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Reconstituting the Constitution

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26.3.3 Climate Change

Furthermore, the issue of climate change is one that must be addressed in the constitution. We must all be clear about one thing: it is a fact. Sea levels are rising, polar ice caps melting. The Ward Hunt Ice Shelf, the largest in the Antarctic, was around for 3,000 years before it began to splinter in 2000. This issue is one that we cannot ignore. Last year, we sat back and watched the world powers at the Copenhagen summit on climate change. The outcome of this meeting that cost millions of dollars and thousands of tonnes of carbon dioxide was simply a resolution to meet again. This is not good enough, and proves the inability of major world powers such as the United States, the United Kingdom and China to leave aside their ulterior motives in order to benefit the global community. Over the upcoming years, I think it is imperative that New Zealand steps up and does what these larger powers are incapable of doing: we must adopt a leadership role on the issue. We are a small country and this can only work in our favour. We do not face soaring crime rates, vast unemployment rates and we have a high standard of living. Because of this, I believe we are in a position to devote a lot of time and energy to the issue of climate change. I am in no way suggesting that one magical conference will suddenly turn everything right, but I do believe that the one key way to solve this issue is carbon crediting. This scheme works as follows: in countries that have signed the Kyoto protocol, companies are allocated a certain amount of carbon credits a year. One carbon credit is equivalent to 1 tonne of carbon dioxide. If a company produces less carbon dioxide than its allocation, it can sell the remaining credits it has. If it exceeds its limit, it must buy credits. This scheme is effective in that it gives incentive for companies to be watchful of the amount of carbon dioxide they produce and it financially hurts those who produce too much. However, it is only compulsory in countries that have signed the Kyoto protocol. The United States, one of the world's largest producers of carbon dioxide, has not. In order to jolt countries like the United States into motion, I suggest that New Zealand impose boycotts on all major companies that do not use carbon crediting. If we do, and encourage other nations to follow suit, I believe it will create incentive for them to switch to carbon crediting. For the youth, this simply ensures that we have a world to inhabit in the future.

26.4 Youth in Parliament

Finally, I will discuss my vision for a greater inclusion of the youth in parliament. I am well aware that the following statement may sound naïve; may be perceived as saccharine idealism; but I genuinely believe that the best way for the constitution to stay relevant and applicable is for it to reflect the growing influence of the youth of this nation. Events such as Youth Parliament are very good for my generation, as they increase this political activity among us which I firmly believe benefits not only us, but the nation as a whole. However, the skills learned at such events are then left to stagnate for an indeterminate period of years (if not forever) and thus,

the opportunity to use these new-found skills is lost. What I propose is that the Electoral Act is changed to include Youth seats in parliament. Now, I'm not suggesting that we let 9 year olds into our houses of governance. I am less idealistic than that. What I do believe is an effective and realistic proposition is that a certain amount of seats be reserved for 18–22 year olds.

I believe that this will be beneficial in two major ways. Firstly, it will see a greater variety of opinions represented in our parliament. At present, decisions made concerning my generation are made by people who are years out of touch with us; people who no longer have an accurate idea as to what is best for us. If there were to be youth seats, then the views of the youth could be accurately and effectively represented in parliament. The youth politicians could speak for the rest of us (as adult politicians do for the adult population) and thus ensure that our best interests are being protected and catered to in parliament. Furthermore, as I've stated already, such a move would see political consciousness among the "youth" increase greatly, and because of this, would see a generation of adults with greater political awareness and therefore, a good skill base to run the nation (as will happen one day).

26.5 Conclusion

In summation, I believe that constitutional change is needed in order to focus more upon my generation. I am loath to use a very hackneyed phrase, but it cannot be ignored: the youth of today are, quite simply, the leaders of tomorrow. If New Zealand were to become a republic, our sense of independence and national identity would increase. If Māori seats were to be retained, we would identify better with our heritage. If MMP were to be reformed, then we would feel more able to bring about change. If climate change were seriously addressed, we would secure our future on this planet. If we were to have youth seats in parliament, it would see our views better expressed. All of these factors contribute to an increased political consciousness among my generation, something that will only be beneficial to both us, and the nation, in the long term.

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Chapter 27
Protecting Future Generations

Tama Potaka

27.1 Introduction

The purpose of this hui (conference) is to consider issues in relation to "reconstituting the constitution". This hui seeks to build on the 2000 hui entitled "Building the Constitution", and provide opportunities for discussion on relevant issues that have arisen over the past decade. It is likely that the hui will reflect key items to form part of the constitutional review that the National Party and Māori Party have agreed to establish.[1] It is hoped that this hui will identify better ways of achieving constitutional reform compared to what has taken place since 2000.

I was asked was to outline my dreams for New Zealand's future keeping in mind the main conference themes. Although this paper does not attempt to deal with all

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[1] The Relationship Agreement between the National Party and the Māori Party dated 16 November 2008 provides, "Both parties agree to the establishment (including its composition and terms of reference) by no later than early 2010 of a group to consider constitutional issues including Māori representation. The Māori Party will be consulted on membership and the choice of Chairperson, and will be represented on the group. The National Party agrees it will not seek to remove the Māori seats without the consent of the Māori people. Accordingly, the Māori Party and the National Party will not be pursuing the entrenchment of the Māori seats in the current parliamentary term. Both parties agree that there will not be a question about the future of the Māori seats in the referendum on MMP [the Mixed Member Proportional voting system] planned by the National Party." The constitutional review was announced on 8 December 2010. The initial details of this review are outlined in the Appendix at the end of this volume.

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themes arising at the conference (or all my dreams), it outlines the following simple dreams as initial considerations to reconstitute the constitution:

(a) Māori can effectively participate in constitutional reform, and help lead the reform process;
(b) Constitutional arrangements give better expression for te Tiriti o Waitangi/the Treaty of Waitangi; and
(c) Constitutional arrangements give better expression for tikanga Māori (principles).

The opinions expressed here reflect some preliminary thinking about constitutional issues since my early university studies in law, politics and Māori studies, and are influenced as much by marae politics as they are by international scholarship/jurisprudence. Indeed, the enduring nature of any constitutional reform for New Zealand may depend more on its relevance and meaning for local communities, as much as formal acceptance and support by international jurists and politicians.

27.2 Some Preliminary Assumptions

> Kōtahi te kōhao o te ngira e kuhuna ai te miro pango, te miro whero, te miro mā[2]
> Through the one eye of the needle will pass the black thread, the red thread and the white thread

New Zealand's demographics are a useful background to the hui themes. Three out of ten children being born now are Māori. New Zealand is becoming browner and more Asia–Pacific oriented. Statistics New Zealand mid-range projections suggest that in 2026 approximately 40% of the total New Zealand population will be of Māori, Pacific Island and/or Asian heritage. The projected average age in 2026 differs considerably between Māori (25), Pacific Island (23), Asian (35), and European and others (42). Projected demographics could and should inform any proposed constitutional and legal reform – and a purely Westminster or Washington approach to our constitution has little likelihood of long term resilience.

New Zealand will continue to be a nation state for the foreseeable future, and not be constitutionally or politically subservient to another nation state. This assumption is critical in relation to Māori participation in the constitutional process, and optimising expression for the Treaty and tikanga. My dreaming may have reduced relevance in the event that New Zealand becomes a province of China or a state of Australia.

[2] A proverbial saying attributed to the first Māori King, Kiingi Pootatau Matutaera Te Wherowhero, announced upon his investiture in 1858.

Finally, constitutional change is to be expected – retaining the constitutional status quo forever is very unlikely and goes against 170 years of New Zealand's history. The questions for our constitutional futures primarily revolve around process issues (for example, will a referendum be required) and substance issues (for example, New Zealand becoming a republic). This paper assumes that constitutional reform is more likely than a more rigorous constitutional transformation and that the key principles of our constitution (for example, Parliament's role to make law) and constitutional attitudes are generally retained.[3]

27.3 Thoughts About Constitutional Futures

Mā pango, mā whero, e oti ai te mahi
Through black, and red, the work will be completed

27.3.1 Māori Participation and Leadership in the Process of Constitutional Reform

The process of constitutional reform is likely to be as important as the substantive outcomes of that process. Our constitution is more about a good constitutional kōrero (conversation) to have amongst all New Zealanders rather than a single document to draft.

Recent legislative changes with constitutional implications have reinforced the uncertain constitutional position for Māori. The Māori body politic (being either individual Māori voters and/or iwi) has been deplorably excluded from meaningful decision-making on and participation in key kāwanatanga issues.[4] My dream is that Māori can effectively participate as tangata whenua and as Treaty partners in constitutional reform and help lead reform.

[3] It appears that constitutional reform in New Zealand is more inclined to be a modernisation of current constitutional arrangements rather than "revolutionary" change emerging from conflict or post-colonialism. As a result, public engagement and support for reform may depend primarily on the impact on the social contract between New Zealanders (and/or Māori specifically) and the constitutional monarchy.

[4] See for example the Supreme Court Act 2003 (the abolition of appeals to the Privy Council), the Foreshore and Seabed Act 2004 (the Crown assertion of title over some areas of foreshore and seabed), and the Local Government (Tamaki Makaurau Reorganisation) Act 2009 and related legislation (Parliament establishing transitional measures for the Auckland Super-City governance arrangements).

27.3.2 Uncertainties Around Participation

It is unclear how the general public or Māori will effectively participate in constitutional reform. There is no comprehensive roadmap for reform. Successive governments have done little to progress civic and citizenship education, and facilitate opportunities for public engagement on constitutional matters.[5] There is no readily accessible "constitutional information kiosk" at the local marae or shopping mall, no Constitution Institute, no Constitution Roundtable, and no Constitutional Ambassadors. If informing oneself of constitutional issues and subsequently participating in constitutional reform is difficult terrain, it is hardly likely that the average passenger on the Kilbirnie bus or helper in the Pipitea Marae kitchen knows how to become informed, inspired, and ultimately involved in constitutional reform (apart from possible referenda required for any major changes).

The uncertainty regarding participation is partly fuelled by antipathy amongst the public towards constitutional (and political) issues. The antipathy often carries with it a toxic perception that meaningful participation in constitutional reform is captured by the "elite" (for example, politicians, academics, tribal leaders) or too complex for public digestion.

27.3.2.1 Bases for Māori Participation

Tangata Whenua

Indigeneity provides the initial basis for this proposal. Mason Durie notes that "… Māori interest in constitutional reform is based on another dimension, indigeneity, that has a longer timeframe."[6] In my opinion, engagement of Māori as tangata whenua (and not just as Treaty partners or as the general public) will reflect Māori interests in constitutional reform that are not limited to but affirmed by the Treaty. Māori aspirations are underpinned by tangata whenua status and are not constrained by the import of international treaties.[7] The Declaration on the Rights of Indigenous Peoples endorses effective Māori participation as tangata whenua (not merely as a special interest group, a populous ethnic minority, or Treaty partner) as a critical element of constitutional reform by stating the following:

[5] The Constitutional Arrangements Committee made various recommendations that appear to have achieved little progress. See Constitutional Arrangements Committee (2005).

[6] See Durie (2003), p. 115.

[7] The Crown has implicitly recognised rights of Māori as Māori (rather than as Treaty partners) in some limited areas e.g. section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (settling that all Māori commercial fisheries claims, including those "founded on rights arising by or in common law (including customary law and aboriginal title)").

- *Article 3*: *Self-determination*. Indigenous peoples have the right of self-determination. This means they can choose their political status and the way they want to develop.
- *Article 18*. Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
- *Article 19*. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- *Article 20: Law and Policy-Making*. Indigenous peoples have the right to participate in law and policy-making that affects them. Governments must obtain the consent of indigenous peoples before adopting these laws and policies.

Treaty Partner

Treaty orthodoxy that Māori consented to the exchange of kāwanatanga provides an additional basis for my dreaming. Constitutional reform is likely to have an effect on the nature of the relationship (or social contract) between Māori and the Crown. Options such as establishing a multi-cameral legislature, or changing the Sovereign as the Head of State, implicate kāwanatanga and are likely to create significantly different governance conditions to those contemplated by or agreed to in the Treaty relationship.

The Treaty contains no assignment provision that provides for the Crown to unilaterally assign or devolve its kāwanatanga rights/responsibilities to a third party.[8] In addition, judicial interpretation of the Treaty (under international law) is likely to favour a meaning that would naturally be understood by Māori to operate for Treaty relationships – and that Māori consent would be a pre-requisite (even if qualified on the basis that it is not unreasonably withheld) for at least moderate reform to the exercise of kāwanatanga.[9]

In my opinion, undertaking moderate constitutional reform without Māori participation in reaching decisions about reform (not just consultation or consideration) would contravene rights of Māori as Māori and as Treaty partners as well as

[8] Major devolution of kāwanatanga roles/responsibilities has regularly occurred. See for example comments in Waitangi Tribunal (1985), p. 73 (outlining that the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others without ensuring that body's jurisdiction is consistent with Treaty promises). Unfortunately, there was no clear dispute resolution clause or applicable law clause in the Treaty either.

[9] See Waitangi Tribunal (1983), p. 48 (commenting on the interpretation of international treaties in the Treaty context).

common sense,[10] and invite multi-faceted political response and domestic and international legal action by Māori.[11]

27.3.2.2 Nature of Māori Participation

I anticipate Māori will lead constitutional reform rather than wait for the Crown to invite discussion. This leadership is borne out of an unquenchable Māori aspiration to ensure that constitutional reform empowers the distinct position of Māori as tangata whenua and as Treaty partners (and as global indigenes). Māori leadership on constitutional reform is already evident from the proposed government review,[12] the proactive work streams of the current iwi leaders' forum (the IL Forum) and historical precedent.

The IL Forum involves tribal leaders from over 50 iwi and is developing focussed approaches to nationally important issues such as education, and topical issues such as public–private partnerships.[13] The IL Forum, implicitly supported by senior national rangatira Māori (Māori leaders), is formally exploring constitutional reform options.

A deeper process may be necessary for a more defensible mandate for iwi leaders to work with the Crown on constitutional reform. Iwi leaders may wish to consult those options "back home" and with a broader Māori electorate before formally presenting any options to the Crown. I imagine that that such intra-iwi consultation will be multi-faceted and involve national hui, internal iwi/marae consultation, and appropriate communications media, for example, Māori Television. It may also be prudent for the IL Forum to seek involvement with urban Māori authorities and significant Māori land incorporations and trusts.[14]

Historical precedent evidences ongoing Māori leadership and commitment to New Zealand's constitutional arrangements. Private delegations and petitions to British monarchs, appeals to the Privy Council, major pan-tribal hui, establishment of Kōtahitanga and Te Kauhanganui, terminal litigation, focussed Māori political

[10] Treaty principles such as the duty to actively protect Māori interests, the duty to act in good faith and reasonableness, and the duty to consult, would each be considerably implicated.

[11] Several United Nations forums may receive submissions in relation to these matters including the Human Rights Committee (action could be taken by other States), the Committee for the Elimination of Racial Discrimination (action could be taken by Māori or other States), and any special body set up pursuant to Article 41 of the Declaration on the Rights of Indigenous Peoples.

[12] See above footnote 1. See for example Turia (2010) (stating that the iwi partnership with the Crown must be determined by iwi (and not by the Crown or government service contracts)).

[13] With its current trajectory, the IL Forum is likely to be the most influential Māori group within a short term, feasibly collaborating with the Māori land-holding authorities, the Kiingitanga, and politically influential Māori individuals around major policy and development matters.

[14] The ongoing litigation from the Māori fisheries settlements and subsequent distribution of the fisheries assets gave rise to significant litigation (up to the Privy Council) involving urban Māori authorities and various iwi and pan-tribal organisations.

movements, and calls to the Crown for joint constitutional reviews all evidence evolving constitutional leadership.

Major hui convened by Ngāti Tuwharetoa ariki (paramount chief) Sir Hepi Te Heuheu in the mid-1990s to discuss constitutional issues show how meaningful constitutional conversations amongst Māori leaders, facilitated by a national Māori leader, can occur. Waitangi Day hui offer a regular annual forum for iwi and Māori to engage in constitutional discourse. The Māori Party consultation hui immediately after the 2008 election shows a more recent and innovative example of effective engagement with the broader electorate. It is now a timing issue for Māori stateswomen and statesmen to request the Crown to engage in the constitutional conversation.

27.3.2.3 Māori Mandate for Constitutional Reform

Some may be anxious to know whether Māori have established a relevant mandate for Māori to work with the Crown on constitutional reform. I can assure you that Māori currently do not have one single mandated voice on these issues, and such a mandated (or even unified) voice is unlikely to emerge soon. It is doubtful that tribal leaders alone have plenipotentiary authority to give Māori consent to constitutional reform. Uncertainty and concern for this matter is not entirely problematic for me at this stage – the lack of a clear mandate, and diversity of opinion amongst Māori, is similar in many respects to the lack of mandate of politicians and varied opinions amongst the general public to reconfigure the constitution.

The Māori fisheries settlements provide precedential value for the premise that Māori should collectively determine who are the mandated individuals or entities for decision-making. The mandated individuals or entities clearly cannot be a "Māori consultative group" or "Māori advisory board" appointed by the Crown,[15] or current Māori electorate MPs seeking to act as proxies for Māori generally.[16] I would expect also that any mandate has some clear parameters including the need to report back to iwi (and possibly Māori generally) and allow a more in-depth consent process be conducted.

[15] See for example Tukoroirangi Morgan's reported comments in relation to a lack of distinct Māori representation in the (then being planned) Auckland governance and the suggestions that Māori undertake an advisory role instead, "That's not where the decisions are made. Giving Māori people the crumbs at the second level is a nonsense and we've made it quite clear we are not interested in being a tekoteko [symbolic figurehead] or tonotono [helper] – people who are subservient to the top table," reported in Trevett (2009).

[16] This would be a very unlikely consequence notwithstanding electoral suicide implications. Elected representatives acting as proxies for these matters disregards the premise that iwi Māori (not Māori electorate members of Parliament) are the contemporary Treaty partners.

27.3.2.4 Māori Consent to Constitutional Reform

Māori will need to determine what level of Māori consent is appropriate to progress constitutional reform options. It is considered that a mixture of voting by iwi and/or voting by voters on the Māori Roll will provide the most effective form of Māori consent (or otherwise) to reform options.

Voting by iwi could take place at the iwi level with a report back through the IL Forum. Iwi members could feasibly vote for options in accordance with their own processes (for example, referendums simultaneous with relevant governance elections, or at notified hui-ā-iwi (major tribal hui)). The result of each iwi vote process could be lodged with the IL Forum, and all results tallied at the IL Forum level. Appropriate representatives mandated by the IL Forum could then either present the collated results to the Crown and seek response, or await the outcome of the Māori Roll vote described below before progressing with the Crown.

A Māori Roll vote could also take place by way of referendum in much the same way as standard referendum amongst all voters – although this process could also be used without a referendum for the General Roll taking place for issues that may only require Māori Roll voting, for example, a preferred option reported by the IL Forum may be presented to the Māori roll for a referendum prior to any presentation of options to the Crown.

27.3.2.5 Additional Comments

It would be very difficult for the Crown to ignore effective engagement on constitutional reform that has been supported by both the IL Forum and the voters on the Māori Roll, and where mandated spokespersons are engaged by Māori for Māori in accordance with parameters set by Māori.

For many iwi however, effective participation in constitutional reform is premature given outstanding historical Treaty settlements. It would be surprising to undertake constitutional reform without at least major tribes including Ngāpuhi, Ngāti Kahungunu, and Ngāti Tuwharetoa, having the full capacity to participate without reallocating limited iwi resources to this work stream, and concern that their negotiations for individual iwi Treaty settlements are not being compromised. All iwi leaders and the Crown should consider this particular timing issue carefully. The risk of leaving some tribes behind in the process is real and may cause instability through litigation and other more political avenues.[17]

In addition, it is perhaps implicit with principles of reasonableness and good faith that Māori will act in the national interest for, and not unreasonably withhold

[17] The National government continues to hold to an informal timeframe to expedite iwi Treaty settlements by 2014. See for example Key (2010). This timeframe probably matches the timing required for relevant Māori exploration of and potential voting for constitutional reform.

consent to, constitutional reform.[18] It is very unlikely that Māori would act without the national interest in mind. The perpetual nature of Māori investment in New Zealand underpins the likelihood that the national interest (rather than just the short term financial, reputational, or political interest) is aligned with Māori participation in effecting constitutional reform. I doubt however, that the national interest is perceived by Māori to be a euphemism for the majority (or plurality) interest of the general electorate or the Crown's position on specific issues. The distinct status of Māori as tangata whenua and Treaty partners warrants independent Māori participation in constitutional reform unshackled by biased notional elements of "public good", "brand New Zealand", or the vagaries of potential market movements as a result of referenda on the issues.

27.4 Reconstituting the Constitution Optimises Expression of the Treaty

> Te pae tawhiti, whaia kia tata, te pae tata, whakamaua kia tina[19]
> Seek distant horizons and cherish those which you attain

It is undeniable that the Treaty is the most important document in New Zealand's history. Constitutional government in New Zealand is essentially reliant on Māori consent to the Crown to govern. My dream is that constitutional reform optimises expression of the Treaty.

27.4.1 The Treaty's Uncertain Application to the Exercise of Public Power

The current location of the Treaty in our legislative and constitutional framework remains uncertain.[20] There is no uniform reference or common meaning for the Treaty or its principles, and the Treaty's actual constitutional and legal force is unclear. Legislative references to the Treaty or its principles have escalated albeit inconsistently over the past three decades, and applicability of the Treaty to the

[18] This approach echoes the principle enunciated in Waitangi Tribunal (1983).

[19] A proverbial saying of Rangitakuku Metekiingi, tribal elder of Whanganui, Ngati Rangi, Ngati Apa and Ngati Hauiti.

[20] This uncertainty continues despite 35 years of contemporary Treaty jurisprudence arising primarily through the Waitangi Tribunal (since the Treaty of Waitangi Act 1975) and the courts (since *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641).