaynaya Dwyer: Listening back to the conversation about the contradictions of the space we were sitting in I was reminded A few days after this conversation – Luke and I and many other people from our travels met again a few days later when we woke up at 4.30 to attend a pre-dawn ceremony to open a purpose build facility for Indigenous learning to the highest sustainability standards – and wake up the University marae, the Indigenous meeting house. A beautiful to thing to participate in as we talk about creating spaces for Indigenous learning. Thanks for listening to White Noise.