Ko wai tātou? Reflecting on Constitutional Transformation in Aotearoa New Zealand

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This article traces the constitutional development in Aotearoa New Zealand from the Indigenous first law of tikanga Māori to our current arrangements and towards our future aspirations. Notably in 2016, He Whakaaro Here Whakaumu Mō Aotearoa: the report of Matike Mai Aotearoa envisioned indigenous constitutional transformation to reconceptualise current constitutional arrangements. Post-2016, constitutional transformation has been limited by Crown politics, with recent initiatives failing to enact true partnership between state and tāngata Māori. As Indigenous peoples around the globe grapple with how to effectively initiate and conduct constitutional discussions within colonial state systems, the Indigenous experience of tāngata Māori in Aotearoa New Zealand will hopefully provide some insights that may positively contribute to meaningful constitutional change.

INTRODUCTION

In te reo Māori, the native language of the Indigenous peoples of Aotearoa New Zealand, the importance of establishing and understanding relationships between the surrounding environment and people is paramount. Ko wai koe is commonly translated as who are you? Literally, it means which waters are you from? The question illustrates the inherent and fundamental understanding that we derive from our waters, our connections to the land and our ancestry. This bond between us and our environment continues despite colonisation or the government of the day.

Nonetheless, like colonised Indigenous peoples globally, over the past 200 years tāngata Māori have largely had taken from us our economic, social and political sovereignty over our own whenua, both illegally and illegitimately. Tangibly, our lands have been taken – only about 6% of the total land area in Aotearoa New Zealand remains as Māori freehold land.[1] Contrary to what was orthodox understanding for over a century, te Tiriti o Waitangi guarantees our ongoing sovereignty, or tino rangatiratanga, with the Crown acquiring our permission to regulate settlers.

Today, we sit at the bottom of all socio-economic ladders in life expectancy, poverty, health, education, safe housing and incarceration. We face structural inequality in that the colonial system is not ours yet is imposed upon us. Our self-determination is denied. Our ways of living and our laws are not respected or recognised by the state.

For these reasons, Māori –iwi, hapū and whānau[2] – have called for constitutional transformation from the beginning of the Crown's assertion of sovereignty over our territories. Our resistance is shown over again through the establishment of religious and tribal movements such as Kingitanga and Kotahitanga, rangatahi youth led protest groups such as Ngā Tamatoa in the 1970s and 1980s, and peaceful protests against the alienation of Māori land seen in the 1975 Land March to Parliament or 1978 Bastion

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[1] Controller and Auditor-General, *Māori Land Administration: Client Service Performance of the Māori Land Court Unit and the Māori Trustee* (18 March 2004) 25.

[2] Māori social groupings. Iwi or "tribes" consist of hapū "subtribes" that can trace descent from a common ancestor which are in turn encompassing of "family" or whānau groupings. Suggested translations of Māori terms are taken from Hirini Moko Mead, *Tikanga Māori: Living By Māori Values* (Huia (NZ) Ltd, 2013) 309.

Point occupation by Auckland-based iwi Ngāti Whātua Ōrākei.[3] Māori have consistently asserted tino rangatiratanga over our land and have never wavered.

Although there have been attempts to provide a forum to hear Māori claims on breaches of te Tiriti o Waitangi through the Waitangi Tribunal, its recommendations are, generally, non-binding (although there are limited exceptions relating to Crown forest or memoralised lands).[4] Similarly, contemporary Tiriti settlement processes provide limited financial and cultural redress and do not engage with our claims to tino rangatiratanga. It is in this context that the national tribal nations leaders' forum (or National Iwi Chairs Forum) commissioned a report on constitutional transformation in 2010, titled *He Whakaaro Here Whakaumu Mō Aotearoa*: the report of Matike Mai Aotearoa, released in 2016.[5] It summarises the hopes and aspirations of Māori to realise tino rangatiratanga as guaranteed in te Tiriti of Waitangi.[6]

This article traces the constitutional development in Aotearoa New Zealand from the Indigenous first law of tikanga Māori to our current arrangements and towards our future aspirations, placing the Matike Mai report in its political context. While we are yet to achieve any meaningful constitutional change, we hope that our efforts in Aotearoa New Zealand might provide some insights for our Indigenous brothers and sisters around the globe. We especially hope that it might positively contribute to meaningful constitutional change in Australia.

Constitutional Development in Aotearoa New Zealand

Although Australia and Aotearoa New Zealand were similarly colonised by Britain the development of the states' constitutional arrangements, and constitutional history and context, differs considerably.

Tikanga Māori

Ancestors of Māori arriving in Aotearoa developed tikanga Māori – the Indigenous first law of the land – by melding culture and laws brought from the Pacific with the new environment.[7] Tikanga Māori was the governing law of Aotearoa and Māori constitutional structures.[8] Under tikanga Māori, authority is not concentrated in one ultimate political authority, but shared among hapū, whānau and eventually iwi and exercised from the ground up.[9] Tikanga Māori can differ across regions, often overlapping and may be place and time-specific to specific whānau, hapū and iwi.[10] In fact it can be described as a "law and a discrete set of values", both codifying political and social expectations, and outlining foundational values in Māori society that is highly sensitive to context.[11]

[3] Kingitanga, the Māori King political institution established in Waikato and Kotahitanga, pan-tribal political movements, intended to unify Maori tribes.

[4] As identified in the *Treaty of Waitangi Act 1975* (NZ). See generally ss 8HA–8HI and ss 8A–8H, 8HJ.

[5] The Independent Working Group on Constitutional Transformation, *The Report of Matike Mai Aotearoa* (2016) (*Matike Mai Report*).

[6] Translated as *self-determination*, Moko Mead, n 2.

[7] Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 *Waikato Law Review* 1, 2.

[8] Carwyn Jones, "A Māori Constitutional Tradition" (2014) 12(1) *New Zealand Journal of Public and International Law* 187, 194. For example, "mana" one key concept underlies Māori leadership and evokes "notions of influence, prestige, power, force and vitality".

[9] Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) 48.

[10] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843.

[11] *Matike Mai Report*, n 5, 41.

Crown Assertion of Sovereignty

As settlers increasingly settled in Aotearoa in the 1830s, Māori sought to maintain control over relationships with settlers and traders, and ensure their compliance with tikanga Māori.[12] Constitutional documents He Whakaputanga o te Rangatiratanga o Niu Tīreni in 1835 and te Tiriti o Waitangi in 1840 affirmed and guaranteed Māori tino rangatiratanga, a freedom to exist as a people, a continued right to land, the power to determine their destinies and the promise of autonomy and self-governance.[13] The Crown as a signatory to Te Tiriti o Waitangi gained kāwanatanga or the authority to govern settlers. In breach of te Tiriti, it has since asserted itself as arguably the only legitimate sovereign power with the authority to impose a mono-legal legal system.[14]

The State's Constitutional Structure

Aotearoa New Zealand has no written constitution, rather comprising of individual statutes, judicial decisions, conventions, regulations and exercise of prerogative power. For example, the *Constitution Act 1986* (NZ) sets out governing powers, and the *New Zealand Bill of Rights Act 1990* (NZ), which is expressly subordinate to other legislation, incorporates many civil and political rights into New Zealand laws. A number of conventions reflect fundamental constitutional principles such as the separation of powers and Parliamentary sovereignty.[15]

Essentially, we have a "political" constitution in that political power determines laws unfettered by a written constitution. Under current constitutional arrangements elected political parties have plenary legislative and executive authority under the sovereign British monarchy. Formally the King is head of state, represented by the Governor General in Wellington who acts on the advice of ministers of the Crown. There is no law higher than legislation and Parliament is absolute, and reigns supreme. The Executive, usually consisting of ministers selected from the party or coalition holding the majority or near majority of seats in Parliament, exercises considerable control over Parliament, effectively determining the laws adopted by Parliament.

Contemporary Context: Incremental Change until 2010

Over the last 40 years, incremental constitutional changes have been enacted to respond to Māori claims to rights under te Tiriti o Waitangi, the common law, and international Indigenous human rights instruments (such as the UN Declaration on the Rights of Indigenous Peoples). The Waitangi Tribunal, established in 1975, hears claims that the Crown has breached the principles of the Treaty of Waitangi, as either pre-1992 historical claims (although new historical claims can no longer be filed) or contemporary claims. The Tribunal is also able to direct district specific or thematic inquiries, such as the current inquiry into the impact of colonisation on Māori women.[16] Its reports are well-researched and considered although as noted its recommendations are usually not binding on the Crown.

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[12] Waitangi Tribunal, n 9, 157.

[13] Waitangi Tribunal, n 9, 153 to 407 for further historical context. He Whakaputanga o te Rangatiratanga o Niu Tīreni or Declaration of Independence was an initial assertion of tino rangatiratanga by northern chiefs in a confederation arrangement to allow for collective representation and self-governance. For example, article three of He Whakaputanga o te Rangatiratanga o Niu Tireni 1835 established formal gatherings at Waitangi each year to enact laws. Similarly, te Tiriti o Waitangi signed between the Crown and a significant number of Māori tribal leaders from around the country from a Maori perspective at least, heavily emphasised retention of rangatiratanga. See also Margaret Mutu, "'To Honour the Treaty, We Must First Settle Colonisation' (Moana Jackson 2015): The Long Road from Colonial Devastation to Balance, Peace and Harmony" (2019) 49 *Journal of the Royal Society of New Zealand* 4, 6–7; Waitangi Tribunal, *Whaia Te Mana Motuhake In Pursuit of Mana Motuhake* (Wai 2417, 2015) 25.

[14] Waitangi Tribunal, *Tino Rangatiratanga me te Kawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry Pre-publication Version* (Wai 1040, 2022) 202–275.

[15] See generally Geoffrey Palmer, "The New Zealand Constitution and the Power of Courts" (2006) 15 *Transnational Law & Contemporary Problems* 551.

[16] Waitangi Tribunal, *Memorandum – Directions of the Chairperson Initiating the Mana Wāhine Kaupapa Inquiry* (Wai 2700, 2018).

Aotearoa New Zealand has had a treaty settlement process since the late 1980s, which provides some cultural and financial redress to iwi groupings accompanied by a Crown apology, although it faces critiques such as that it fails to engage with or address tino rangatiratanga.[17] It is worth noting that recent Treaty settlements have included innovative redress options such as shared management arrangements between Crown and iwi over significant natural landmarks, including granting legal personhood. For example, Te Urewera, an area of native forest, formerly a national park and the ancestral homeland of Ngāi Tūhoe, was recognised as a legal person as a result of the Ngāi Tūhoe iwi treaty settlement. Decision-making powers in relation to this area of forest was assigned to a board comprised of representatives from Ngāi Tūhoe and the Crown.[18]

Increasing Recognition of tikanga Māori

Even now, incorporation of tikanga Māori into the existing monist system is limited, suggesting the Crown is only beginning to grapple with legal pluralism in Aotearoa New Zealand.[19] New Zealand's legal system has been fiercely mono-legal where the incorporation or recognition of tikanga has been poor or for the purposes of assimilation.

The courts initial position can be summarised in the 1877 *Wi Parata v Bishop of Wellington* case where Prendergast J dismissed the Treaty of Waitangi as a "simple nullity" where "primitive barbarians" lacked sovereignty or any form of law.[20] Moving forward to contemporary times, the courts held in *Takamore v Clarke* that tikanga Māori informs and influences the development of New Zealand common law.[21] The recent Supreme Court decision, *Ellis v R*, confirmed and extended this legal proposition.[22]

Incremental Change Does Not Realise Māori Rights: Constitutional Change Is Needed

Incremental change as outlined is simply not enough. Aotearoa New Zealand's Constitution is, at its core, fundamentally at odds with tikanga Māori ways of governance especially in its basis in top-down authority, resulting in inequality.

Aotearoa New Zealand's Constitution is imposed without Māori consent contrary to the rule of law and premised on the Crown's absolute and illimitable sovereign power contrary to te Tiriti's agreement to share authority and iwi Māori retaining our sovereignty and regulation over our own. Piecemeal incorporation of tikanga Māori within the courts and state system fails to meet these requirements of te Tiriti. Essentially, there is no recognition of tino rangatiratanga in the law illustrated by Parliament's unconstrained power to make any law it desires, even if contrary to human rights or Treaty rights. We have seen abuses of this power with Parliament deliberately legislating over the top of judicial decisions that recognise Māori land rights.[23]

It would be difficult to provide remedy through incremental or internal changes to the state constitution and state governance structures. Significant, transformative, structural change is required. This is not a new realisation – Māori have long called for the need to reform and decolonise state systems.[24] As seen

[17] Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua, Healing the Past, Building a Future* (2021). By deciding on the process, the Crown has ultimate control over the treaty settlement process. See Malcolm Birdling, "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2(2) *New Zealand Journal of Public and International Law 259*.

[18] *Te Urewera Act 2014* (NZ) s 21.

[19] Janet McLean, "The Political, the Historical and the Universal in New Zealand's Unwritten Constitution" (2014) 12 *New Zealand Journal of Public and International Law* 321, 325.

[20] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77–78.

[21] *Takamore v Clarke* [2013] 2 NZLR 733; [2012] NZSC 116.

[22] *Ellis v The Queen* [2022] 1 NZLR 239; [2022] NZSC 114.

[23] See, eg, *Attorney General v Ngati Apa* [2003] 3 NZLR 641 and the resulting *Foreshore and Seabed Act 2004* (NZ).

[24] Widely documented in publications such as; Te Ohu Whakatika, *Ināia Tonu Nei: Māori Justice Hui* (2019); Tā Mason Durie's presentation at the *Toitu Hauora Māori Leadership Summit 2019* which documented the history and future of Māori involvement

in colonised Indigenous populations around the world, a system that fails to appropriately recognise the laws and rights of the Indigenous population is also one that delivers consistently poorer outcomes – as Māori experience in Aotearoa New Zealand.[25]

MATIKE MAI: INDIGENOUS CONSTITUTIONAL TRANSFORMATION

In 2010 the National Iwi Chairs Forum, which advocates for the collective priorities of iwi, established the Independent Constitutional Working Group. The purpose of the Working Group was to develop a model for an inclusive Constitution for Aotearoa drawing on He Whakaputanga and Te Tiriti o Waitangi in Aotearoa New Zealand.[26]

Between 2012 and 2015, the Working Group held over 252 hui around the country with Māori communities including iwi and hapū to discuss constitutional transformation. The final report titled *He Whakaaro Here Whakaumu Mō Aotearoa* drew on constitutional values such as tikanga, community and belonging that featured in these discussions.[27] Importantly, this Report proposed new forms of governance legitimised by the guarantee of tino rangatiratanga in He Whakaputanga, and Te Tiriti o Waitangi which the Report recognises as the founding documents of Aotearoa and a basis to reconceptualise current constitutional arrangements.[28]

The Report proposes six possible models of constitutional structure. These models redistribute power currently concentrated with the Crown into separate spheres of influence of Māori and the Crown in various arrangements. The spheres represent separate sources of power and authority of Māori and the Crown and suggests how they might interact; however, the Report emphasised these models were merely starting points for discussions on constitutional transformation.[29]

To monitor progress towards the proposed constitutional transformation, the Report sets out a number of short-term goals, to be achieved by 2021. These recommendations were largely focused on continuing this constitutional discussion, primarily led by and engaging with Māori but to expand and initiate dialogue with others in their communities and the Crown, and formalising and furthering discussion through constitutional conventions among Māori, and with the Crown.[30] Ultimately achieving these goals brings Aotearoa New Zealand closer to recognising tino rangatiratanga through constitutional transformation.

CONSTITUTIONAL DEVELOPMENTS POST MATIKE MAI

There have been significant developments post the publication of the Matike Mai Report, evidencing an increasingly articulate, forceful and compelling case for transformation as opposed to incremental steps.

Crown's Response to Constitutional Transformation

Initially the Crown did not respond in any formal capacity to the release of the Matike Mai Report in 2016. As Moana Jackson recounted, the Crown's initial predictable reaction to the Report: "their response was 'it doesn't matter because we're in charge'".[31]

within the health system; or Moana Jackson, *Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective* (Department of Justice, 1988), the seminal text on the shortcomings of the criminal justice system, and suggested reform.

[25] For example, tāngata Māori have often over twice as high mortality rates in cardiovascular disease indicators than non-Māori; Ministry of Health, *Wai 2575 Māori Health Trends Report* (2019) 51. Tāngata Māori are over 52% of the prison population; Department of Corrections, *Corrections Volumes Report 2020* (2020) 3.

[26] *Matike Mai Report*, n 5, 7–11.

[27] *Matike Mai Report*, n 5, Appendix Three, 117–121.

[28] *Matike Mai Report*, n 5, 104–112.

[29] For example, "Model Three" outlines a three-sphere arrangement consisting of a "Tino Rangatiratanga" sphere for iwi and hapū, a "Kāwanatanga" sphere for the Crown, and a "Relational" sphere where iwi, hapū and Crown work together. See generally *Matike Mai Report*, n 5, 99–104 of the Report.

[30] *Matike Mai Report*, n 5, 113.

[31] Helen Potter, *Constitutional Transformation and the Matike Mai Project: A Kōrero with Moana Jackson* (Economic and Social Research Aotearoa, 2018).

The New Zealand Labour Party has been in government since 2017, most recently winning a landslide victory in 2020 and forming the first ever single-party majority government under the Mixed Member Proportional (MMP) voting system introduced in 1993 , with strong representation of Māori Members of Parliament (MPs). [32] Although seemingly having the support and political will to respond to and facilitate constitutional discussions, the Labour Party did not campaign on this point, and have not made any explicit or deliberate moves to initiate constitutional transformation. Perhaps most telling is their leading "major policy commitment" is to celebrate Matariki as a public holiday from 2022.[33]

While there have been promising developments in the form of shared governance structures over water management and the establishment of a Māori Health Authority, as outlined in more detail below, Māori focused policies have been incremental, developed by and within the State-controlled system and are subject to governmental control.

Three Waters Proposal

The government has proposed reform to water services and infrastructure in Aotearoa New Zealand including transferring water management from councils to regional entities. Initially imagined as a way for Māori to exercise greater tino rangatiratanga through equal representation on newly established Regional Representative Groups, this proposal resulted in significant public backlash where some perceived enactment would allow Māori to veto decisions or gain ownership rights over the water. The government has relaunched this initiative assumedly in an effort to clarify its intent.[34]

Māori Health Authority

To combat health discrimination, the Crown has "reset" health services in Aotearoa New Zealand to give effect to the *principles* of Te Tiriti o Waitangi which involves establishing Te Aka Whai Ora, a Māori Health Authority.[35] Effective since June 2022, this independent statutory authority is empowered to create kaupapa Māori services and monitor improvement in hauora Māori although ultimate decision-making power remains with the Minister appointed board.[36]

He Puapua: The Crown's Commitment to "Co-governance"

Aotearoa New Zealand (after an initial rejection) endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2010, indicating a commitment to recognising Indigenous rights. This is significant as in recent years, initiatives to realise the Declaration have become the central space where the government has indicated engagement in constitutional transformation ideals.

In 2019, the Māori Development Minister invited the UN Expert Mechanism on the Rights of Indigenous Peoples to provide support and key recommendations as to the development and content of a plan that enacts the Declaration such as the consultation, participation and partnership of Māori in each phase of the process.[37] In recognition of the Crown's commitment to the United Nations Declaration on the Rights of Indigenous Peoples (the *Declaration*), the Māori Development Minister also established a working

[32] Dr John Wilson, *The 2020 General Election and Referendums: Results, Analysis and Demographics of the 53rd Parliament* (Parliamentary Service, 2021).

[33] See Labour Party, *Māori Manifesto Labour 2020* (2020).

[34] Department of Internal Affairs, *Transforming the System for Delivering Three Waters Services – Summary of proposals* (2022) 36–37; Department of Internal Affairs, *Three Waters Reform Programme* (2023) <http://www.dia.govt.nz>; Zane Small, "Are Councils Being Stripped of Assets? Will Māori Have Veto? Three Waters Explained", *Newshub*, 1 October 2021; Kieran McAnulty, "Three Waters Reset: McAnulty Explains Why Co-governance Stays", *1News*, 16 April 2023.

[35] *Pae Ora (Healthy Futures) Act 2022* (NZ) s 6.

[36] *Pae Ora (Healthy Futures) Act 2022* (NZ) ss 21, 29, 32. See also Te Aka Whai Ora, *Te Aka Whai Ora Statement of Intent 2022–2026* (2022) 15 which promotes embedding Te Tiriti o Waitangi in the health system and ensuring "iwi, hapu and whanau exercise tino rangatiratanga in their decision-making authority" although unclear how this power may be exercised.

[37] Expert Mechanism on the Rights of Indigenous Peoples, *Country Engagement Mission (8–13 April 2019) New Zealand, Advisory Note* (14 July 2019).

group in 2019 to prepare *He Puapua* – an advisory report on what a national plan of action to enact the Declaration might entail.[38] The Report relies on the assumption that the government will recognise and implement the Declaration.

Although not a direct response to the Matike Mai Report (where Te Tiriti and He Whakaputanga as constitutional documents legitimise transformation), He Puapua explicitly draws on the Report and proposes a similar constitutional structure where both Māori and the Crown exercise and share governance authority.[39]

More specifically, He Puapua imagines a "Vision 2040", which can be achieved through specific outcomes suggested in the Report such as empowering Māori to exercise authority over Māori matters, including jurisdiction over their lands territories and resources, and culture. Other markers of success include strong Māori participation in central and local government, or new governance institutions such as a senate or upper house in Parliament which could ensure legislation is compliant with te Tiriti or the Declaration, and/or significant return of Crown lands and waters to Māori ownership.[40] As the Report emphasised, there is no one way to achieve constitutional transformation.[41]

Public release of He Puapua was highly politicised where opposition accused the Government of advancing a hidden separatist agenda. This rhetoric has previously caused the Labour Party to withdraw from advocating on Māori rights.[42] Leader of the opposition at the time, Judith Collins heavily played on this point, claiming the "divisive" Report outlines a "two systems' treaty view".[43] Perhaps unsurprisingly, to minimise pushback, the Labour Government publicly dismissed some of the recommendations such as establishing a separate Māori senate. Prime Minister Jacinda Ardern noted the Report had "not gone before Cabinet and does not necessarily represent the views of Cabinet".[44]

National Plan of Action: Enacting the Declaration

In 2021, the Crown initiated the development of a national plan of action to realise Aotearoa New Zealand's obligations under the Declaration together with representatives from the National Iwi Chairs Forum and the Human Rights Commission.[45] The initial Cabinet Paper proposing this action specifically advocated for enhancing tāngata Māori self-determination and "ambitious action as opposed to business as usual" to demonstrate commitment to Māori wellbeing and development.[46] Originally slated for public consultation in late 2022, the Crown has now paused this workstream until after the election, largely due to the government reluctance to agree to the proposals put forward in the draft plan.[47]

[38] Claire Charters et al, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa, New Zealand* (Te Puni Kokiri, 2019).

[39] Charters et al, n 38, iv. Examples of thematic areas include rangatiratanga, participation in kāwanatanga Karauna and culture.

[40] Charters et al, n 38, iv, 45, 58.

[41] Charters et al, n 38, 10.

[42] For example, see Meriana Johnsen, "He Puapua Report Bogged Down in 'Swamp of Politics'", *Radio New Zealand*, 9 May 2021.

[43] Luke Malpass, "Judith Collins Issues Race Relations Warning, Says Labour Planning 'Two Systems by Stealth'", *Stuff Newspaper*, 2 May 2021.

[44] Michael Nelison, "Prime Minister Jacinda Ardern Responds over Māori Self-determination Report He Puapua", *The New Zealand Herald*, 3 May 2021.

[45] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan* (1 June 2021) para 10.

[46] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples: Next Steps for a Declaration Plan* (SWC-21-MIN-0083, 2 June 2021) para 5; Cabinet Office Circular, *New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of National Plan* (28 February 2019) 1–4.

[47] Cabinet Office Circular, *United Nations Declaration on the Rights of Indigenous Peoples Plan: Update* (SWC-22-MIN-0053, 6 April 2022) para 9; Jo Moir, "Co-governance Work Set to be Put on Hold", *Newsroom*, 2 December 2022.

Other Constitutional Developments

The Human Rights Commission recently released Maranga Mai, a report reviewing how colonisation and racism has affected Māori, noting how non-Māori settlers created the existing systems in Aotearoa New Zealand "in their image for their benefit to the exclusion of Māori".[48] A key recommendation is for the government to commit to constitutional transformation as articulated in Matike Mai (and other reports such as *He Puapua*) to recognise He Whakaputanga and Te Tiriti o Waitangi as the founding documents of Aotearoa and contributes notable support and legitimacy from a human rights perspective.[49]

Initiatives have also focused on the recommendations outlined in Matike Mai, specifically on continuing the constitutional discussion. This included, a *Matike Mai Constitutional Convention* in February 2021 which provided a chance to both look back on constitutional transformation and ahead at what questions might still need to be addressed, and more recently, the *Constitutional Korero Conference* in November 2022. Hosted by te Puna Rangahau o te Wai Ariki, the Aotearoa Centre for Indigenous Peoples and the Law at Waipapa Taumata Rau (The University of Auckland), global experts on Indigenous peoples and the state and Indigenous constitutions shared legal insight and advice on constitutional transformation.

Perceptions and Reflections: Where Are We at?

The government has demonstrated that affirming rights of Māori under the foundational documents of the country is not their priority. The government and opposition parties continue to misrepresent and politicise expression of tino rangatiratanga during election campaigns despite appeals from Māori.[50]

In our experience, articulating Indigenous priorities and framing constitutional discussions are aided by sourcing Indigenous rights in our own traditional legal system to establish our authority authentically and providing resources, space and capability to effectively and materially engage our whānau Māori. Perhaps importantly, instead of negotiating space within the current system, constitutional transformation may be expedited by rejecting the legitimacy of the current system and returning to these Indigenous legal systems with their own authority, legitimacy and precedent.

Conclusion

This article provides a brief overview of the historical and political context to constitutional transformation in Aotearoa New Zealand. As discussed, incremental change where the Crown validates Indigenous legal systems at its own pace fails to deliver solutions to inequalities that Indigenous people disproportionately face. Matike Mai presented constitutional transformation from an Indigenous perspective and brought these discussions into the consciousness of political parties, and the nation. The Crown's response has been conditional and lacking real engagement. Current forms of "co-governance", inducing backlash from some of the public, has been limited in its scope, failing to enact true partnership.

We have outlined key takeaways of the Indigenous experience in Aotearoa New Zealand in the hope that it may help to inform constitutional discussions in Australia. Constitutional transformation should not be out of our grasp. As Matike Mai reported, a legitimate treaty expectation discussed was the "belief that the many practical and social obstacles to transformation can be overcome and a new constitution established".[51]

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[48] Human Rights Commission, *Maranga Mai! The Dynamics and Impacts of White Supremacy, Racism and Colonisation upon Tangata Whenua in Aotearoa New Zealand* (2022) 21.

[49] Human Rights Commission, n 48, 12. See also Human Rights Commission, *Ki te whaiao, ki te ao Mārama* (2022) which had similar recommendations.

[50] Russell Palmer and Jamie Tahana, "Iwi Leaders Warn Hipkins Not to Bow on Three Waters Co-governance", *Radio New Zealand* (3 February 2023). Both National Party and Act Party have taken strong stances opposing both the Māori Health Authority and Three Waters Reform, creating key policies to walk these back. See, eg, policy document National Party, *Local Water Done Well* (2023); Zane Small, "National's Christopher Luxon Commits to Scrapping Māori Health Authority, but No Need for Referendum on Co-governance", *Newshub*, 29 March 2022. Current leader of the National Party Chris Luxton also explicitly labelled co-governance conversations as "divisive and immature"; Amelia Wade, "Rātana Gets Political: Christopher Luxon Calls Co-governance Conversation 'Divisive, Immature'", *Newshub*, 24 January 2023.

[51] *Matike Mai Report*, n 5, 99.