

Self-Determination and Constitutional Change

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I. INTRODUCTION

Te Tiriti o Waitangi 1840 (“te Tiriti”) and the United Nations Draft Declaration on the Rights of Indigenous Peoples 1993 (“Draft Declaration”) are based on the two great values that underpin every human struggle for dignity and rights: equality and freedom.¹

On the twin pillars of equality and freedom, Indigenous Peoples have constructed the ideological principle of self-determination² to sustain and legitimise their demands for collective human rights.³ Consequently, contemporary human rights discourse is now the third-generation descendant of an extended family made up of individual, economic, social, cultural and collective rights that are universal, indivisible and interdependent.⁴

The relationship between the domestic and the international legal and political concerns of Indigenous Peoples is a dynamic one. Indigenous Peoples’ concerns within a nation-state influence their concerns on an international level

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- 1 See Article 1 of the Universal Declaration on Human Rights, the first affirmative clause of the Draft Declaration on the Rights of Indigenous Peoples, and Articles I and III of te Tiriti o Waitangi where the parties treated as equals and the civil and property rights of the British were given to Maori in exchange for the right of pre-emption.
 - 2 Anaya, *Indigenous Peoples in International Law* (1996) cited in Wickliffe, “An Overview of Collective Human Rights Developments in the Pacific Region with an Emphasis on the Collective Right to Self-Determination” in Tomas (ed), *Collective Human Rights of Pacific Peoples*, (1999) 151, 155.
 - 3 Stavenhagen, “Indigenous Rights: Some Conceptual Problems” in Assies and Hoekama (eds), *Indigenous Peoples’ Experiences with Self-Government: Proceedings of the Seminar on Arrangements for Self-Determination by Indigenous Peoples within National States* (1994) 9, 17.
 - 4 Wickliffe, supra note 2, 151-152.

which, in turn, influence their domestic concerns.⁵ The Waitangi Tribunal captured this cycle when it stated that:⁶

The Draft Declaration on the Rights of Indigenous Peoples affirms the relevance of the Treaty's principles for the global environment of today, defines the required relationship between governments and their indigenes, and emblazons in vivid relief the many respects in which the ability of ... Maori to develop in their own country was removed from them.

Both te Tiriti and the Draft Declaration use the ideological principle of self-determination, or te tino rangatiratanga, to articulate, in different fora, the aspirations of Indigenes for equality and freedom. Ultimately, these aspirations and principles require consideration of how "a new set of arrangements [can] affirm the constitutional position of Maori".⁷

II. TE TIRITI O WAITANGI

The ideals expressed in te Tiriti and the expectations that flow from these ideals are contested by sections of Maoridom, the Crown, the Waitangi Tribunal and mainstream Aotearoa/New Zealand.⁸ This article is written on the assumption that te tino rangatiratanga was retained by Maori after the signing of te Tiriti in 1840: to state otherwise is factually unconvincing.⁹ It is erroneous to assume that mana Maori, which existed for over one thousand years prior to colonisation, required the recognition and endorsement of English law in order to exist after 1840.

When interpreting te Tiriti, the Waitangi Tribunal is required to adopt a broad approach consistent with the principles of the Treaty of Waitangi, as expressed in the long title, preamble and section 6(1)(c) of the Treaty of Waitangi Act 1975.¹⁰ The Waitangi Tribunal has formulated the principles of the te Tiriti/Treaty of Waitangi in the process of considering various claims. The

5 Iorns Magallanes, "International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand" in Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (1999) 235, 238.

6 Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi – Wai 143* (1996) 308 ("The Taranaki Report").

7 Durie, "A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa" (7–9 April 2000) speech delivered in the 10th session of a conference on Building the Constitution, Wellington, New Zealand <http://www.vuw.ac.nz/inst-policy-studies/conferences/m_durie.html> (last accessed 3 July 2000).

8 Kelsey, "Globalisation and the Demise of the Colonial State" in Trainor (ed), *Republicanism in New Zealand* (1996) 137. The term "Aotearoa/New Zealand" is used to illustrate "the dualism of distinct colonial and indigenous life-worlds within the settler colony", 178, n 1.

9 The former Minister in Charge of Treaty of Waitangi Negotiations, Sir Douglas Graham, asserted sovereignty on the basis that we have it because we say we have it: "What is, is": see Graham, "Speech Address to Waikanae/Kapiti Rotary Clubs", 3 May 1995, 2. Also, the fact that the Maori population dramatically out-numbered British settlers in 1840 is counterfactual to a negotiating party who gives up the greater part of a bargain.

10 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui-Waitara Claim – Wai 6* (1983) 49.

claims process, and the principles derived from it, also help to unravel the content of *te tino rangatiratanga* or self-determination.

The Courts have also contributed to the development of *te Tiriti* jurisprudence and enlightenment amongst some sections of Aotearoa/New Zealand. However, this article will focus on the work of the Waitangi Tribunal, a body that has generally been more adventurous in its use of jurisprudential sources and in its interpretations of *te Tiriti*. The Waitangi Tribunal has analysed and articulated the relationship between the domestic and international concerns of Indigenous Peoples more frequently than the Courts.¹¹

Maori who signed *te Tiriti* did so in order to benefit from trade and to gain access to western technology. Likewise, the Crown wanted to exploit the natural and land resources of Aotearoa/New Zealand, which were considered under-utilised by European standards. The prospect of a better life for all necessitated a partnership on the terms of Articles I and II: "The cessation of Maori sovereignty to the Crown ... in exchange for the protection by the Crown of Maori *rangatiratanga*."¹²

1. A Partnership

It is widely acknowledged that partnership is the overarching principle of *te Tiriti*.¹³ But the nature of that partnership is contested by sections of Maori and their Pakeha supporters. This friction has been exacerbated by the Crown grafting onto the principle of partnership the duty of each party to act in "good faith", a nebulous legal concept at the best of times. How the partnership between Maori and Pakeha is defined is of major importance, because it goes directly to the structure of their relationship.

All dealings between the two parties are adhered with the structure embodied in the partnership. This is contingent on the definition of equality that is operative. Some Maori articulate a partnership between equals: where one "people" equates to one vote. This view is in contrast to the one-person/one-vote notion of majoritarian democracy.¹⁴ The social democratic concern with equality of outcome versus the liberal democratic concern with equality of opportunity in turn translates into two distinct models of the state. One is a bicultural state model, as expressed by the slogan "Two Peoples: One Country", which implies a relationship between equals in which Maori go everywhere the Crown goes.

11 See also Waitangi Tribunal, *Muriwhenua Fishing Report – Wai 22* (1988) ("*Muriwhenua Fishing Report*"); Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (1992) ("*Ngai Tahu Report*"); Waitangi Tribunal, *The Taranaki Report*, *supra* note 6. Also, Counsel for Maori claimants argued that the Crown had breached the International Covenant on Civil and Political Rights and the right to self-determination in Waitangi Tribunal, *Te Whanganui-a-Orotu Report – Wai 55* (1995) ("*Te Whanganui-a-Orotu Report*") and Waitangi Tribunal *Kiwifruit Marketing Report – Wai 449* (1995) respectively.

12 Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, *ibid* 201.

13 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim – Wai 8* (1985), 99 ("*Manukau Report*").

14 Winiata in International Commission of Jurists, *A Transcript of the Seminar on Bill of Rights, the Pros and Cons* (1985) 66-67.

Another is a multicultural state model, which is based on the liberal democratic definition of equality: Maori are but one of a plurality of competing minority interests within a population that is subject to the predominantly Pakeha state.

A bicultural state model is consistent with the principle of choice, a principle that is guaranteed by the preservation of mana Maori in Article II, and the affirmation of property and civil rights to Maori in Article III. Such a model provides a genuine alternative for both cultures “to develop along customary lines and from a traditional base ... to assimilate into a new way ... [or] to walk in two worlds”.¹⁵ The Crown’s duty to consult with Maori is also consistent with a bicultural state model because mutuality is inherent in the equal status of te Tiriti parties. Each is required to negotiate with the other, and neither can unilaterally impose its wishes on the other.

The requirement of compromise on both sides – which effectively means that the least powerful party loses out – needs to be replaced by the requirement to find a genuinely constructive solution for both parties. Perhaps the incentive to find genuinely constructive solutions would be greater if the status quo prevailed when a genuine agreement between the parties cannot be achieved.

2. Based on Reciprocity

Reciprocity is implicit in the exchange between the two parties. Law-making authority (Article I) and the right of pre-emption (Article II) are given subject to the condition that tribal authority over resources and other taonga is preserved according to Maori cultural preferences (Article II). This is reinforced in the preamble to te Tiriti in which the Crown records its desire to “protect” Maori.

The duty is one of active protection from which the Crown cannot derogate by delegating it to entities that are not bound by te Tiriti.¹⁶ It requires the Crown to ensure that Maori have sufficient resources to provide for their “comfort, safety or subsistence”¹⁷ and profit.¹⁸ It also includes taking active steps to assist with the development of resources so that Maori may derive full benefit from them.¹⁹ The exchange is ultimately underpinned by the surety that redress will be made if the Crown breaches te Tiriti.

3. Capable of Adaptation and Open to Development

The notion that te Tiriti is capable of adapting to meet new circumstances and other Tiriti principles, combined with the right to development, form the

15 Waitangi Tribunal, *Muriwhenua Fishing Report*, supra note 11, 195.

16 Waitangi Tribunal, *Manukau Report*, supra note 13, 99.

17 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim – Wai 9* (1987) 146.

18 Waitangi Tribunal, *Muriwhenua Fishing Report*, supra note 11, 194.

19 Ibid.

basis of claims to modern commercial entities as diverse as commercial fisheries,²⁰ power generation²¹ and the electromagnetic spectrum.²²

The Waitangi Tribunal reports on these claims are instructive because they show how international issues affect domestic concerns. In these claims, an emerging human rights standard was successfully used to support the right of Maori to development. This was possible because the right to development had evolved from an international human rights standard into customary international law, and was thereby automatically incorporated into domestic law.²³ Some writers suggest that the right of Indigenous Peoples to self-determination, and the autonomy needed to achieve this, is also an accepted right in international customary law, and is therefore part of municipal law.²⁴

In the *Muriwhenua Fishing* and *Ngai Tahu* reports the Maori expectation of a right to development was affirmed.²⁵ The right to development is an inalienable and general human right that implies the right of peoples to self-determination.²⁶ It provides that “all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development”.²⁷ This was successfully established by counsel for the Maori claimants in the Muriwhenua fishing claim and subsequently accepted by the Crown in the Ngai Tahu claim. The Waitangi Tribunal found that Maori were entitled to develop the method (offshore), nature (commercial) and species of their fisheries to benefit from the use of contemporary knowledge and technology. Counsel reinforced the Crown’s duty of active protection with the internationally recognised right to development. This argument was also used to reinforce submissions concerning Te Tiriti rights in the Te Ika Whenua River and the Radio Spectrum claims. As Catherine Iorns Magallanes observed, modern developments in the rights of Indigenous Peoples have influenced the articulation of Maori te Tiriti rights.²⁸ Despite the right to development being a general human right, not a right specific to Indigenous Peoples, it has been adopted by the Waitangi Tribunal and the New Zealand Courts and applied to Maori rights.²⁹

20 Waitangi Tribunal, *Muriwhenua Fishing Report*, supra note 11 and Waitangi Tribunal, *Ngai Tahu Report*, supra note 11.

21 Waitangi Tribunal, *Te Ika Whenua Rivers Report* (1998).

22 Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report – Wai 776* (1999).

23 Iorns Magallanes, supra note 5, 244.

24 Ibid 242-3. Iorns Magallanes also reports that James Anaya has suggested that most of the norms in the 1989 ILO Convention 169, concerning indigenous and tribal peoples in independent countries, express customary international law to which even those states who have not signed the Convention are bound.

25 Waitangi Tribunal, *Muriwhenua Fishing Report*, supra note 11, 234-235; Waitangi Tribunal, *Ngai Tahu Report*, supra note 11, 253-256.

26 United Nations Declaration on the Right to Development, Dec 4 1986, UN GA Res: 41/128, 41 see Arts 1 & 2.

27 Ibid, Art 1.

28 Iorns Magallanes, supra note 5, 262.

29 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 554.

In turn, Maori customary rights have been conclusively acknowledged to contain a right to development.

Closer consideration of international human rights law on the rights of Indigenous Peoples reveals where the rights of Maori under te Tiriti are ripe for further development.

III. THE DRAFT DECLARATION

The Draft Declaration aspires to recognise and protect Indigenous Peoples on the basis of their humanness and their sui generis status.³⁰ It is one of a number of actions that Indigenous Peoples have taken in the United Nations to define their collective and individual human rights in relation to nation-states.³¹

Importantly, the Draft Declaration reflects the concerns of Indigenous Peoples themselves and, to that end, was written by the Working Group on Indigenous Peoples ("WGIP"). While the WGIP was, and remains, part of the United Nations, it is unique insofar as it enabled Indigenous Peoples to participate in writing the Draft Declaration. This gives the Draft Declaration a moral force that urges governments to act in accordance with it despite the fact that they are not legally bound to do so.³²

It is unlikely that the Draft Declaration will be adopted by the United Nations General Assembly given that the very nation-states whose oppression has caused Indigenous Peoples to seek international protection are required to ratify it. Even if the Draft Declaration were to be ratified, it would not necessarily constitute binding international law: this can only be achieved through treaties, customary law, or the observance of jus cogens principles. The Draft Declaration may, however, become binding international law either as the basis of a treaty or by developing into a new rule of international customary law.³³ As mentioned above, some writers believe that customary international law has already accepted the right of Indigenous Peoples to self-determination and the freedom to control their own destinies that this right implies.³⁴

James Anaya has suggested that the norms embodied in the International Labour Organisation Convention No. 169 ("ILO Convention"), which have much in common with the Draft Declaration, are declaratory of international customary

30 Lloyd, "The Draft Declaration on the Rights of Indigenous Peoples (DDRIP): Self Determination, Self Government and Maori" *Youth Law Review* [1998] 13.

31 Jackson, "The United Nations Declaration on the Rights of Indigenous Peoples An Indigenous View" in *Report of the Twelfth Session of the United Nations Working Group on Indigenous Peoples in Geneva and the Study Trip on Indigenous Justice Systems in Canada* (1994) Appendix One. Other undertakings include the establishment of a permanent body for Indigenous Peoples within the United Nations, the annual review of indigenous developments and the International Decade for Indigenous Peoples.

32 Iorns Magallanes, *supra* note 5, 245.

33 *Ibid.*

34 Iorns Magallanes, *supra* note 5, 242-243.

law, and are binding even on those states that are not parties to it.³⁵ However, the ILO Convention does not adequately express the right of Indigenous Peoples to self-determination. The use of the term “peoples” has been limited in the ILO Convention. Furthermore, “[t]o limit the right is in fact to deny it”,³⁶ because the crux of self-determination is that only Indigenous Peoples themselves can and should determine the right.³⁷ In that sense, the Draft Declaration represents a significant shift in international human rights standards from one of assimilation to one that acknowledges that Indigenous Peoples are entitled to their own distinct culture and identity, and the autonomy that that implies.³⁸

1. Constructing “Peoples” and Controlling Humanness

Historically, Indigenous Peoples have refused to accept the colonial view that their cultures are inferior and that they, in turn, are not sufficiently human to be members of the “family of nations”. In the preamble to the Draft Declaration, Indigenous affirm that they “are equal in dignity and rights to all other peoples”. Through the ideological principle of self-determination, they affirm their equality as members of the human race and their entitlement to the inalienable rights of all human beings.

The right of Indigenous Peoples to “freely determine their political status and freely pursue their economic, social and cultural development” is laid down in Article 3, the foundational article from which all other rights are derived. Article 31 provides a non-exhaustive indication of the constituent elements of self-determination. The right to self-government and the right to fund these autonomous activities – presumably by way of a separate tax system – are among the core elements of Article 31. Political and economic autonomy are inextricably linked because independent governance without the resources necessary to fund it amounts to welfare, a system that keeps Indigenous Peoples subject to the colonial state. Another important aspect of self-determination is the right to establish indigenous institutions based on distinct “juridical customs, traditions, procedures and practices”, as listed in Article 33, an important element of which is a separate legal system.

The equality asserted by Indigenous Peoples is sourced in different cultural values and identities. This means that it cannot be realised without the autonomy to be different. Underpinning the colonial paradigm that denies the existence of Indigenous Peoples in international law, by refusing to recognise their practices in international custom and covenants, is a very different perception of equality. There is a tension between two meanings of “equality”. On the one hand, equality means “the same as” or “equivalent to”, and is based on the hierarchical

35 Anaya, *supra* note 2.

36 Jackson, “Discussion of some significant issues” in *The United Nations Declaration on the Rights of Indigenous Peoples An Indigenous View* (1994) Nga Kaiwhakamarama I Nga Ture (Wellington Maori Legal Service Inc).

37 *Ibid.*

38 Iorns Magallanes, *supra* note 5, 239-240.

premise that anyone not “the same as” is inferior. On the other hand, equality has a more fundamental meaning that goes to the “unmistakable footprint of a common humanity”.³⁹ Human rights are founded on this basic principle of universality, which in turn implies equality.⁴⁰ It is generally accepted that the concept of universal human rights would be nonsensical if it did not take account of specific human rights such as those that protect women, workers and Indigenous Peoples.⁴¹

The freedom to be different is inherent in being human. Any limitation on the right of human beings to determine their own culture and identity limits their status as human beings. It makes some human beings more equal than others. As Moana Jackson has stated:⁴²

[T]he right of self-determination is not created by this Declaration or international law. At its most fundamental it is a right inherent in being human. To deny it to Indigenous Peoples is to deny their humanness: to limit its application to Indigenous Peoples is to limit their ability to perceive of themselves as fully human.

The use of the term “Indigenous Peoples” in the Draft Declaration encapsulates both the unique collective nature of the rights asserted and the common humanness on which these rights are based. The International Bill of Rights⁴³ and the United Nations Charter declare the right to self-determination of “peoples”, and characterise these rights as “human” rights.⁴⁴ Indigenous Peoples expect the international community to recognise collective rights as distinct from, yet equally worthy of, the protection that has been granted to the individual rights of non-Indigenes throughout the development of human rights law.⁴⁵ The desire of Indigenes to be recognised as part of the collective – the basis of their strength – is asserted as being of equal worth to the wish of non-Indigenes to be acknowledged as individuals.

Colonial states have challenged the use of the term “peoples” on the basis that a people’s right to self-determination undermines the sovereignty of nation-states, that it incorporates the right to secede which dismembers the territorial integrity of states.

However, it is now widely accepted that the right to self-determination does not necessarily involve secession.⁴⁶ In modern times the notion of purely

39 World Commission on Culture and Development, *Our Creative Diversity: Report of the World Commission on Culture and Development* (1996) 21, cited in Wickliffe, supra note 2, 168 n 51.

40 Stavenhagen, supra note 3, 11.

41 Ibid 14.

42 Jackson, supra note 31, Appendix Two.

43 Wickliffe, supra note 2, 155. As noted by the author, this consists of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration on Human Rights 1948.

44 Jackson, supra note 31, 14.

45 Ibid.

46 See the Submissions Table by the Australian Minister of Aboriginal Affairs at the 11th WGIP 1993, cited in Jackson, supra note 31, n 17. See also the Institute Proceedings, cited in Jackson, supra note 31, n 18; Hannum “Rethinking Self-Determination” (1993) 34 Va J Int’l L 61, where

sovereign states with discrete legal jurisdictions is more legal fiction than reality.⁴⁷ The economic and political power of transnational corporations, multinational and regional organisations – such the International Monetary Fund and Asia-Pacific Economic Cooperation, are all limits on state sovereignty. An overlay of competing and overlapping internal jurisdictions further undermines the notion of universal sovereignty. Modern legal reality is one of overlapping legalities within and outside states, and any suggestion that the self-determination of Indigenous Peoples cannot be accommodated within these is spurious.

IV. CONSTITUTIONAL CHANGE

The remainder of this article will consider how the ideals and expectations of Maori under *te Tiriti* and the Draft Declaration can be effectively implemented in Aotearoa/New Zealand.

At a recent conference on the topic of constitutional change, Professor Mason Durie suggested that, until there is more widespread agreement about the constitutional implications of *te Tiriti*, “a Treaty-focused approach by itself might fail to highlight attitudes to fundamental issues”.⁴⁸ By Professor Durie’s assessment, *te Tiriti* will be a significant, but not the sole, consideration in the debate on constitutional change.⁴⁹ The issue is not just how *te Tiriti* will be given constitutional status, but how the constitutional position of Maori will be protected under a new constitutional framework.⁵⁰

According to Professor Durie, there are four non-negotiable starting points for Maori, upon which a new constitution would need to be founded.⁵¹ These are: (i) a single independent nation-state; (ii) recognition of Indigenous Peoples’ rights; (iii) Maori self-government; and (iv) an improved understanding of *te Tiriti*. The first three of the four starting points will be addressed in turn below.

1. A Single, Independent Nation-State

Maori self-determination (Professor Durie’s term is “self-governance”) is likely to be debated in the context of Aotearoa/New Zealand becoming a republic. However, the “single” structure Professor Durie posits is not

the author observes that, in the great majority of cases, intra-state solutions are likely to achieve the desired results of self-determination.

47 MacCormick, “Beyond the Sovereign State” (1993) 56 *Maori LR* 1. The author examines the legal and political relationship between England and the European Community to illustrate his thesis that the legal orthodoxy of “sovereignty” based on hierarchical relationships of superordination and subordination is no longer applicable to understanding the modern legal order which is one of overlapping legalities.

48 Durie, *supra* note 7, 1.

49 *Ibid.*

50 *Ibid* 4.

51 *Ibid* 4-5.

necessarily a foregone conclusion. Becoming a republic will involve formally cutting our connections with colonial Britain and establishing a post-colonial state.⁵² As Professor Jane Kelsey suggests, widespread constitutional reform must precede or occur alongside this process.⁵³ Sections of the population who favour mana Maori will simply not allow te Tiriti to be side-stepped. There is a high level of distrust towards the Crown amongst Maoridom and their Pakeha supporters, who suspect that the Crown will try to use the shift to republicanism to shirk its responsibilities under te Tiriti.⁵⁴ On the other hand, it would be difficult to mobilise change around issues of Maori self-determination in isolation because a mature understanding, let alone consensus, on the constitutional implications of te Tiriti and human rights discourse is not prevalent in Aotearoa/New Zealand. Also, as Professor Kelsey has argued, “[t]here is a logical and intimate connection between globalisation, republicanism and decolonisation” which makes it likely that decolonisation will occur in the context of a move to republicanism.⁵⁵

2. Recognition of Indigenous Peoples’ Rights

Maori must be recognised as having special constitutional status by virtue of their status as tangata whenua of Aotearoa/New Zealand.⁵⁶ The emergence of an international human rights standard that recognises the right of Indigenous Peoples to self-determination has added, and will continue to add, support to Maori aspirations for special constitutional recognition. In the long term it is inevitable. The special status of Maori will be constitutionally recognised and protected if the discourse of “indigenouness” (starting from the principle of self-determination) is increasingly filtered through to our juridical institutions, parliament and into the public consciousness, through the articulation of Maori rights.

3. Self-Government and Self-Determination

In the first week of April 2000, *The New Zealand Herald* published three articles about Maori self-determination and the need for independent, Maori-controlled institutions.⁵⁷ An example of how the ideological principle of self-determination is being repeatedly infiltrated into the public consciousness can be

52 Kelsey, *supra* note 8, 149.

53 *Ibid* 154.

54 Tunks, “Mana Tiriti” in Trainor, *supra* note 8, 113, 120.

55 Kelsey, *supra* note 8, 157.

56 Durie, *supra* note 7, 4.

57 “King-hit missing in Act Attack”, *The New Zealand Herald*, Auckland, New Zealand, 1 April 2000, A15; “Maori Seek role at Constitution Talks”, *The New Zealand Herald*, Auckland, New Zealand, 8 April 2000, A3; “The Question is Where We are Going, and How”, *The New Zealand Herald*, Auckland, New Zealand, 8 April 2000, A19.

found in Alliance MP Willie Jackson's response in Parliament to attacks by Act Party Leader Richard Prebble on Labour MP John Tamihere.⁵⁸

The racism comes from members of this House who refuse to let Maori have what we have always wanted – self-determination with the ability to participate well in New Zealand The natives are getting right out of control, are they not?

Jackson is especially on point given the fact that the institution under attack, Te Whanau o Waipareira, is, along with many other Maori institutions, likely to be one of the foundations of self-government upon which Maori self-determination is built.⁵⁹

However, Professor Durie believes the third non-negotiable element of constitutional change for Maori is self-government rather than self-determination. He suggests that, in the process of Maori deciding what the central elements of a modern Maori society should be, Maori need to focus on the nature of the relationships between themselves, rather than the structures that are the source of conflict and disagreement in Maoridom.⁶⁰ However, the structure of the relationship between Maori and Pakeha is, as submitted above, fundamentally important because everything derived from that structure is adhered with its character.

The character of self-government is of a quasi-independent body reliant on state-controlled resources. The character of self-determination is independent political and economic power. Self-determination is preferable because it fosters equal relations between the two races both in substance and in form. More importantly, it is for Indigenous Peoples themselves to decide their destiny, and the Draft Declaration is evidence of their clear preference for self-determination.

4. Process

The above section on constitutional change began by assessing whether or not the expectations and ideals of the Draft Declaration are consistent with the type of society Maori desire. In so doing, it was helpful to refer to Professor Durie's non-negotiable starting points. This process could be used as a framework for developing constitutional change that affirms and expands the constitutional position of Maori.

Between the starting points and the outcomes desired would be the all-important process. Professor Durie recommends that the Treaty partners first reach separate agreements amongst themselves before seeking a wider agreement between each other. Integrationists will no doubt contest his proposal for separate constitutional commissions as an innately racist practice. However,

58 Ibid A15.

59 Examples of other Maori institutions that make self-government viable include urban authorities, marae, runanga-a-iwi, kohanga reo, kura kaupapa, wananga, Maori health services and churches.

60 Durie, *supra* note 7, 5. For example, iwi versus tribal authority, iwi versus iwi, iwi versus hapu and so on.

separatist strategies have enjoyed some success in both the international Women's and Civil Rights movements in which separate meetings along the lines of gender and race have been adopted. Closer to home, the Anglican Church has also introduced separate services, governance and funding regimes based on cultural distinctions with some measurable success.

The following diagram, based on Professor Durie's framework for constitutional change, serves as a useful depiction of the views expressed in this article:⁶¹

| Starting Points | Process | Outcomes |
|--------------------------|---|---|
| Independent State | Separate constitutional meeting structures for Pakeha and Maori | Maori self-determination needs to be consistent with the independent state |
| Indigenous Rights | Maori meet to determine their values | The tangata whenua status of Maori is recognised in the constitution |
| Maori Self-determination | Two bodies agree on the way forward for further agreement | Political, economic, social and cultural independence Separate government Independent source of revenue Maori institutions (e.g. a separate legal system) Shared institutions |
| Te Tiriti Relationship | Seek agreement from voters on general and Maori electoral rolls | Decide on state structure and constitution |

V. CONCLUSION

Sir Hepi Te Heuheu, Ngati Tuwharetoa Paramount Chief, has suggested that, until we have a constitution based on te Tiriti o Waitangi, disharmony and a sense of injustice will continue.⁶² However, the modern colonial state seems

61 Durie, *supra* note 7, 7.

62 Te Heuheu, "Interview", Morning Report (sound recording), National Radio, 30 January 1995, cited in Joint Methodist-Presbyterian Public Questions Committee, "Alternative Vision: From Fiscal Envelope to Constitutional Change" (1996) New Zealand <<http://www.pq.godzone.net.nz/altvision.htm>> (last accessed 3 July 2000).

intent on wiping the slate clean with the settlement process offered to Maori in the Fiscal Envelope. Moana Jackson encapsulated the objections of some sections of Maoridom to the settlement process when he stated that:⁶³

While the Crown says it wants to settle treaty issues, it is unwilling to face up to what the treaty is all about, which is matters of the constitutional rights of Maori; the rights of Maori to make their own legislative decisions; to develop their own revenue collection or taxation mechanism; their right to have their own justice; all the things which are part of sovereignty. For the Government to say that those are separate from the fiscal envelope proposal when they say the fiscal envelope is a treaty matter, is actually to limit what the treaty is about.

Between these two visions of our future, however, lies mainstream Aotearoa/New Zealand. Unfortunately, this significant section of our society lacks an understanding of *te Tiriti* and the basis of Maori grievances, as well as an appreciation of international human rights issues, sufficient to make an informed contribution or decision about the shape of future constitutional arrangements. It is imperative that these issues are publicly discussed and debated before widespread constitutional change, incorporating self-determination or *te tino rangatiratanga* for Maori, will be realised.

63 Jackson, "Interview", *Mana News*, National Radio (sound recording) 31 January 1996, cited in Joint Methodist-Presbyterian Public Questions Committee, *ibid*.