CONSTITUTIONAL REVIEW: AN OPPORTUNITY FOR INFLUENCE

YEARLY MEETING **20 MAY 2011**

Introduction

Constitutional review is on the political agenda thanks to the agreement on confidence and supply between the Māori Party and the National led Government. It presents Friends and others with a rare opportunity to influence the shape of the future.

Friends have long recognised that change to "share power" more justly in our society is necessary. This was given emphasis and urgency by the manner in which the Government of the day enacted legislation (the Foreshore and Seabed Act 2004) that breached Treaty and other human rights in what the government perceived as the "majority interest".

In addition to addressing this issue, a review provides an opportunity for much broader consideration as illustrated by the recent adoption of constitutions in Ecuador and Bolivia, which entrenched rights for mother earth as well as human rights.

In order to exert the sort of influence that Friends have historically achieved, we need to be well informed, well organised and active. In this session I will provide some background to the issues and then David and Jillian will describe the constitutional arrangements as they currently stand. I will then describe a process that the Treaty Relationships Group recommends to further inform ourselves, to begin developing possible options and to extend the discussion to our networks of support and influence. Finally, if we have time we will start on the process of visioning a future by identifying some core values we would like to see expressed in our constitutional arrangements.

Background

Constitutional change does not necessarily require a written constitution such as in the case of the United States of America. Neither does it necessarily require the further severing of ties with the British Crown. Significant improvement can be achieved without such change and several commentators consider that the process in Aotearoa is likely to involve a continuing incremental process unlike the radical, even revolutionary process in the South American jurisdictions.

However, it could be argued that the more we retain of the existing model, the less the end result will express and contribute to our emerging unique identity here in the South Pacific.

Friends in Aotearoa have a long term commitment to constitutional change based on our concern about the injustices that the present arrangements impose on Māori. This commitment springs from an even longer Quaker tradition of concern for justice in "newly settled countries" as illustrated by the following from *Advices and Queries of London Yearly Meeting 1840*:

> We would entreat those who may establish themselves in newly settled countries to reflect upon the responsibility which attaches to them when they are the neighbours of uncivilised and heathen tribes. It is an awful but indisputable fact, that most settlements of this description, besides dispossessing the natives of their land without equivalent, have hitherto been productive of incalculable injury to the moral and physical condition of the native races; which have been thereby more or less reduced in

> numbers, and in some instances completely exterminated. Earnestly, therefore, do we desire that all those under our name, who may emigrate to such settlements, may be careful neither directly nor indirectly to inflict injury upon the natives, but that they may, on the contrary, in their whole conduct, exhibit the practical character of that religion which breathes 'Glory to God in the highest, and on earth, peace, goodwill toward men'.

In 1988-89 Yearly Meeting adopted a statement titled *Bicultural Issues*, a core element of which stated:

> We recognise the Treaty of Waitangi/Te Tiriti o Waitangi as a living document fundamental to the life of this nation, and we commit ourselves to the principle of partnership which it embodies. This is in accord with our longstanding commitment to social equality and peaceable co-operation. We accept that honouring the Treaty will have implications for our personal and collective lives. We cannot yet know in detail what this will mean for the Religious Society of Friends, but we acknowledge that it will certainly involve equitable sharing of resources and giving up by Pākeha of exclusive decision-making in the institutions of society.

The theme was developed further in the *Statement on Māori-Pākeha Issues* from Yearly Meeting in 1995:

> ...we also recognise the extreme frustration experienced by Māori tribes and people, especially those of the younger generation, at the lack of real progress towards redressing historical grievances. This has led some of them to assert dramatically, by their physical presence on disputed land, their claim to the rangatiratanga (uncontested authority) guaranteed by the Treaty which their ancestors signed. We acknowledge that this guarantee has not yet been honoured in more than 150 years. We believe that now is a most opportune time to start working towards new constitutional arrangements to give effect to the Treaty. These would reflect the status of Māori as tangata whenua in this country, with the same right to self-determination as other indigenous peoples of the world.

Our concerns for change were proven well founded by the legislative process and ultimate enactment of the Foreshore and Seabed Act 2004. This illustrated how our constitutional arrangements failed to protect basic human rights. The Act was introduced, as has so often happened, when the Courts ruled in favour of a case brought by Māori. Instead of allowing the court process to proceed, the government changed the law. In doing so it was advised by its own experts that the legislation was in breach of the Treaty of Waitangi and the Bill of Rights Act. It proceeded despite this because of the government's interpretation of the majority interest.

After considering this further example of injustice, Yearly Meeting in 2008 adopted the *Statement on Constitutional Change* from which I quote as follows:

> For nearly 170 years Māori have attempted to address their concerns by using the legal systems and processes of the nation with tenacity and patience. Our observation is that the majority of these systems have failed to safeguard the basic rights of Māori as tāngata whenua. Majority decision making has continued to oppress and control.
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> We reaffirm our Statement on Bicultural Issues in 1989 and in particular our acknowledgement that honouring the Treaty of Waitangi would involve "…giving up by Pākeha of exclusive decision-making in the institutions of society." We are now clear that the way to achieve this is through constitutional provisions.

Whilst we have to date approached the issue of constitutional change through the 'lens' of the Treaty, there are other compelling reasons for us to push for change. While indigenous peoples' rights are particularly vulnerable, it is not only the rights of Māori that the current constitutional arrangements fail to protect. There is similarly no protection for other New Zealanders' human rights as can be been seen through the amount of legislation enacted that breaches a range of rights guaranteed under legally binding international human rights instruments. Furthermore, Friends along with many others have become increasingly concerned about how existing economic and financial systems are leading to exploitation of, and damage to, the environment. Parliament will shortly be considering a Taxpayers' Rights Bill designed to protect the interests of the taxpayer by placing limits on the State's ability to raise taxes. One could well ask why such protection of the environment is not being considered.

Constitutional arrangements

According to a number of experts including Mathew Palmer, constitutions are at heart about public power, who exercises it and how. They provide checks, balances and safeguards that governments and courts must adhere to.

Palmer and others point out that constitutions are also an expression of our deepest values. They are an expression of what we aspire to, what we want life on this part of the planet to mean.

In order to push for change we need to understand what our current constitutional arrangements are and how they work. David James and Jillian Wychel have a useful model they use in their Treaty work and they will now introduce you to that model.

(See attached paper)

The concept of parliamentary supremacy is therefore taken to an extreme not seen in other democracies which we like to compare ourselves with, and this raises several issues:

- Parliament, especially without any form of upper house, in reality means a small elite comprising the Cabinet and senior public servants (the Executive) who have the power to draft laws and see them enacted by use of mechanisms such as party discipline to ensure a Parliamentary majority.
- This small Executive is exposed to constant lobbying, and in the case of social and economic elites; such lobbying is well resourced and well connected.
- We have seen laws enacted, particularly in the 1980s for which there was no prior electoral mandate. The populace reacted and this led to the electoral reforms of the 1990s. Whilst the resulting MMP system has helped to ameliorate the problem, this has been only to a small extent.
- We also continue to see laws enacted that breach Treaty and other human rights because the system provides for the will of the majority (as interpreted by the party in Government), to dominate all other considerations. Both the Foreshore and Seabed Act 2004 and the Coastal and Marine Area (Takutai Moana) Act 2011 are recent examples.
- In most democracies, human rights are protected either by means of entrenched legislation i.e. special Acts that override other legislation and cannot be changed without a strong majority in the parliament, or by means of written constitutions. The very purpose of human rights legislation is to protect human rights (including those of minorities) that are too important to be subject to political whim. Our system, based as it is on advancing the majority interest, seems to be inconsistent with such aims.

The Government itself summarised the situation for the UN Human Rights Committee in 2010 as follows, “Under New Zealand’s present constitutional structure, it remains open to Parliament to legislate contrary to the Bill of Rights Act and other legislative protections...and so to the Covenant” [the International Covenant on Civil and Political Rights in this case, but the statement applies equally to all of the legally binding human rights instruments to which New Zealand is a state party].

- Article 2 of the Treaty of Waitangi guaranteed the continuance of tino rangatiratanga to hapū and iwi. A system based on majority rule is fundamentally inconsistent with this Treaty commitment.

There isn’t time to expand on all these points but some emerging evidence of crucial importance to the last point is worth mentioning.

The Treaty and Rangatiratanga

Hapū and iwi have always maintained that in signing the Treaty of Waitangi in 1840 they did not relinquish “sovereignty”. Evidence presented to the Waitangi Tribunal hearings of the Ngapuhi claim, by experts such as Ann Salmond and Manuka Henare, is providing substantial support for this view.

It has always been a puzzle, given the demographics and balance of power at the time, that rangatira would voluntarily cede their authority, as the prevailing view would have it. There are no known examples of this occurring anywhere around the world, and Manuka Henare’s research demonstrates that sovereignty is never ceded willingly but always taken, usually by force.

The evidence presented to the Waitangi Tribunal is clear in its conclusion that Māori in fact did not cede sovereignty. This has presented the Tribunal with one of its biggest challenges to date. I await their determination with keen interest.

The key aspect of the new evidence is that the Treaty cannot be accurately interpreted if it is analysed as a one-off event. To obtain an accurate picture of the intention of both parties it is critically important to examine the antecedents to the Treaty. We know of the British antecedents to the Treaty including the support for the Declaration of Independence and Lord Normanby’s instructions to Hobson which required honourable dealing with and informed consent of the indigenous inhabitants.

Manuka Henare in his doctoral research unearthed previously unknown archival evidence of the antecedents pertaining to hapū and iwi, including accounts of visits to England by rangatira from the early 1800s and the letters that followed those visits, leading to the Declaration of Independence in 1835. Through all this archival evidence there is a clear picture of a developing concern amongst hapū and iwi to safeguard their rangatiratanga in Aotearoa whilst seeking the protection of the British Crown from other nations’ colonial intentions and from the predations of an increasingly lawless settler group, thus allowing peaceful settlement.

In this authoritative view of the Treaty, hapū and iwi agreed to peaceful settlement of their land under the protection of the British Crown on the basis that they would continue to live as they always had under their own authority and laws and the British authorities would govern their own population.

So what, you may well ask?

In the view of the Treaty Relationships Group it is a matter of simple justice and fair dealing. The London Yearly Meeting advice says it well, “Earnestly, therefore, do we desire that all those under our name, who may emigrate to such settlements, may be careful neither directly nor indirectly to inflict injury upon the natives...”

Do we want our nation to be founded on injustice resulting from breaching the Treaty with the indigenous peoples and a “revolutionary seizure of power” (Sir Geoffrey Palmer) or on an evolving sense of agreement about how to honour the Treaty, which is widely recognised as the founding document of our nation?

Our statement from Yearly Meeting 2008 clearly indicates that we favour the latter course and that the way to honour the Treaty is through constitutional provisions.

Constitutional options

It seems to be the view of some that constitutions are for lawyers and experts. In contrast, our view is that broad based participation is vital, with the experts doing the technical drafting work only after the intent and substance has been agreed. This accords with the view of a constitution as an expression of our values and culture.

Certainly in recent constitutional developments in several South American jurisdictions there has been widespread public participation. In the case of Ecuador and particularly Bolivia, the outcomes provide an example of the possibilities inherent in constitutional development in the modern context.

Bolivia has adopted a constitution that amongst other things recognises the rights of 36 distinct indigenous “nations” and creates a distinct indigenous legal system that will run parallel to the state system of courts. Indigenous practices and styles of dispute resolution will thus be taken into account in the way the system functions overall. In such provisions it is provides a model of indigenous self-determination within the framework of legacy institutions from a history of colonialism stretching back some 517 years.

The Bolivian constitution goes much further by also recognising indigenous beliefs in Pachamama (the nurturing principle of mother earth) as one of the sources of inspiration for the Bolivian nation. This will shortly lead to “the world’s first laws granting all nature equal rights to humans” (The Guardian, UK, 10 April 2011). The laws, which are expected to be enacted this year will establish 11 new rights for nature including

- the right to life and to exist
- the right to continue vital cycles and processes free from human alteration
- the right to pure water and clean air
- the right to balance
- the right not to be polluted
- the right to not have cellular structure modified or genetically altered
- the right to not be affected by mega- infrastructure and development projects that affect the balance of ecosystems and the local inhabitant communities

It is clear therefore that constitutions can provide the basis for right relationships not only amongst the human community but also between the human community and the environment.

Returning however, to the theme of constitutional options to protect the rights of indigenous peoples in Aotearoa/New Zealand, over the years there have been a number canvassed such as:

- Entrenched human rights laws. Although not a Treaty based right itself (it is much wider and exists in jurisdictions without a Treaty), such entrenchment would help to meet the undertakings of Article 3 of the Treaty of Waitangi. It does not however begin to deal with the undertakings in Article 2 pertaining to tino rangatiratanga or 'sovereignty'.
- A Treaty Commissioner to interpret and apply the Treaty to contemporary issues.
- An upper house of Parliament comprised of members that represent the Treaty signatories.
- Regional autonomy. Contrary to the popular, but simplistic and inaccurate call of "one law for all" regional autonomy is a feature of all federated states such as the US and Australia. The fact is that the law in Victoria is different from the law in Queensland. There is not "one law for all" and as Judith Binney recently suggested, some degree of regional autonomy for the Tuhoe iwi has already been on the statute books and cannot therefore be seen as a threat to the nation state of Aotearoa.
- For iwi who no longer have a clear geographic base, options for what Alison Quentin-Baxter calls "corporate federalism" as distinct from "geographic federalism" need to be explored. Such options provide some measure of decision making autonomy for individual populations within the corporate whole of the nation state.

Whilst it is useful to have such options in mind because they illustrate the nature of what is possible, there is a risk of settling on such options too early in the process when what is required initially is broad thinking on the subject. We also need to bear in mind that at some stage, a conversation with Māori is essential and we need to approach that with open minds.

Recommended process

It is the view of the Treaty Relationships Group that reviewing our constitutional arrangements requires a process of unhurried and broad discussion. At some point, dialogue with Māori is critical. Hapū and iwi have long discussed the need for constitutional change, and most recently Moana Jackson and Margaret Mutu have been asked to Co-convene the Working Group on Constitutional Transformation which has developed a three-year process of engagement with Māori to work on developing a model constitution based on kawa and tikanga, the Declaration of Independence and the Treaty. They will approach the task from an indigenous perspective which is likely to lead to a different set of conclusions from the rest of the community. The challenge then will be to move toward a mutually agreeable position.

There is a parallel, albeit lower key, process of engagement underway by the Pākeha Treaty workers network, following the meeting convened by Peace Movement Aotearoa earlier this year, which some Friends are already involved in.

The Government review is to take place over 3 years, concluding in 2013. The terms of reference are a disappointment and appear to be an attempt to limit the scope of the conversation. The conversations in the Māori community will not be constrained by such terms of reference and will range very broadly. In our view, so should the conversations by other New Zealanders. They may not therefore be accepted as part of the current review, but the conversation itself is the important thing and will contribute to greater understanding of the need for real change, which will result in ongoing pressure on governments.

In our view it is important for the Society of Friends in Aotearoa to engage in a process of learning and discussion so that we are able to enter a conversation on an informed basis with our networks, the wider community and with Māori at an appropriate time. The wider process of constitutional change, involving as it does questions of power in society, is likely

to be difficult and conflictual at times. If we wish to be useful allies and exercise our traditional role as peaceable mediators then the first step is for us to become as well informed as possible.

The process the Treaty Relationships Group recommends is as follows:

- This Yearly Meeting encourages Monthly Meetings to consider the topic of constitutional change during 2011, using the questions below as a starting point for discussion.
- Monthly Meetings ensure that they are well represented at the Treaty weekend at the Settlement 21 - 24 October 2011, and that their representative/s come with a report on any discussion that has taken place within their Meeting by then.
- At the 2011 Treaty weekend, work will be done on providing further resources for those present to take back to Monthly Meetings so that the learning and discussion continues.
- During 2012, Monthly Meetings connect with networks in their communities, such as other faith groups, Pākeha Treaty workers, and other organisations interested in a Treaty-based future, and extend the discussion more broadly.
- At the 2012 Yearly Meeting Treaty Relationships Group session there will be feedback and further discussion.
- The Treaty weekend in 2012 will then begin to draw the threads together so that we have an accepted basis for contributing to a conversation with the wider community and with Māori.

Making a start

To focus the discussion about constitutional change in Monthly Meetings, we suggest using the following questions:

1. How well do you consider the way we govern ourselves delivers right relationships with;
   - each other,
   - indigenous peoples,
   - other countries,
   - the environment?
2. What values need to underlie new constitutional arrangements so they encourage right relationships?
3. How do we want to be governed (how should decisions be made) to encourage right relationships.

Resources

The following resources will be useful to help inform the discussion:

- Constitutional arrangements: resources and comment http://www.converge.org.nz/pma/cons.htm
- Treaty of Waitangi: Questions and Answers, Network Waitangi, 2008 http://www.converge.org.nz/pma/treatyqa.htm
- Treaty Relationships Group Submission to the Review of New Zealands Existing Constitutional Arrangements Inquiry , 2005 http://www.converge.org.nz/pma/catrg.doc 2005
- Constitutional Review Report http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/e/9/b/e9b156d30c1840eb8ffa20c6b28277de.htm
- Chris Laidlaw interview about the Bolivian constitution (Available from Replay Radio)
- Geoffrey Palmer, New Zealand's constitution in crisis: reforming our political system, Dunedin: McIndoe, 1992