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Reconstituting the Constitution

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).

exercise of public power is dependent on a range of discretions and considerations. The legislative references include (with emphasis added):

- *Nothing in this Act shall permit* the Crown *to act in a manner that is inconsistent with* the principles of the Treaty of Waitangi (State Owned Enterprises Act 1986, section 9);
- This Act shall so be interpreted and administered *to give effect to* the principles of the Treaty of Waitangi (Conservation Act 1987, section 4);
- . . . *give particular recognition* to the principles of the Treaty of Waitangi and their application to the governance and services of the Foundation (Royal New Zealand Foundation for the Blind Act 2002, section 10);
- . . . *take into account* the principles of the Treaty of Waitangi (Resource Management Act 1991, section 8);
- . . . in the management of natural and physical resources, *full and balanced account is taken of*. . . (iii) The principles of the Treaty of Waitangi (Environment Act 1986, Preamble); and
- . . . *shall have regard to* the principles of the Treaty of Waitangi (Crown Minerals Act 1991, section 4).

These references generally relate to executive action rather than legislative action.

Treaty compliance or consideration, outside of legislative requirements, may not be legally necessary for the legitimate exercise of public power by executive officials or administrators. The Treaty is not yet a formally required consideration in all administrative decision-making. There have also been legislative efforts to remove all Treaty references from legislation.[21]

Whilst the Cabinet Manual records that the Treaty may "indicate limits in our polity on majority decision making" the legislation-making process itself is not subject to a formal "Treaty compliance" regime.[22] This contrasts with (for example) the rights and freedoms set out in the New Zealand Bill of Rights Act 1990.[23] The Māori Party provides some additional de facto monitoring for legislation vis-a-vis Treaty compliance at the executive level and during the legislative process (but this is not guaranteed as evidenced by the Auckland Super City governance legislation), and political negotiation not constitutional reference continues as the arbiter of Treaty compliance.

[21] See for example the failed Principles of the Treaty of Waitangi Deletion Bill 2006, Parliament Number 48, Bill Number 66–1.

[22] See Keith (2008).

[23] Section 7 of the New Zealand Bill of Rights Act 1990 provides: "Where any Bill is introduced into the House of Representatives, the Attorney-General shall, (a) In the case of a Government Bill, on the introduction of that Bill; or(b) In any other case, as soon as practicable after the introduction of the Bill, bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights."

The judicial position on the Treaty for the most part remains grounded to the principle enunciated by the Privy Council that the Treaty was a valid Treaty of cession and that it had no enforceability in municipal law except to the extent incorporated in statute.[24] This principle has remained applicable notwithstanding significant judicial commentary in various actions brought by the New Zealand Māori Council, the Tainui Māori Trust Board, and others over the past 25 years. Unlike the New Zealand Bill of Rights Act 1990 which requires the process of judicial interpretation (where possible) of legislation to prefer a meaning that consistent with the rights and freedoms contained in that legislation, there is no formal requirement for the judiciary to prefer an interpretation of any legislation that is consistent with the Treaty (although unless specifically required it would be unusual if a judge preferred an interpretation that was clearly inconsistent with the Treaty).[25]

Finally, the formal exercise of public power and devolved kāwanatanga by local government continues, for the most part and the Resource Management Act 1991 aside, unconstrained by Treaty considerations.[26] This is an extremely problematic situation given that Māori development and cultural survival will predominately occur at local and regional levels, and there appears to be marginal if any monitoring by the Crown of local government performance in this regard.

27.4.2 Optimising Expression of the Treaty

For Māori as Treaty partners, optimising the expression of the Treaty through the constitution is imperative for constitutional reform. Given that the primary relationship in the Treaty is between the Crown and Māori, it will also be important to

[24] See *Hoani Te Heuheu v Aotea Māori District Land Board* [1941] AC 308. The notable exceptions to this basic rule were outlined in *Huakina Development Trust v Waikato Development Authority* [1988] 2 NZLR 188 (basically holding that the court could resort to the Treaty as an extrinsic aid in statutory interpretation), and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (basically holding that the Treaty "colours" interpretation of legislation concerning the control of children).

[25] Section 6 of the New Zealand Bill of Rights Act 1990 provides: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

[26] For further commentary in the local government space, see Potaka (1999) (discussing the Treaty implications of devolving public power to local government). Some territorial authorities continue to act in direct contravention of the limited Treaty related provisions in the Resource Management Act 1991. See for example the Hamilton City Council's actions as reported *Waikato-Tainui Te Kauhanganui Incorporated v Hamilton City Council* [2010] NZRMA 285 (holding that the Hamilton City Council's decision not to notify a proposed variation to the District Plan to the iwi authority was invalid, and that the Council must consult with the iwi authority under the Resource Management Act 1991).

clarify whether that reform will also have ramifications for Māori in relationships with one another and also with the general public.

Many proponents of the Treaty consider that codifying the Treaty in a written constitution will optimise expression of the Treaty. I doubt that there is a more emotionally demanding topic for New Zealand's constitutional reform than codifying the Treaty into supreme law and/or entrenching the Treaty. I am not yet convinced that codifying the Treaty in such a way will have the immediate effect desired by its many proponents. However, enshrining the Treaty in legislation (as the likely codification method) continues to raise complex issues to be considered including:

- Will it be the Treaty or the Treaty principles that are in legislation;
- If the Treaty principles are used, which principles will be included in the "Treaty legislation";
- Is Māori/Crown/public consent required for codification of the Treaty;
- Will the Treaty be supreme law trumping all (or some) other laws;
- Will the Treaty legislation be entrenched and require a super-majority in Parliament to repeal and/or amend;
- Who will be ultimately responsible for interpreting the Treaty, for example, judiciary, Waitangi Tribunal, the Supreme Court, a Treaty of Waitangi Court, an administrative tribunal comprising judicial officials and Māori appointed officials; and
- Would Treaty interpretation rules or statutory interpretation rules or a mixture of both apply to interpreting legislation incorporating the Treaty?

Each of these issues may be ripe for the reconstitution process that the conference organisers envisage, the constitutional review planned by the Māori Party and National Party, or useful doctoral research. However, I expect that these issues will not be given uniform and durable answers in the immediate future. These issues could be core items for consultation, but could be more appropriate once other means to give expression to the Treaty are explored.

Optimising expression for the Treaty could be achieved through alternative means for complete and comprehensive codification. These alternatives could include some or all of the following:

- Redefinition of Parliament, for example, Treaty of Waitangi (Upper) House with equal numbers of Māori and non-Māori representatives that must approve all (or some) legislation;
- Head of State changed (for example, to a person approved by the Māori Roll (or IL Forum) and General Roll);
- Requiring a mandatory Attorney-General report on non-compliance with the Treaty whenever a Bill is introduced (or immediately thereafter);
- Ensuring statutory interpretation is consistent with the Treaty;
- Using the Treaty as an extrinsic aid to statutory interpretation;
- Ensuring that the Treaty is formally considered in all administrative decision-making;

- Introducing an internal Treaty compliance process for all Cabinet decision-making;
- Establishing a Treaty of Waitangi Court;
- Requiring local government to comply with the Treaty in all decision-making; and
- Requiring the Select Committees to ensure all Bills comply with the Treaty.

Whilst not requiring formal codification of the Treaty in legislation – as supreme law or otherwise – implementing some (or all) of these options would go some way to enhancing the expression of the Treaty across the exercise of public power. Some of these options have more constitutional significance than others and differing implications for the social contract. Importantly however, these are matters that could feed the constitutional conversation within Māori and between Māori and the Crown.

27.5 Constitutional Reform Optimises Expression of Tikanga

E kore au e ngaro, he kakano i ruia mai i Rangiatea
I shall never be lost, the seed that is sown from Rangiatea

The Treaty is not the only starting point or end point of Māori constitutional aspirations or, importantly, how the constitution can best give effect to tikanga. In my dreaming, tikanga infuse substantive aspects of the constitution – by way of legislation and the common law and – across the exercise of public power. Constitutional cultural attitudes in New Zealand may include tikanga such as kōtahitanga (unity). The common law and legislation may evolve to optimise expression of tikanga such as manaakitanga (caring/sharing) and kaitiakitanga (responsibility/guardianship).

27.5.1 Describing Tikanga

Tikanga (and kawa (protocols)) can be seen as model personal and community standards guiding behaviour of many Māori. Tikanga are often considered the rules (in a Māori sense) by which things are done properly and underpin obligations that Māori have towards other humans, animate and inanimate objects. They are not sourced in the Treaty, legislation or regulation, but rather from Māori oral and customary traditions. Many tikanga do mirror behavioural expectations of other cultures.

For example, the tikanga practice associated with taking ones shoes off when entering into a wharenui is not legislatively required (and you probably will not be prosecuted for not taking your shoes off) but is regarded as a mandatory at most

marae throughout New Zealand. Another example is the tikanga of whanaungatanga (familiness) which implicates relationship obligations such as:

- Tuakana-teina (sibling relationships) where it is expected that an older sibling/relation may care for and "look out" for a younger sibling/relation; and
- Kaumatua-mokopuna (grandparent-grandchild) where it is expected that a grandparent will pass on learning (and love and lollies) to his/her grandchild.

This "Māori way of doing things" is very alive and functioning amongst Māori and forms a significant part of the constitutional bedrock of Māori communities – who exercises power and how is it exercised.

27.5.2 Statutory Law and Tikanga

Legislation is starting to incorporate tikanga. For example: kaitiakitanga;[27] whanaungatanga;[28] and tikanga Māori[29] are all made reference to in statute law.

Whilst limited primarily to laws concerning Treaty settlements and the environment, legislators are clearly giving some consideration as to how tikanga may form part of statute. In this respect it is important that the inconsistency for wording and the application of Treaty principles is not emulated with tikanga, and constitutional reform may offer an opportunity to achieve this.

27.5.3 Optimising the Expression of Tikanga

Customary (or aboriginal/native) title/interests affirming certain constitutional guarantees may continue to accrue to Māori notwithstanding the Treaty, constitutional government, and other constitutional change over the past 170 years. The common law affirms the principle that unless there is statutory intervention or declaration of extinguishment, indigenous peoples own their own properties for so long as they wish to keep them and how these properties are so owned is determined by indigenous customs and laws (essentially tikanga) and not the customs and laws of England.[30] Unfortunately, outside of property related legal issues, the Courts have done little to explore opportunities to recognise tikanga.

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[27] See for example section 7 of the Resource Management Act 1991 (exercise of functions and powers under the legislation requires particular regard to kaitiakitanga), and section 3 of the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 (purpose of legislation).

[28] See for example Schedule 2 of the Central North Island Forests Land Collective Settlement Act 2008 (iwi acknowledging commitment to resolution process that amongst other things promotes whanaungatanga).

[29] See for example section 7(2A) of Te Ture Whenua Māori Act 1993 (knowledge of tikanga Māori as criteria for appointment of Judges).

[30] See for example the obiter comments in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.

The Declaration on the Rights of Indigenous Peoples echoes the principle that laws need to recognise tikanga by providing (emphasis added):

- *Article 26: Ownership*. Indigenous peoples have the right to own and control the use of their land, waters and other resources. *Indigenous laws and customs shall be recognised.*
- *Article 33: Indigenous Laws and Customs*. Indigenous peoples have the right to their *own legal customs and traditions*, as long as they accord with international human rights law.

Giving greater expression to tikanga by way of the common law does not require any intervention from legislators or the general public, or rely on definitions for terms such as kāwanatanga, tino rangatiratanga and sovereignty. Tikanga could feasibly be vested with legal status although judicial discretion and interpretation will ultimately guide under what common law circumstances this occurs.[31]

What this means in practice may also provoke uncertainty and anxiety amongst Māori as well as some conference attendees. Māori may be disturbed with the relevance and/or authority of the judiciary to determine what constitutes tikanga. Others may find the notion of Māori rules being included in the common law as a step too far beyond ordinary custom that underpins common law. At the very least, any interpretation of the common law that recognises tikanga needs to be accurate, supported by reliable evidence, and attributed to actual (and not claimed) practice.

27.5.4 Tikanga in Action

27.5.4.1 Common Law

The exercise of a trustee's duties provides an example of how tikanga may influence the interpretation of the common law. Trustees are generally under a duty to act prudently in holding assets on trust for the beneficiaries. Imagine for a moment that the following circumstances apply:

- Three Māori trustees hold general land on discretionary trust for descendants of the settlor;
- The land transferred from Māori land to general land as a result of the Māori Affairs Amendment Act 1967 which required compulsory conversion of Māori land title to general land where there were four or fewer owners;
- There is no mortgage or securities attached to the land;

[31] See for example Thomas 2009, p. 280. There are numerous issues which may arise with tikanga being vested with legal status but are outside the scope of this paper. For example, will recognition of tikanga be associated with a more inquisitorial approach by the judiciary, and will tohunga/experts and treatises be given greater credibility in the consideration of tikanga.

- The land is providing an annual net return of 1.5% and there is minimal income available every year for distribution to the beneficiaries (some of whom live overseas);
- There is little likelihood of capital gain in the property as it is landlocked, surrounded by marginally productive land, and has no water available;
- The settlor's great grandfather is buried on the land but the exact burial location is unclear;
- The discretionary beneficiaries do not have an interest in any other land and are receiving minimal income from the land held on trust;
- The trustees could sell the land and make an annual net return of 5.5% by holding the money from the sale in a term deposit at the TSB Bank and therefore increase the income available for distribution to the beneficiaries;
- An Irish dairy farmer seeking to amalgamate titles in the area offers to buy the land for significantly more than market value (and the current value);
- The trustees decide against sale on the basis that the land has ancestral value because of the urupā (burial place); and
- Some of the overseas-based discretionary beneficiaries decide to sue the trustees for breach of their duty of care.

The financially prudent decision for the trustees is likely to be selling the land in order to invest elsewhere for greater return, and subsequently increase income available for distribution to the beneficiaries. The judiciary are faced with applying the common law (and in this example section 13D of the Trustee Act 1956 in relation to trustees' investment powers) to a situation where it is clearly in favour of the beneficiaries applying for relief.

However, tikanga such as kaitiakitanga and manaakitanga are very common practices and customs within Māori communities and are almost certainly relevant to these circumstances. Whilst not maximising the financial returns from the land, the trustees may be expressing kaitiakitanga (for the settlor's great grandfather) and manaakitanga (for the settlor's descendants – living or not) by declining to sell the property. The process to recognise tikanga in this situation could depend on judicial enthusiasm and ability to gather reliable evidence on the practice of these tikanga (perhaps through expert court witnesses or judicial assessors assisting the judge) but the reader should be able to see what type of conundrums are faced by Māori in relation to circumstances where tikanga and common law (and statutory) duties may be difficult to reconcile or balance.[32]

[32] Another possible approach is that certain tikanga evolve as constitutional cultural attitudes or constitutional norms such as those identified by Matthew Palmer. See Palmer (2008), pp. 234–293. Palmer notes constitutional cultural attitudes in New Zealand being authoritarianism, egalitarianism and pragmatism, which he considers underlie constitutional norms being representative democracy, parliamentary sovereignty, rule of law, judicial independence and an unwritten, evolving constitution. I can envision tikanga such as aroha (respect) as a recognised constitutional attitude, and kōtahitanga constituting a constitutional norm.

27.5.4.2 Legislation-Making Process

In addition, tikanga may be able to affect legislation making itself – and not just the interpretation of common law. As an example, the House may adopt tikanga as standing orders or practice guidelines. Indeed, tikanga of allowing other members to speak without interruption may actually make for better political judgment and legislation making. Other tikanga such as women deciding when a male's speech should end by way of a song should also result in improved behavioural standards. The Māori Party has influenced the expression of tikanga related concepts for drafting the substance of policy and legislation (for example, whānau ora). In the event of the Māori Party (or a party with similar basic values) not being in government however, the framing of tikanga in the legislative process may have a finite life.

27.6 Conclusion

> He ao apōpō, he ao tea[33]
> Tomorrow is a new day which will bring clarity

I have outlined some simple dreams for New Zealand's future and constitutional reform as follows:

(a) Māori can effectively participate in constitutional reform, and help lead the reform process;
(b) Constitutional arrangements, if any, give better expression for the Treaty; and
(c) Constitutional arrangements, if any, give better expression for tikanga.

For stability purposes, the New Zealand public needs to be informed, inspired and invited to contribute to reconstituting the constitution. International human rights instruments, as well as current and projected demographics, encourage this conclusion. Technology and innovative engagement options allow for an efficient and more meaningful process, as do New Zealand's relatively limited geography and small population. Smart marketing will be needed.

Māori have distinct roles and responsibilities in any constitutional reform process and should help to lead that process. These roles and responsibilities derive from two distinct bases – the status of Māori as tangata whenua and as Treaty partners – that are affirmed by international documents. My view is that moderate constitutional reform requires Māori consent (not unreasonably withheld) both as to the process for and the substance of the reform. Importantly, Māori should consider (with the national interest in mind) what processes internally to Māori will be used

[33] A proverbial saying attributed to Rangitakuku Metekiingi.

to consider constitutional reform and the appropriate timing for progressing such reform. This internal focus may have more kōtahitanga and rangatiratanga implications than any eventual engagement with the Crown.

The Treaty is caught in a vortex between law and politics – everyone knows that the Treaty is important but there is no current agreement amongst key stakeholders as to the level of its importance and its applicability to constitutional arrangements. Our constitutional arrangements can and should give better expression to the Treaty. These options range from minor changes in legislation, the standing orders, and judicial interpretation, to more substantive structural changes to the exercise of public power across the three branches of central government. The level of the general public, and Māori, support for different constitutional reform choices will likely depend on the nature of changes sought and the social contract implications. Ratifying the Treaty into domestic law may provide the best solution for constitutional arrangements to give better expression to the Treaty – although additional options are available that may cause less short-term volatility and more long term durability.

The Aotearoa New Zealand constitution can optimise expression of tikanga that are affirmed by but not limited to Treaty discourse. Tikanga could infuse substantive aspects of the constitution further, including the common law, statutory law, and the full exercise of public power.

I doubt my dreams set out herein are a silver taiaha (weapon) for all the political challenges confronting Māori, or the inevitable constitutional conversations that lie ahead, but hope that this type of dreaming can provide ballast for a more autochthonous constitutional reality and be mana-enhancing to all New Zealanders. In that way, I foresee that a more sustainable Aotearoa New Zealand awaits us.

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