

Tsai apology needs backing policy

Written by Guy Carlton

Wednesday, 06 July 2016 07:45

When President Tsai Ing-wen (蔡英文) gives the long-sought-after and advocated for apology to indigenous people on Aug. 1, the president will have made a significant step in the process of reconciliation with Aborigines nationwide.

Apologies are important.

The acknowledgement that policymakers have engaged in wrongful and unjust activities that have injured Aboriginal individuals, families and communities is an essential part of the process. It is a recognition that the Aboriginal injured parties are real persons and communities — with their own stories, traditions and laws, which are as important as that of the majority society.

It is recognition that Aboriginal groups are an integral part of Taiwanese civil and political society, a status that until the past few decades was denied them. They are the part of the creation of a new national narrative.

As then-Australian prime minister Kevin Rudd said in his 2007 apology to the Stolen Generations in Australia, an apology enables a state to “turn a new page” in the nation’s history and become the type of multicultural open society that Taiwan aspires to be.

Tsai’s apology on behalf of the government should be seen within the context of a growing appreciation of the need to protect of Aboriginal interests. Indigenous groups in Taiwan, like many groups across the globe, have disproportionately been injured by colonial and national expansion based on totalizing notions of cultural fitness and the logic of the national state.

They have experienced a succession of colonialist ruling governments for centuries, including Dutch and Spanish colonial forces, the Chinese Ming and Qing dynasties, Japanese rule and the Republic of China (ROC) since 1949.

Historically, all these governments have pursued assimilationist policies based on notions of

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cultural and ethnic superiority and have significantly intruded upon traditional Aboriginal territories.

Over the past century, collectively owned lands have been nationalized and/or subject to policies that undermined Aboriginal community integrity and agricultural practices.

In addition, various traditional territories with significant natural beauty have been designated as national parks and forest reserves, precluding traditional hunting, fishing and gathering activities.

However, over the past several decades these policies have begun to shift. A series of constitutional and national laws and regulations have been passed to protect and promote indigenous peoples' rights, such as the Indigenous Peoples Basic Act (原住民族基本法) and Aboriginal groups now enjoy indigenous representation in the Legislative Yuan, as well as language and cultural protection.

However, much more needs to be done. The aspirations informing these laws have been drowned out by other national concerns and the purposeful implementation of them has lagged.

Aboriginal communities continue to have significant unaddressed grievances ranging from the government's continued failure to recognize their property interests and use in traditional territories as well as the failure to incorporate Aboriginal governing structures into local natural resource management and municipal processes.

As such Tsai's apology can serve to refocus efforts to address Aboriginal concerns. However, an apology in itself can only look to the past. And often, as in Taiwan, the past continues to be contested. This is evident in the discussions surrounding draft legislation promoting transitional justice in recent weeks.

This contestation is complicated by the switch from Japanese colonial control to the ROC government, which repudiated the previous Japanese regime in furtherance of this claim to be the legitimate government of China.

As a result, it strikes many people as nonsensical to apologize for Japanese colonial acts against Aboriginal communities.

However, in many ways the inescapable complexity of the past should not detract for the real purpose of reconciliation — to improve the lives of indigenous peoples and reset the national narrative of Taiwan.

In this sense, the government must speak for all previous regimes — it is the only entity that can and should do so. This restorative justice approach emphasizes how unjust policies damage the capacities of individuals and harm the whole community and focuses on policies that enable people and the community to repair the damage.

From the perspective of restorative justice and future reconciliation there are several problems that the present proposals need to address.

First, it is important to consider what standard is used to measure out the injuries done to Aborigines. Unlike in New Zealand, the US and Canada, there are no treaties or agreements that can provide an agreed upon standard of performance.

It is considerably more difficult to measure and compensate past injustices than measuring a government's performance against a treaty text such as the 1840 Treaty of Waitangi, where the British Crown guaranteed New Zealand's Maori "full exclusive and undisturbed possession of their lands and estates, forests, fisheries ... so long as it is their wish and desire to retain the same in their possession."

The difficulties are compounded because each local interaction has a particular history and it is difficult to generalize across historical periods and among various groups.

The lack of standards to evaluate the injuries that have been meted out to particular tribes and communities suggests a different approach to investigate and order recompense than the

proffered in current proposals.

According to the draft legislation, an office will be established in the Presidential Office to investigate and recommend actions to achieve reconciliation. The government is required to act on these recommendations.

Such an approach will not do sufficient justice to the historical evidence and storytelling aspect important to both the victims and the perpetrators in the reconciliation process. It could also potentially result in the manipulation of the historical evidence and recommendations, a particular problem where the standard of injustice must be formulated in light of the historical evidence.

A better approach would be similar to the Waitangi Tribunal in New Zealand, because it would allow for a more particular measure of historical injustice given the local circumstances.

The tribunal is an independent statutory body charged with investigating breaches of the Treaty of Waitangi. It hears petitions from various groups and collects evidence from all parties (including the government) in an informal and non-adversarial basis with due regard for local Maori custom and legal rules of evidence.

It then generates a report on the historical action and recommends various actions to the New Zealand government, which can be used as a basis for a settlement.

The recommendations are non-binding and the government can choose to ignore them, but it does enable the tribunal to issue findings and recommendations without regard for political feasibility.

The non-binding nature of the recommendations has not made the tribunal any less effective. Indeed, New Zealand is currently engaged in a massive treaty settlement process and the Waitangi Tribunal has increased the historical legitimacy and political support of the process.

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Reconciliation with Aboriginal communities necessitates an incorporation and recognition of Aboriginal law into state law. In short, the majority society and state must take steps to recognize that Aboriginal communities and law are part of the legal and social landscape of the nation while remaining distinctive.

While this is an ongoing and contentious process across a range of state and customary law, there are areas where it can be relatively quickly implemented such as natural resource management over reserve and traditional lands and hunting, fishing and gathering activities.

These co-management activities are increasingly undertaken in North America and Australia between indigenous groups and national/state governments. They have proven to be successful in ensuring continued healthy flora and fauna populations, offered protection for rare and endangered species, as well as allowed for continued Aboriginal use of the resources.

In Canada, the Crown has a duty to consult in good faith with an Aboriginal community that could be affected by its actions and accommodate for the potential impacts on Aboriginal rights.

Similar integration, while not unproblematic could be done in Taiwan.

Article 10 of the ROC Constitution (which guarantees and provide assistance for Aboriginal land among other things) and Section 19 of Indigenous Peoples Basic Act (which allows for subsistence hunting, fishing and gathering activities in traditional territories) already provide a framework for implementation.

In implementation both would recognize Aboriginal autonomy and self-determination while ensuring consistent and effective natural resource and land management policies.

Reconciliation and the settlement of historical grievances are important aspects of defining national identity. This new narrative will establish a more just basis for the entire society. Aboriginal communities and law are part of the legal and social landscape of the nation.

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No discussion about justice, history or identity is ever truly settled, nor should it be. We will always revisit the past to help us make sense of the present and future.

However, a simple apology without institutions and policies that create accurate and acceptable historical narratives and legally recognizable rights for Aborigines to deepen the reconciliation process will not be sufficient.

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