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“Kāore o ngā moemoea, don’t dream it’s over”

Is the constitutional dream of embedding Te Tiriti o Waitangi into its framework in Aotearoa over?

LLM RESEARCH ESSAY

LAWS 522: PUBLIC LAW

FACULTY OF LAW

TE HERENGA WAKA: VICTORIA UNIVERSITY OF WELLINGTON

October 2021

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Introduction

The dreams of our tipuna of ensuring Te Tiriti o Waitangi is reflected in the constitutional framework of Aotearoa continues to hang in the balance with limited movement from the government to embed the founding document of Aotearoa into the constitutional framework the guides the nation. After nearly 200 years of the signing of Te Tiriti o Waitangi/Treaty of Waitangi, those working to serve to the public of New Zealand continue to struggle to understand exactly what Te Tiriti o Waitangi/the Treaty of Waitangi means, and their obligations within our current constitutional framework of Aotearoa.

Te Tiriti o Waitangi/Treaty of Waitangi is unique to New Zealand. There are no other examples of similar treaties between indigenous and colonising nations such as this. New Zealand's constitutional framework has been adapted from a western legal framework which was never intended or had any experience with dealing with such an agreement. With the differing interpretations of the obligations by those who signed Te Tiriti o Waitangi/Treaty of Waitangi, jurisprudence continues to develop over the obligations of the Crown and who the Crown is in respect of this agreement. Some argue that Te Tiriti o Waitangi/Treaty of Waitangi obligations are only for the Crown which does not include those who serve the government of the day such as public servants. Such tension raises the ultimate question being posed of who exactly is the Crown? Former Chief Justice Rt Hon Dame Sian Elias has described the crown as "all branches of government, legislative, executive and judicial"[1].

Although these tensions exist, we have seen an increase in Aotearoa's society to reference the obligations of the Crown to Te Tiriti o Waitangi/ Treaty of Waitangi. This has led to the empowering of Māori to participate in central and local government leadership, and decision making continues to also grow. Furthermore, we have also seen the development of Māori focussed work programmes with the aim of uplifting and empowering those serving the public to ensure that New Zealand understands its origins and its obligations to tangata whenua. So, with that backdrop, is the dream really over on embedding Te Tiriti o Waitangi into the constitutional framework in Aotearoa really over?

The purpose of this paper is to explore the current constitutional framework that exists in New Zealand, understand the current climate and whether or not the dream of developing a new constitution that upholds the mana of Te Tiriti o Waitangi is over. By using our experience of the past, I will then look towards the future to provide analysis and discussion

[1] https://natlib.govt.nz/he-tohu/korero/what-is-the-crown

on what should happen to ensure that a new constitutional framework can be developed in Aotearoa that truly reflects the society that it is meant to serve.

Our constitutional journey

Constitutional Frameworks prior to colonisation

Prior to the arrival of the Pakeha in Aotearoa, Tangata Whenua had this own constitutional framework in which the communities of Aotearoa lived by. Māori used notions of Tikanga Māori to centre their approach to how communities were governed. there was a distinct Māori constitutionalism, founded in tikanga.[2] Tikanga guided the parameters of political and constitutional conduct and is defined by a set of values. These set of values were guided by tikanga Māori. The same values guided the way in which Māori lived their lives. Tikanga Māori also served as a way in which society was regulated. Tikanga Māori was used as a guide a way in which whānau interacted, care for each other and engaged within their communities. It also provided a way in which a whānau wanted to live their lives in order to thrive in the community.

Iwi and hapu developed their own tikanga Māori which was derived from their values and their experiences. Not all iwi or hapu shared the exact same tikanga Māori however, the general guiding principles such as manaakitanga, rangatiratanga, mana, tapu, aroha and noa were built from the same concepts and were consistent. Tikanga Māori was used as a way of means of social control or order. Mead[3] describes Tikanga Māori as the way in which Māori control "interpersonal relationships, provides ways for groups to meet and interact, and even determines how individuals identify themselves".

When reflecting on tikanga Māori as a constitutional framework, political organisation in tikanga Māori was traditionally based around hapu sometimes acting in alliance with others[4]. Between 1835 and 1838, 52 mostly northern Rangatira signed He Whakaputunga[5]. He Whakaputunga proposed that Māori come together regularly in Whakaminenga (assembly) to make joint decisions, with a clear concept of a Māori nation state[6]. The Whakaminenga was to include Rangatira, who would meet annually to pass laws, make regulations and act as

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[2] Moko Mead Hirini *Tikanga Māori, Living by Māori Value* (1st Ed, Huia Publisher, Wellington, 2003) at 5
[3] Above at 9
[4] Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: Report on Stage 1 of te Taparahi o Te Raki Inquiry* (Wai 1040, 2014) at 157
[5] At 154
[6] Independent Working group *Matike Mai o Aotearoa* (2016) at 44

Parliament[7]. It provided a way for iwi and hapu to connect at a national level and a place where Māori and the Crown could make joint decisions while respecting the mana of the other. [8] The Whakaminenga never met as a group with the British, but gatherings of Rangatira did take place[9]. This shows that prior to the signing of the Treaty of Waitangi and Te Tiriti o Waitangi, Māori had ways in which they made decisions and created the general law and order within the country. However, things changed with the arrivals of Europeans, and with such the western dominance influence started to take hold and change the way in which the country was governed. New Zealand became largely became self-governing in 1852 with the New Zealand Constitution Act[10].

Te Tiriti o Waitangi and colonisation of Aotearoa

The 1800's saw the first arrival of Europeans to Aotearoa. A tense time in Aotearoa led the negotiation of the founding document of Aotearoa to be formed and signed, called Te Tiriti o Waitangi. Unfortunately, what unfolded over 100s of years following the signing of the Te Tiriti o Waitangi saw the erosion of the tikanga Māori practices, governance and constitutional arrangements. As Māori become the non-dominant race in Aotearoa, we saw the rise of power of pakeha and the then co-potion western constitutional frameworks which were then to rule communities and change the way in which all who lived in Aotearoa lived.

The constitutional frameworks that were formed to govern New Zealand are described as an "unwritten" or an "uncodified" constitution. This description is based on the western concept of constitutionalism namely the same constitutional approach that is present in Britain. New Zealand's constitutional framework developed over the years to contain a series of New Zealand statutes, constitutional conventions, judicial decisions in the common law, international treaties and doctrines or principles and instruments of the branches of government. Matthew Palmer had previously identified 80 such elements in the New Zealand's constitution. These elements are made up of 45 Acts of Parliament, only nine coming from common law[11]. These constitutional frameworks are derived from law from England which have never incorporated or recognised the existence of indigenous nations or tangata whenua. Since in 2021, we have no see the inclusion of Te Tiriti o Waitangi into any constitutional frameworks.

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[7] Mason Durie "Tino Rangatiratanga: Māori self-determination" (1995) 1 (1) He pukenga korero: a journal of Māori studies 44 at 45.
[8] Independent working group, above at n 6 at 49
[9] Waitangi tribunal above n 4, at 209 and 214
[10] Moon Paul "A Proud thing to have recorded: the origins and commencement of national indigenous political representation in New Zealand through the 1867 'Māori Representation Act" (2014) 16 Journal of New Zealand Studies 52 at 53
[11] Palmer Matthew "*Constitutional Dialogue and the Rule of Law"* Keynote address *(*2016) Faculty of Law, Hong Kong university

Te Tiriti o Waitangi/Treaty of Waitangi

Te Tiriti o Waitangi has never been formally incorporated into the constitutional framework of Aotearoa. Over the past 180 years we have continued to hear calls from Māori for Te Tiriti o Waitangi/Treaty of Waitangi to be recognised appropriately. Te Tiriti o Waitangi/Treaty of Waitangi lays the foundation in which the Crown is obliged to consult with Māori. Te Tiriti o Waitangi/Treaty of Waitangi consists of preambles and articles which both in English and Te Reo Māori outlining the expectations that each party had on how their partnership would work at the time of negotiations and it has been argued by many that this partnership has never been upheld. Such differences in interpretation of the partnership and lack of formal constitutional guidance have led to decades litigation, and the development of significant jurisprudence in an attempt to assist both parties in establishing long lasting relationships with each other. This jurisprudence has dramatically increased also since the introduction of the Waitangi Tribunal in 1975[12].

The Waitangi Tribunal has inquired into many alleged breaches of Te Tiriti o Waitangi/Treaty of Waitangi and has produced many reports since the 1970's which provide a foundation of understanding of how to interpret the commitment the Crown and Māori made to each other in 1840. The different constituted tribunals since the establishment of this specialised tribunal have developed a suite of principles as a tool to assess whether the Crown has breached their commitment to Māori and which ones apply.

Contrasting natures but threads of commonality

Every society aims for a community to live in a harmonious way, and they naturally develop systems of law and constitutional ways. As we can see Māori naturally undertook this role prior to the arrival for Europeans and prior to the signing of the Treaty of Waitangi/Te Tiriti o Waitangi. It is not disputed that when bot parties signed Te Tiriti o Waitangi/Treaty of Waitangi there was a mutual wish for both parties to build a new nation post colonisation that recognised each other and ensured that both communities live in a harmonious way. This included the mutual desire to develop systems of law that would suit the new world.

However, the tension came as the European settles dominated the development of this as the two cultures integrated and took steps to control societal order. This included the adaption of the western system of laws and constitution which has since created nearly 200 years of tension between both cultures. When reflecting on the past, we can see the differences in approaches with the adoption of the constitutional framework in New Zealand with no mention of traditional ways in which Māori use tikanga as their first laws or the silence of where the Treaty of

[12] Treaty of Waitangi Act 1975

Waitangi/Te Tiriti o Waitangi sits in that framework. Even though there are up to 80[13] sources for New Zealand, there has been no inclusion of tikanga or the Treaty of Waitangi/Te Tiriti o Waitangi in that constitutional framework.

Unfortunately, over the past 100 years there have been active steps through the actions of colonisation to try to irradicate any trace of traditional legal structures that Aotearoa had prior to the arrivals of the European settlors including active steps taken to try to disempower Māori in all areas of life. This approach is not uncommon to approaches seen in other countries effected by colonisation however, the goal to completely disempower was never achieved. Even though some concepts and knowledge of tikanga Māori were lost due to the introduction of colonisation and the suppression of Māori culture, tikanga Māori and matauranga Māori (knowledge) were never completely lost. With the removal of some policies and laws which directly supressed Māori culture in Aotearoa such as the Tohunga Suppression Act, Māori were then freed to reconnect again to their culture. These changes enabled Māori to strengthen their own communities. Over the recent years we have seen a resurgence of the use of tikanga Māori and matauranga Māori in many areas of society in Aotearoa as well as many non-Māori recognising the importance of this knowledge and cultural practice. We see also in the development of laws and jurisprudence in both mainstream and specialised courts.

A movement to recognise Te Tiriti o Waitangi

The movement to recognise Te Tiriti o Waitangi has gained significant traction over the past three decades. We have seen the rise of the incorporation of Te Tiriti o Waitangi principals in legislation, the use of Te Tiriti o Waitangi principles in workplaces and an active commitment by many organisations to recognise their importance.

The development of Te Tiriti o Waitangi principles

The jurisprudence developed from the Waitangi Tribunal has been extensive since 1975. They have developed a suite of principles after undertaking extensive inquiries into historical claims of most iwi and hapu of Aotearoa. These principles are now being referred to in a number of settings including Courts and guide the way in which public service departments work to serve communities. It is not uncommon to see the use of Te Tiriti o Waitangi principles to be on websites of public departments where they make public commitments stating that these are the values of their organisation[14]. Although it is common to see the word of “rangatira” on a website, often the whakapapa of that term is never explained in a way that those having to work by the value know its origin. The most common principles used in these settings are the principle of

[13] Above at n11
[14] www.corrections.govt.nz

partnership and the duty of informed decision making, the principle of tino rangatiratanga, the principle of kāwanatanga and the principle of active protection.

The principle of partnership and the duty of informed decision-making

The principle of partnership is well-established in Treaty jurisprudence. Both the Courts and the Waitangi Tribunal have referred to the concept of partnership to describe the relationship between the Crown and Māori.[15] The Court of Appeal has likened the Treaty relationship between Māori and the Crown as 'akin to a partnership', which imposes on the partners the duty to act reasonably, honourably and with the utmost good faith.[16] Inherent in the Crown's obligation to act in good faith is the duty to make informed decisions.

In *New Zealand Māori Council v Attorney General* (1987), Justice Richardson observed:

> The responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty.[17]

The Waitangi Tribunal, in expanding on this duty, affirmed in the Ngawha geothermal report:

> Before any decisions are made by the Crown … on matters which may impinge upon the rangatiratanga of a tribe or hapū over their taonga, it is essential that full discussion take place with Māori. The Crown obligation actively to protect Māori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.[18]

In the *Hauraki Settlement Overlapping Claims Inquiry Report*, the Tribunal, referencing the *Te Arawa Settlement Process Report*, emphasised that only decisions that are fully informed can be sound, fair, protective of Māori interests, and thus uphold the Treaty partnership, and the honour of the Crown.[19]

The principle grounds the duty of informed decision-making. Taking it one step further, the Tribunal emphasised that the principle of partnership was particularly important when it came to providing social services, concluding that partnership is the only model that will produce the best outcomes for Māori. Recognising that Māori were not resourced to carry

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[15] Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri: Wellington, 2002), p 77

[16] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) per Cooke P at 664; see also per Richardson J at 682; per Somers J at 692-693; and per Casey J at 702

[17] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 683

[18] Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 101–102

[19] Waitangi Tribunal, *Hauraki Settlement Overlapping Claims Inquiry Report* (Wellington: Legislation Direct, 2020), p 12; Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), pp 26-27

out the delivery of social services on their own, the Tribunal envisaged a model based on the Crown empowering and supporting Māori to be fully involved in decision-making on all matter affecting their community. What this meant was 'a partnership in which the State provides logistical and financial support and the Māori Treaty partner exercises decision-making responsibility'.[20]

Elaborating further in the *Hauora* report, the Tribunal said that partnership under the Treaty, was much more than participation. It means 'at least joint decision-making between Crown and Māori agencies and groups, not mere "contributions to" or "participation in" decision-making'.[21]

The obligation to act reasonably, honourably, and in good faith also includes the need to respect each other's point of view. In the *Taranaki Report*, the Tribunal recognised the right of Māori 'to enjoy cooperation and dialogue with the Government'.[22] The Tribunal found that a refusal by the Crown to respect Māori authority, by failing to treat with them as equals, was a serious breach by the Crown to honour its Treaty obligations.[23]

The principle of tino rangatiratanga

The principle of partnership is expressed through the necessary balancing of the concepts of kāwanatanga and tino rangatiratanga expressed in articles 1 and 2 of te Tiriti / the Treaty.[24]

The Waitangi Tribunal observed that rangatiratanga and mana are inextricably linked. Tino rangatiratanga is the mana or full authority to possess what is yours and to control and manage it in accordance with your preferences. [25] This is something more than the 'full, exclusive and undisturbed possession' guaranteed in the English version of the Treaty. 'In Māori terms, the two words are really inseparable … As we see it, "rangatiratanga" denotes "authority". "Mana" denotes the same thing but personalises the authority and ties it to status and dignity'.[26]

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[20] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Taumata Tuarua, vol 2* (Wellington: Legislation Direct, 2011), p 559

[21] Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wellington: Legislation Direct, 2019), p 78

[22] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), p 20

[23] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), pp 8, 55

[24] Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wellington: Legislation Direct, 2017), pp 22–23; Waitangi Tribunal, *Māori Electoral Option Report* (Wellington: Brooker's Ltd, 1994), pp 3–4

[25] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wellington: Government Printing Office, 1983), p 51; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker & Friend Ltd, 1987), p 185

[26] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printing Office, 1985), p 67; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker & Friend Ltd, 1987), p 186

In the Muriwhenua Fishing report, the Tribunal found that the guarantee of tino rangatiratanga comprised three main elements:

- Authority or control is crucial because without it the whole iwi foundation is threatened socially, culturally, economically and spiritually.
- The exercise of authority must recognise the spiritual source of taonga, and to ensure the maintenance of the iwi foundation for succeeding generations.
- The exercise of authority is not only over property but also persons within the kinship group and their access to resources.[27]

In the context of this inquiry, we will therefore focus on the right of iwi to care for, protect and provide for, tamariki Māori.

The Tribunal specified that tino rangatiratanga referred to tribal management, not to a separate sovereignty.[28] In the *Taranaki Report: Kaupapa Tuatahi*, the Tribunal equated tino rangatiratanga with mana motuhake and likened them to the international terms, aboriginal autonomy and aboriginal self-government.[29] The Tribunal expanded on this in the central North Island report.

> Essentially, in terms of the environment and natural resources, the Māori right to autonomy and self-government means that they have the right to govern and manage their own policy, resources, and affairs with minimum Crown interference but in accordance with their duty under the Treaty to act reasonably and with the utmost good faith.[30]

Tino rangatiratanga limits the Crown's right to govern and is itself limited by the obligations of the iwi to manage rights between hapū and with neighbouring iwi. Tino rangatiratanga also carries with it the obligations of kaitiakitanga or stewardship to maintain and protect resources in order to preserve the tribal base for succeeding generations.[31]

The Tribunal confirmed that the Treaty continues to speak today: 'The Crown's guarantee of te tino rangatiratanga continues, even where today the guarantee lacks the original context and content' of when it was signed.[32]

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[27] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Print Ltd, 1988), p 181
[28] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Print Ltd, 1988), p 187
[29] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), p 5
[30] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims* (Wellington: Legislation Direct, 2008), p 1241
[31] Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims* (Wellington: Legislation Direct, 2008), p 1246
[32] Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p6

The principle of kāwanatanga

In the Māori text, the chiefs ceded to the Queen 'kāwanatanga'. The Waitangi Tribunal observed that this was something less than the sovereignty or absolute authority ceded in the English text. According to the Tribunal, as used in the Treaty, kāwanatanga means the right to govern and make laws for the good order and security of the country, but subject to an undertaking to protect Māori interests.[33] Kāwanatanga, therefore, must be exercised in accordance with the principles of good government and in a way that actively protects, and does not diminish, tino rangatiratanga.[34]

In the *Kōhanga Reo* report, the Tribunal found that the right of the Crown to govern is qualified by the requirement to actively protect the tino rangatiratanga 'or authority of Māori and their taonga'. It stated that 'the Crown must design early childhood education policy in terms of te reo Māori for Māori children and their whānau in a manner that does not undermine the rangatiratanga rights of Māori and their institutions'.[35]

The Tribunal also referred to the Crown's obligation in its *Ko Aotearoa Tēnei* report, when discussing the survival of te reo Māori.

> "It is unarguable that the right to govern should be exercised wisely so as to produce well-designed policy which is implemented efficiently to minimise the cost to the taxpayer. That is an obligation owed by every government in the world, whatever the source of its right to govern. But here there is a greater dimension: a taonga of the utmost importance is at issue. In this Treaty context, the state owes Māori two kāwanatanga duties; transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly functional. Te reo Māori deserves the best policies and programmes the Crown can devise."[36]

The principle of active protection

The Crown's duty of active protection is a central Treaty principle that was first raised by the Waitangi Tribunal in its early reports. In 1983, the Tribunal pointed out that 'the promise to "protect" is provided for in the second article of the English text, and in the preamble to both the English and Māori texts.[37]

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[33] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printing Office, 1985), p 66
[34] Waitangi Tribunal, *The Mokai School Report* (Wellington: Legislation Direct, 2000), p 10; Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 64
[35] Waitangi Tribunal, *Matua Rautia: The Report of the Kōhanga Reo Claim* (Wellington: Legislation Direct, 2013), pp 234-5
[36] Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuatahi* (Wellington: Legislation Direct, 2011) p 163
[37] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wellington: Government Printing Office, 1983), p 53

Commenting further on this guarantee in the Treaty, the Tribunal concluded that a failure to provide protection is as much a Treaty breach as any action of the Crown that removes Māori rights.

> "The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the preamble (where the Crown is "anxious to protect" the tribes against envisaged exigencies of immigration) and the third article where a "royal protection" is conferred. It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights".[38]

The Court of Appeal affirmed the principle of active protection in the 1987 *Lands* case. The Court found that the duty of the Crown is 'not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable'.[39] The president of the Court of Appeal described the Crown's responsibility as 'analogous to fiduciary duties', that is, to act in the best interest of another.[40]

The priority the Tribunal affords the principle of protection can be seen in the *Muriwhenua Land Report*:

> "The principles of the Treaty flow from its words and the evidence of the surrounding sentiments, including the parties' purposes and goals. Four are important in this case: protection, honourable conduct, fair process and recognition, though all may be seen as covered by the first".[41]

The Crown's duty of active protection was discussed by Justice Hardie Boys of the Court of Appeal in the *Broadcasting* case about te reo Māori.

> "It was not disputed either that the prime objective of the Treaty was to ensure a proper place in the land for the two peoples on whose behalf it was signed. Nothing could be further from that objective than the obliteration of the culture of one of them or its absorption into that of the others. Thus, protection of the Māori language, an essential element of Māori culture, was and is a fundamental Treaty commitment on the part of the Crown".[42]

The Inquiry will investigate if the Crown's has upheld its duty of active protection of the whakapapa and culture of tamariki Māori in care.

The Privy Council elaborated on the Crown's duty. The Council advised that the Crown's duty was not an absolute one but did depend on the nature and value of the resource.

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[38] Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printing Office, 1985), p 70
[39] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA),
[40] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA),
[41] Waitangi Tribunal, *The Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 388
[42] *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA) at 587

Where a taonga is threatened, the duty of active protection requires vigorous action, especially where its vulnerability can be traced to earlier breaches of the Treaty:

> "If as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations and may extend to the situation where those breaches are due to legislative action".[43]

Incorporation of Te Tiriti o Waitangi principles in legislation

There are many legislative examples in which imbed the principles of Te Tiriti o Waitangi/Treaty of Waitangi which can assist in guiding the Crown when working with Māori which has further gathered momentum in the development of recognising the need for the Treaty of Waitangi/Te Tiriti o Waitangi to be considered and included in New Zealand Constitutional Frameworks and how society works.

Conservation Act 1987

Section 4 of the Conservation Act 1987 requires the Minister of Conservation and Department of Conservation to give effect to the principles of the Treaty of Waitangi in the interpretation and administration of the Conservation Act (including all enactments listed in Schedule 1 of the Act). This section was one of the earliest examples of the Treaty of Waitangi recognised in legislation. The section remains on the strongest legislation direction with its "to give effect to aspiration[44]". The application of s4 given its broad nature has been central to much debate and confusion. Case law has attempted to assist with this.

In 2018, Ngāi Tai ki Tāmaki iwi represented by their Trust entity, Ngai Tai Trust, challenged whether section 4 required consideration by the decision-maker of a degree of preference for an iwi concessionaire over others in the Supreme Court on appeal. Ngāi Tai ki Tāmaki Trust ("Ngāi Tai Trust") sought judicial review of two decisions to grant concessions under s 17Q of the Conservation Act 1987.[45]

In that case Ngāi Tai ki Tāmaki outlined their deep and long-standing connections with the Rohe extending across Tīkapa Moana (Hauraki Gulf), including the ancestral motu of Rangitoto, Motutapu and Motu-a-Ihega (Motuihe). Ngāi Tai Trust alleged that the

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[43] *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) *[Broadcasting Assets case]* at 517
[44] Jacinta Ruru "Managing Our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi" New Zealand Journal of Environmental Law at 244
[45] *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation [2018] NZSC 122*

Department of Conservation ("DOC") was obliged to refuse to grant concessions to other parties as part of its duty of active protection of Ngāi Tai interests. It argued that granting other concessions would limit or remove opportunities for Māori. The Supreme Court decided whether the decision-maker had properly met the obligation in s 4 of the Act in granting the concessions.

The Supreme Court upheld Fogarty J's finding from the High Court that the decision-maker's dismissal of the possibility of preference being accorded to Ngāi Tai as mana whenua, and of the economic benefit that could accrue to Ngāi Tai meant that s 4 was not properly considered. However, the Supreme Court did not agree that the errors were "insufficient" to say that the Minister had breached s 4. The Court concluded that had a degree of preference been given to Ngāi Tai, and their economic interests taken into account, the decision-maker may well have reached a different conclusion on the application of s 4.

Section 4 required the Court to give effect to the Treaty principles in relation to the granting of concessions to other parties. Ngāi Tai relied on the principles of partnership, active protection, right to development and redress.

The Court found section 4 did require consideration of both the possibility of according a degree of preference to Ngāi Tai ki Tāmaki and the potential associated economic benefit of doing so. However, the Court also confirmed that section 4 does not create a power of veto for an iwi or hapū over the granting of concessions, nor any exclusive right to concessions in their rohe.

Oranga Tamariki Act 1989

Te Tiriti o Waitangi/Treaty of Waitangi is referred to in the recently amended Oranga Tamariki Act 1989/Children's and Young People's Well Being Act 1989. The bilingual titled legislation is the key piece of legislation which provides the legal framework for the care of all children in Aotearoa, New Zealand including those who whakapapa Māori.

The legislation was recently overhauled after an extensive review led by the Minister of Social Development in 2015[46] due to ongoing issues within the state care system. This was the first significant change in the Act in almost 30 years after the Child, Young Person's and Family Act 1989 was introduced following the landmark report of Puao-te-ata-tu[47].

[46] https://www.beehive.govt.nz/release/independent-expert-panel-lead-major-cyf-overhaul
[47] Ministerial Advisory Committee on Māori Perspective of Social Welfare *Puao-te-ata-tu* (Wellington, 1988)

An expert panel[48] was established by the Minister of Social Development in 2015 to look into the ongoing issues of state care. At the heart of the expert advisory panel's report that they released after investigating these issues, the panel said: *"at the heart of the issue is a profound misunderstanding of the place of the child in Māori society and its relationship with whānau, hapu and iwi structures"*[49].

The main recommendation of the expert panel was to strengthen their obligations to the welfare of a Māori child in care and introduced a name change of the act as well as being guided by the principle of Mana Tamaiti[50]. This led to wide sweeping changes of the 1989 Act to introduce the section of 7AA. 7AA provides for a mandatory obligation of the Chief Executive of the Ministry of Children/Oranga Tamariki to recognise and provide practical commitment to the principles of Te Tiriti o Waitangi and to ensure that any practices involving Māori children focus on the following[51]:

1. Reducing disparities.
2. Have regard to Mana Tamaiti.
3. Ensuring that whakapapa and whanaungatanga to whānau hapu and iwi are maintained.
4. Developing strategic partnership with iwi and Māori organisations including iwi authorities.
5. Reporting mechanisms by the Chief Executive on measures undertaken to her duties including measure in improving outcomes for Māori children and young persons who come in attention to the department.

The introduction of the changes to the act specifically relating to Māori came into effect in July 2019. The changes to the Act also led to the introduction of a new Ministry[52], which also holds of bilingual name, Oranga Tamariki, the Ministry for Children.

The introduction of the new act with references to tikanga Māori concepts has come with new challenges for those who are interpreting, using and make decisions around the Act. However, the key driver for this change is to improve the outcomes for Māori who come into contact with state care. The responsibilities of the Chief Executive that are now legislated signals a fundamental shift to ensure that the Chief Executive and the state are responsible to ensure

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[48] https://www.msd.govt.nz/documents/about-msd-and-our-work/newsroom/media-releases/2015/cyf-modernisation-tor.pdf
[49] Ministry of Social Development *Expert Panel Final Report, Investing in New Zealand's Children and their Families* (Wellington, 2015)
[50] Oranga Tamariki Act 1989**,** Part 2, section 13
[51] Oranga Tamariki Act 1989, 7AA
[52] https://www.beehive.govt.nz/release/new-ministry-vulnerable-children-oranga-tamariki-launched

that the principles of Te Tiriti o Waitangi are given effect. Even with the enactment of such changes, Oranga Tamariki has come under intense scrutiny over the past 2 years since its changes. There continues to be significant debate on exactly what those changes mean and how they can be enacted in a legal and policy setting. Oranga Tamariki practices towards children that whakapapa Māori has been at the centre of significant investigations and reviews recently led by the Office of the Children's Commissioner, the Waitangi Tribunal, the Office of the Ombudsman, the Whanau Ora Commissioning agency and Oranga Tamariki itself. Such investigations have highlighted the lack of cultural capability and understand of the obligations of Te Tiriti o Waitangi/Treaty of Waitangi being at the centre of failures in the agency[53].

Sentencing Act 2002

The Sentencing Act 2002 and its predecessor, s16 of the Criminal Justice Act 1985 was used expressly by parliament to try to right the wrongs of colonisation to decease the disproportionated number of Māori incarcerated in Aotearoa and to recognise its commitment to Te Tiriti o Waitangi/Treaty of Waitangi. In its earlier iteration in 1985, the provision was very much underutilised, and the re-worded provision not only gives clearer guidance as to the nature of the information sought from a "cultural speaker", but also enables the court, in s27(5) to suggest that such a speaker may be of assistance if the offender has not called one of their own volitions.

Section 8(i) sits alongside s27 in the Sentencing Act in giving explicit recognition to the relevance of cultural background in sentencing, providing that the court must take into account "the offender's personal, family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose. This provision is often referred to in the absence of a s27 application, which is invariably raised by counsel, notwithstanding the ability of the judge to call for a cultural speaker pursuant to s27(5). We have seen this approach in R v Mason[54] and Mika v R[55] where the court considered Māori cultural background factors pursuant to s8(i) in the absence of a s27 application by defence counsel.

In the High Court decision of *Solicitor-General v Heta*[56], Whata J considered an appeal by the Crown where a s27 Cultural Report was considered in sentencing. In that case, Her Honour, Judge Moala concluded that having read the report, she was persuaded that a significant

[53] https://www.waitangitribunal.govt.nz/news/tribunal-releases-report-on-oranga-tamariki/
[54] *R v Mason* [2012] NZHC 1849
[55] *Mika v R* [2013] NZCA
[56] *Solicitor-General v Heta* [2018] NZHC 2453

discount be given, not just for the cultural aspect of it, but for the horrific background in the report. Subsequently, she reduced Ms. Heta's sentence by 30 percent to consider the background and cultural information in that report.

On appeal, the Solicitor-General submitted that the usual discounts for hardship apply and thus a 30 per cent discount for Ms Heta's personal circumstances was too high. They submitted that Keil v R[57] precludes a discount of 30 percent. *Keil* focuses on what is perceived to be a collective group or ethnic discount rather than individual circumstances. Whata J addresses this within his judgment. At para 41, Whata J explains that there is no express requirement to have regard to systemic Māori deprivation in sentencing. However, the Court when fixing sentence may consider "any aggravating or mitigating factor the court thinks fit." Section 27 then mandates consideration of the full social and cultural matrix of the offender and the offending.

Whata J went further to say, the inclusion of all material background factors in the assessment aligns with the underlying premise of s27. It better serves the purposes and principles of sentencing to identify and respond to all potential causes of offending, including here relevant, systemic Māori deprivation. It may inform, among other things, the actual and relative moral culpability of the offender and the capacity for rehabilitation. The use of this provision has increased steadily over the past 5 years to be used in a number of criminal court cases and the understanding of the importance of cultural impacts and colonisation to sentencing continues to grow.

Public Service Act 2020

One of the most recent inclusions of Te Tiriti o Waitangi/Treaty of Waitangi is seen the updated Public Service Act 2020. The Public Service Act 2020 has a new inclusion of a section which explicitly recognises the role of the public service to support the Crown in its relationship with Māori under Te Tiriti o Waitangi/the Treaty of Waitangi.

The provision explicitly puts responsibilities of the public service to support the crown in its relationships with Māori under Te Tiriti o Waitangi/the Treaty of Waitangi. These responsibilities include[58]:

[57] *Keil v R* [2017] NZCA 563
[58] Public Service Act 2020

1. Public service leaders for developing and maintaining capability of the public service to engage with Māori and to understand Māori perspectives.
2. The Public Service Commissioner, when developing and implementing the newly required leadership strategy, to recognise the aims, aspirations and employment requirements of Māori, and the need for greater involvement of the Māori in the Public Service.
3. Public Service employers to operate an employment policy that recognises the aims, aspirations and employment requirements of Māori, and the need for greater involvement of Māori in the public service.
4. The Public Service Commissioner and chief executives being accountable to their respective Minister for upholding their responsibilities to support the Crown's relationships with Māori.

Public Service agencies upholding Te Tiriti o Waitangi

Prior to the updated Public Services Act, the Crown had put out guidance to public service agencies in 2019 to outline how they would like ministries to act in relation to upholding the commitment of the Crown to Māori as reflected in Te Tiriti o Waitangi/Treaty of Waitangi.

Cabinet Circular

In 2019, Cabinet released a set of guidelines for Ministers and department involved in contemporary Te Tiriti o Waitangi/Treaty of Waitangi issues. The guidelines were to help lead ministers and agencies involved in Waitangi Tribunal or court proceedings as well as provide guidance for Ministers leading kaupapa inquiries and dealing with contemporary Treaty of Waitangi issues that are not necessarily covered in such kaupapa inquiries. The circular also outlines report requirements for contemporary Treaty of Waitangi issues or policy changes[59].

Introduction of Te Arawhiti

At the same time of the release of the cabinet circular, the Crown also introduced a new agency to Aotearoa called Te Arawhiti[60]. Te Arawhiti meaning "the bridge" represents the commitment that the Crown must build a bridge between both Māori and the Crown in the attempt to uphold commitments of Te Tiriti o Waitangi/Treaty of Waitangi. Te Arawhiti's main

[59] CO (19) 5: Te Tiriti o Waitangi/Treaty of Waitangi Guidance, Department of Prime Minister and Cabinet, 2019
[60] Above at 59

role is the advise the Minister for Māori Crown Relations across a number of key areas, including:

- ensuring the Crown meets its Treaty settlement commitments
- developing engagement, and the co-designing and partnering of models that will ensure other agencies generate better solutions across social, environmental, cultural and economic development
- ensuring public sector capability to work effectively with Māori is strengthened
- ensuring the engagement of public sector agencies with Māori is meaningful
- providing an independent, cross-government view on the health of Māori/Crown partnerships.
- providing strategic leadership and advice on contemporary Treaty issues.
- brokering solutions to challenging relationship issues with Māori; and
- coordinating significant Māori/Crown events on behalf of the Crown.[61]

Māori focussed senior leadership roles in the public service

In the same year as the cabinet circular and introduction of Te Arawhiti, the Department of Corrections, Ara Poutama appointed their first Deputy Chief Executive Māori to their leadership to implement their strategy Hokai Rangi[62] which focussed on reducing the number of Māori in prison. The DCE Māori role was created as one of the first actions in Hōkai Rangi, which focussed on maximising positive outcomes for Māori in the corrections system. The Deputy Chief Executive role also now leads the Māori business group has been resourced to include a Rautaki Māori Strategy & Partnerships team as well as key organisational functions including Policy, Research & Evaluation, Psychology & Programmes, Reintegration & Housing, critical change portfolios and the Māori Pathways Programme[63].

The introduction of similar roles has been seen across the Justice system including the Ministry of Justice.

Looking to the past to create a way forward

With the jurisprudence developed by the Waitangi Tribunal and the Courts, the inclusion of Te Tiriti o Waitangi/Treaty of Waitangi in legislation, cabinet guidance and the commitment of public service agencies, it can be easily observed that although the constitutional

[61] Above at n59
[62] Department of Corrections "*Hokai Rangi" Wellington*, 2019
[63] Above at 62

development of Aotearoa has been stuck for generations, the quiet develop of the recognition of Te Tiriti o Waitangi/Treaty of Waitangi has gone the complete opposite way. With such development continuing, it may make it easier for the dream of embedding Te Tiriti o Waitangi/Treaty of Waitangi into the constitutional framework of Aotearoa significantly easier. So how should Aotearoa progress when embedding Te Tiriti o Waitangi/Treaty of Waitangi into our constitutional framework? Will Te Tiriti o Waitangi/Treaty of Waitangi eventually be included by way of natural progression? Should advocates use development over the past 30 years to push for the inclusion of Te Tiriti o Waitangi/Treaty of Waitangi sooner?

Enabling Te Tiriti o Waitangi to stand in its own mana

If we look to launch off the platform of Te Tiriti o Waitangi jurisprudence that has developed over the past 40 years, how do we ensure that we enable Te Tiriti o Waitangi/Treaty of Waitangi stands in its own mana on any constitutional framework that is developed in Aotearoa? All legislation examples above that expressly refer to Te Tiriti o Waitangi/Treaty of Waitangi pick and choses, parts of the principles in which they would like to be relevant for that setting and doesn't always reflect deeper meaning and understanding of terms that Māori know them to be. Legislation is passed by the elected parliament that although has some Members of Parliament who whakapapa Māori, are not in parliament mandated or represent tangata whenua or iwi. Such actions appear to co-opt parts of Te Tiriti o Waitangi/Treaty of Waitangi which is line with the approach of current constitutional frameworks which does not provide for a guide in which Te Tiriti o Waitangi/Treaty of Waitangi should be referred to.

To enable Te Tiriti o Waitangi/Treaty of Waitangi to stand in its own mana, the use and reference to Te Tiriti o Waitangi/Treaty of Waitangi cannot continue in the same manner in which it current does. Such co-option of Te Tiriti o Waitangi or Tikanga Māori continues to lead to ongoing tension between the Crown and Māori relationship.

Enabling Te Tiriti o Waitangi to stand in its own mana may be the key to removing the tension and ongoing confusion of the use of Te Tiriti o Waitangi in the Crown and Māori partnership. At the centre of Te Tiriti o Waitangi and He Whakaputanga pre-co-option of the Westminster legal system expresses Māori authority to govern themselves and determine their own destinies, to participate in Crown governance, law and policy, and to have their rights protected. The former is a contemporary expression of globally agreed Indigenous peoples' rights, and the latter are compacts between leaders of peoples at the formation of a nation comprised of those peoples: they are New Zealand's constitutional foundation[64].

[64] Above at 4

In the WAI 262 report, the Tribunal stated: "Unless it is accepted that New Zealand has two founding cultures, not one; unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change. Māori will continue to be perceived, and know they are perceived as an alient and resented minority, a problem to be management with a seemingly endless stream of taxpayer funded programmes, but never solved"65.Moving towards a Declaration-compliant nation enables an important opportunity for the Crown to reassess its assumptions of ownership and power, including exclusive sovereignty.

International perspective: comparative indigenous frameworks

Aotearoa is not unique in the tensions of constitutional frameworks and understanding of how to between Māori and those who have led colonisation in the country. The autonomy of indigenous people to regulate and strength their own system of justice is an inherent component of the rights to self-determination and culture[66] which is ultimately lost during colonisation. However, just like New Zealand, many countries through-out the world have battled this tension and used their own indigenous systems to try to advance a constitutional framework that is unique to them and can recognise self-determination. In an international perspective, self-determination as the equal treatment of individuals or groups to be in control of their own destinies and to live within governing institutional orders that are devised accordingly[67]. It is helpful to understand the experiences of others around the world if we are truly committed to ensure Te Tiriti o Waitangi/Treaty of Waitangi should stand in its own mana in a future constitutional framework for Aotearoa.

Norwegian Sami

Examples for securing the rights of indigenous peoples, including political representation. The Sami span four counties, Sweden, Finland, Norway and Russia, and 2,000 years. Traditional Sami society is egalitarian, with land owned collectively and used according to agreements between extended families. Extended families were organised into siddas, who were run by an elected council (norraz)[68]. The norraz was the main cultural, political, legal and economic body" that was "responsible for internal affairs such as the use of natural

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[65] Above at 20
[66] Report of the Special Rappoteur on the Rights of Indigenous peoples UN Doc A/HRC/42/37 (2 August 2019) at [9]
[67] Anaya James "The rights of Indigenous People to Self-Determine in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenahgen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples (*International Working Group for Indigenous Affairs, Copenhagen, 2009) at 187
[68] Pia Solberg "Indigenous internal self-determination in Australia and Norway" (thesis, University of New South Wales, October 2016) at 31

resources and their distribution, and region affairs such as negotiating with other siias and non-Sami[69]. Norwegian Sami have a history of suppression and marginalisation by the dominant society[70]

From the 1800s Neowegianlisms was an official policy in Norway[71] underpinned by theories of race and evolution[72] The policy targeted Sami and the Kvens (early Finnish immigrants to nother Norway) and its aim was the abolishment of the Sami language and assimilation into Norwegian culture[73] Norwegianisation was mainly implemented through education[74] and banning land sales in northern Norway to those who had not assimilated (through the Land Act 1902)[75] As well as losing access to traditional lands, the state actively tried to destroy Sami culture and used aggressive assimilation politics to eliminate their language[76]

The Alta affair

Sami commission to represent Sami nationally was formed[77] to assist with constitutional matters, change was sparked following this by the 'Alta Affair" which was a conflict over a lengthy state-managed hydropower development that affected an area of land significant to Sami. With a history of land loss, Alta represented the limit of encroachments for Sami. Demonstrations and a legal challenged were launched[78]. This surprised the government who had considered Sami to be "well integrated. Police cracked down on protections, not wanting them to be a catalyst for Sami separatist moments. Alta is seen as the most fa-reaching and deepest conflict between Sami and the state in the twentieth century.

The Norwegian government found it difficult to balance its perception as a model humanitarian actor on the international stage while ignoring indigenous demands at home. As a result, they passed the Sami Act of 1987, which made for provision for the government to protection and develop Sami language, culture and society. In 1998, the government adopted an amendment to the Constitution of Norway to this effect, section 110A. They also established a nationwide Sami Parliament elected by and among Sami, in 1989. Over the

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[69] At 31
[70] At 19
[71] Semb AJ "From Norwegian citizens via 'citizens plus' to 'dual political membership'? Status, aspirations, and challenges ahead" (2012) 35 (9) Ethnic and Racial Studies 1654 at 1655
[72] Above at n68, 59
[73] Semb above n71, 1655
[74] Above at n68, 50
[75] Above at n68
[76] Hendricksen J "The Continuous process of recognition and implementation of the Sami people's right to self-determination" (2008) 21 (1) Cambridge Review of International affairs 27 at 28; Solberg, above n7 at 55.
[77] Above at n68, 113
[78] Svensson Tom G "Right to Self-Determination: A Basic Human Right Concerning Cultural surivial. The case of the Sami and the Scandinavia State' in Abdullahi ahmed An-Na'im (ed)

following years Norway consolidated its international profile as a peace negotiator and state led humanitarian became widely supported national project.

From 1989, the Sami Parliament has changed the way Sami and the state related to each other. The Sami Parliament was established to recognise Sami's historical presence as a separate ethnic people, counteract the effects of a 150 years long assimilation policy and ensure Sami did not mobilise against the state. It has 39 directly elected members, representing seven electorates. Members of the Parliament are elected every 4 years. The Parliament elects a president, who appoints a Sami Parliament Council. The Council essentially operates like a national government. The parliament seems to be accepted as a separate but integral way of Norwegian democracy.

The Parliament does not have an independent legislative or fiscal power, but its mandate is under ongoing debate and powers have "increased steadily since its establishment. Today the Parliament is a "fully informed formal participant in public decision-making processes. It administers grants to Sami affairs, and it has been delegated decision making power in matters relating to Sami culture, the sami languages and teaching based on the sami curriculum.

Finnmark Act

In 2005, the Norwegian government adopted the Finnmark Act, arguably the states final answer to the Alta protest twenty-five years earlier. The stated handed ownership of 96 percent of the Finnmark area (traditional Sami territory in the northern Norway) to the Finnmark Estate. The Board of the Finnmark Estate is an attempt at a partnership approach to land issues. It consists of six members, three appointed by the Finnmark County Council, and three by the Sami parliament. It is argued that the Finnmark estate recognises indigenous rights "within a framework of joint responsibility of both sides for the overall development of the region in which they shared.

Indigenous courts shall apply their won principles, cultural values, norms and procedures. Subject to the reservation they respect all rights and guarantees contained in the constitution. Primacy of land is the lens for all the constitution.

Proposed frameworks from Tangata Whenua

When reflecting of the experiences of the Norwegians, one way in which Te Tiriti o Waitangi may be able to enable to stand in its own mana is through enabling Māori to have a voice in the conversation of constitutional reform and for that to then inform constitutional change. The work of the Matike Mai Constitutional Reform Kaupapa was the first sign of such work taking place in

Aotearoa. The Matike Mai Working Group was established at a meeting of the Iwi Chairs' Forum in 2010. The Iwi Chairs forum is a collective of leaders or Rangatira from iwi form around New Zealand who come together to discuss issues relevant to Maoridom. The Working group established by the iwi chairs forum had the following Terms of Reference:

"To develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tireni of 1835, Te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition[79]".

The Terms of Reference did not ask the Working Group to consider such questions as "How might the Treaty fit within the current Westminster constitutional system" but rather required it to seek advice on a different type of constitutionalism that is based upon He Whakaputanga and Te Tiriti o Waitangi for that reason, this Report uses the term "constitutional transformation" rather than "constitutional change". The working group produced a report was the culmination of 252 hui between 2012 and 2015 led by Māori.

The report's conclusions centred on the concept of 'Spheres of authority' This conceptual framework seeks to reorient the balance between the rangatiratanga and kāwanatanga spheres and broaden the joint (or relational) sphere as part of a Vision 2040 which would be 200 years past the signing of the Treaty of Waitangi/Te Tiriti o Waitangi (11). These spheres are described as the following:

Joint/ relational sphere

Māori and the Crown share governance over issues of mutual concern. This sphere shows the intersection of Articles 1 (kāwanatanga) and 2 (rangatiratanga), with an overlay of Article 3 (equity). The Crown's right to kāwanatanga (Article 1) itself is informed by rights to self-determination in the Declaration. If they choose, Māori must be able to participate in Crown governance. This is reinforced by Article 3 of te Tiriti o Waitangi, which confirms Māori equity and equality with other citizens.

Shifting nature of governance

As the joint and relational spheres are developed it is then predicted that this will allow for Māori institutions are strengthened, as opportunities/ mechanisms for exercising self-determination are broadened and developed. This concept can strengthen and create certain governance functions for such things as Education and Social Services.

[79] Above at n4

Shared jurisdiction

This sphere focuses on relationships and how both Māori and non-Māori can work together for joint Kaupapa. The relational sphere reflects how co-governance might work and could require a joint governance structure, or it might involve mechanisms for the respective governance entities to coordinate to make law and policy with respect to certain subjects. This sphere also discusses the possible need for a Te Tiriti o Waitangi body or court to regulate jurisdictional boundaries. Similar to the role of the Waitangi Tribunal but with more binding powers.

These spheres of influence described above show a more nuanced approach to how the constitutional framework can be in recognising both elements of western constitutional governance as well as recognising the uniqueness of the Te Tiriti o Waitangi.

With the korero captured in this task as well as the proposed spheres of influence not only can it provide a pathway forward to development a constitutional for New Zealand, but it also provides tools for public servants tasked with upholding Treaty of Waitangi/Te Tiriti o Waitangi tools to assist. It does raise the questions does the constitutional framework need to be changed officially when such information is around?

Aotearoa 2040: Our new constitutional journey

For a nation which has battled the consequences of colonisation for almost 200 years, Aotearoa continues to push forward to incorporate Te Tiriti o Waitangi/Treaty of Waitangi in the day to day lives of those who live here. These steps have guided legislation and processes which have assisted those who serve the public to understand the commitments the Crown entered with Māori. Although there are still differences in the way people interpret the Crown's commitment to Māori there is a general sense that there needs to be partnership and there is now a suite of tools to help to understand how that may look.

It seems abundantly clear from the work that has been done that Aotearoa is ready to take the next step in progressing a new constitutional framework. It could be said that although it may not seem deliberate and there may not appear to be specific programmes in place, all the work that is current being undertaken is helpful and needed in progressing to a new constitutional framework just as many tipuna who signed Te Tiriti o Waitangi in 1840 envisaged. When reflecting on learnings from overseas nations and the work of Matike Mai, there is a way in which a constitutional framework centred on Te Ao Māori approaches and Te Tiriti o Waitangi can be progressed.

The Waitangi Tribunal released an updated programme for their contemporary kaupapa inquiries and have listed Constitutional, self-government and electoral systems as the next kaupapa inquiry to be started at the Tribunal[80]. The inquiry will investigate constitutional law, sovereignty, provision for the exercise of Māori self-government, electoral regime, national political representation and representation in local and specialist bodies. It is likely that this inquiry will start in the next year. It may be helpful off the back of that to wait to progress any constitutional reform to ensure that any findings from the Waitangi Tribunal can be used for the benefit of that reform. We have seen in the past many significant changes to system led from findings from the tribunal. It seems like a sensible approach to wait to progress anything until that work is completed.

Conclusion

The dreams of our tipuna of ensuring Te Tiriti o Waitangi is reflected in the constitutional framework of Aotearoa is not over. Further, with the Waitangi Tribunal also releasing its updated work programme, it appears that the next contemporary kaupapa inquiry that they will focus on will the constitutional framework of Aotearoa.

Although it may appear from the outside that Aotearoa has done minimal to progress the reform of the constitution of Aotearoa, this is far from the truth. Specialist tribunals, courts, legislative development, policies and procedures have all been developed over the years to progress the need to uphold the commitment that the Crown entered with Māori in 1840. Although there has been testing times and differing opinions in the past, and some of these continue today, Aotearoa continues to take vital steps to increase its learning about the commitments made in Te Tiriti o Waitangi/Treaty of Waitangi.

The key pieces of guidance for Aotearoa comes from jurisprudence developed from the Waitangi Tribunal. Reports and evidence gathered in such a form since the early 1980's have provided a base in while a suite of principles have been developed to understand the partnership needed with the Crown and Māori. The principles of active protection, partnership, tino rangatiratanga, kāwanatanga will be key foundational evidence that can be used when shaping Aotearoa's future constitution. This evidence will only be strengthened following the kaupapa inquiry.

We have seen Aotearoa use this jurisprudence to incorporate Te Tiriti o Waitangi principles into acts which have now assisted in a vast area of jurisdiction such as criminal law, care of children law and environmental law. The use of these principles in these settings show that

[80] https://waitangitribunal.govt.nz/assets/Documents/Publications/Kaupapa-inquiry-programme-App-B-updated-Jan-2021.pdf

they are adaptable to any circumstance and can provide guidance in ensuring laws are developed to reflect those that they serve. Norway has shown us too that we are not the only nation who has done this before, and international perspectives are also helpful to help guide as the nation moves forward.

Aotearoa 2040 and beyond looks to be a nation who will continue to work towards the dreams of our tipuna to have a constitutional that reflects the bicultural nation that was founded 200 years ago. Aotearoa will be well equipped to do this by using all the lessons and tools that have been created and learned during this time.

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