

NGĀ TOKI WHAKARURURANGA

TE TIRITI O WAITANGI & INTER-NATIONAL TREATY MAKING

#4. THE CROWN'S PRINCIPLES OF CONSTITUTIONALISM¹

As part of Ngā Toki Whakarururanga's mandate to bring a te Tiriti o Waitangi lens to the international trade and investment space, we have commissioned a series of working papers on the constitutional power to make international treaties. The full paper *Mana and Constitutional Transformation of Treaty Making* can be accessed at ngatoki.nz/kaupapa/rangatiratanga-and-constitutional/

The *Tomokia Ngā Tatau Matangireia/Constitutional Kaupapa* (Wai 3300) Inquiry into constitutional issues affecting Māori began in December 2022. The mandate covers the constitution, self-government, and the electoral system, with identified themes of: Tino Rangatiratanga, Mana Motuhake, Autonomy, and Self-governance; Kāwanatanga; and Constitutional Legitimacy and Sovereignty. That includes constitutional authority in the international domain.

In November 2024 the Crown tabled a Statement of Position on Principles of Constitutionalism² and a supplementary submission in April 2025 at the request of the Tribunal.³

The Crown's initial Statement of Position said it was not going to address the challenges that will be canvassed in the inquiry, nor the claimants' propositions for constitutional evolution and change. There was no substantive discussion of "Te Tiriti/The Treaty" and the findings of Wai 1040 *He Whakaputanga me Te Tiriti* were ignored.

Instead, the Crown relied uncritically and exclusively on commentary produced by or for the Crown itself, including the prerogative power of the Crown to negotiate, adopt and ratify international treaties.

¹ www.ngatoki.nz, August 2025

² Crown Law, 'Crown Statement of Position on Principles of Constitutionalism', Wai 3300, 25 November 2024.

³ Crown, 'Addendum to Crown Statement of Position on Principles of Constitutionalism', Wai 3300, 17 April 2025

These positions have not been argued, or tested, at the initial hearings taking place on a number of marae around Aotearoa. Ngā Toki Whakarururanga will challenge the Crown directly on its claim to an exclusive prerogative over treaty making.⁴ That will come later, in the second stage of the inquiry process. The paper sets out and critiques the Crown’s statements tabled to date.

The Crown’s Statement of Position

According to the initial Crown’s Statement of Position, a “constitution” defines the power of the state - it “*describes and establishes the major institutions of government, states their principal powers, and broadly regulates the exercise of those powers.*”⁵

The Statement explicitly “*does not address the challenges which will be canvassed in this inquiry, or comment on propositions for constitutional evolution and change outlined in claimant statements.*” Instead, it simply asserted the legitimacy of the Crown’s unilateral assertion of power and status as “*a constitutional monarchy with a parliamentary system of government*” under the Constitution Act 1986.

There was no attempt to explain, let alone justify, the contradiction between the Crown’s unilateral assertion of sovereignty and the mana, rangatiratanga, and tikanga that inform a Tiriti-based constitutional authority, as recognised in *He Whakaputanga me Te Tiriti* (Wai 1040). Te Tiriti is referred to as The Treaty, ignoring the agreement that almost all the rangatira adopted.

The Treaty was further reduced to “a” founding document and “one of” the sources of New Zealand’s constitution, along with legislation, the common law, constitutional conventions, and Parliamentary customs. But, relative to those other sources, its role was left very vague - it “*affects, in various ways and to varying extents, how public power is exercised in New Zealand*” – matters which the Crown determines.

By contrast, representative democracy sourced in majority rule was described as “*the underlying principle of New Zealand’s key constitutional conventions*”. There was no historical context that acknowledged the central role of “representative democracy and majority rule” in colonial dispossession and breaches of Te Tiriti, which were first used to disenfranchise Māori and ensure settler majority rule within Westminster institutions, and then to marginalise Māori into Māori electorates until they became a minority in the system of universal franchise.

Colonial concepts of equality and human rights

At the request of the Tribunal, the Crown tabled an addendum to its Statement of Position on Constitutional Principles in April 2025 to address the “principle of equality”.⁶

⁴ Ngā Toki Whakarururanga, ‘Statement of Reply to Crown Statement of Position’, Wai 3300, 17 December 2024

⁵ Crown Statement of Position on Principles of Constitutionalism, 25 November 2024, Wai 3300

⁶ Addendum to the Crown Statement of Position.

The commentary started with the concept of “fundamental human rights” whereby “all people are of equal value in dignity and rights” and “everyone is subject to the law and equal before the law”. The Crown claimed this principle is “*consistent with Article 3 of the Treaty/te Tiriti, expressing Māori gained the same rights and duties as British subjects*”. This time it did refer to Te Tiriti o Waitangi, but without differentiating it from The Treaty of Waitangi, and in practice referring only to the word in that English draft that contain the notion of the Queen’s “subjects”.

What may seem an uncontroversial principle becomes even more problematic when its political and legal premises are deconstructed. Māori were never treated as equal, even within the Crown’s system within which they had no power.

More fundamentally, true equality reflects parity, whereby each collective retains its own system as the Tiriti envisaged, rather than sameness under the system imposed by the Crown. The “doctrine of discovery” and legal imperialism would never allow true equality. The “law” to be applied could only be Western law whose tenets of individualism, private property rights and dominion over nature were and are antithetical to tikanga. The very existence of tikanga was denied until recent judicial decisions that assimilate it within the colonial common law.⁷

This highlights the profound constitutional contradiction in the Crown’s position. Ani Mikaere points out

*... that it is illogical for Māori to turn unquestioningly to Western legal concepts for the answers to problems which have been brought into our lives by the imposition of Western law.*⁸

She quotes from Moana Jackson that

*... the mind from which the definitions [of rights] have sprung has remained bound by its own particular view of the world, and by its own interests in relation to other people. ... There has been little recognition of collective rights, such as an indigenous peoples right to independent sovereignty, since such a right clearly challenges that dominance in a political, social and economic sense.*⁹

Only from a position “grounded in our own cultural legal norms should we consider whether the Western construct of human rights has any application to our circumstances.”¹⁰ Therefore:

The starting point for change is the recognition that Māori have collective rights to self-determination, to independent sovereignty. These rights are inherent in our status

⁷ See New Zealand Law Society, “Tikanga Māori”. Available at: <https://www.lawsociety.org.nz/professional-practice/practice-briefings/tikanga-maori/>

⁸ Ani Mikaere, “Collective Rights and Gender Issues: A Maori Woman’s Perspective” in *Collective myths and Māori realities: He Rukuruku Whakaaro*, Huia, 2011, 179-204

⁹ Quoted Mikaere, “Collective Rights and Gender Issues” at p.181

¹⁰ Ibid

*as tangata whenua and were reaffirmed in both the 1835 Declaration on Independence and the 1840 Treaty of Waitangi guarantee of tino rangatiratanga. These rights exist independently of the New Zealand government and are neither defined nor dictated by that government. They are certainly not bound up with principles of majority rule which only contemplate an indigenous people's right to self-determination where they form a majority, rendering all colonised indigenous peoples who find themselves a minority in their own lands forever powerless, merely by accident of numbers.*¹¹

The Crown's further claim that equality means one-person one-vote and "through participation in democratic processes people are able to express the importance of equality, fairness and justice to elected decision-makers" perpetuates its historical and contemporary amnesia. The current government and recent predecessors (The Seabed and Foreshore Act 2004 and announced revision of the Marine and Coastal Area (Takutai Moana) Act 2011, among many other examples) have shown how dispensable "equality, fairness and justice" to Māori are to elected decision-makers when it suits them.

The Statement also said that equality "allows affirmative action"; but it is the Crown that determines if, when and what that might involve and, as the current government has shown, the Crown can simply take it away for fiscal, political and/or racist ideological reasons.

In its closing comments, the Crown belatedly accepted that "equality is a concept that bears different meanings", but it did not explain what that means for the legitimacy of its position.

The Crown's self-legitimising narrative

The Crown's statement principally relies on Sir Kenneth Keith's introduction to the (Crown's) Cabinet Manual. This talks only of The Treaty, never Te Tiriti. It completely ignores the findings on rangatiratanga, mana Motuhake and Crown sovereignty in *Te Raki* and *Te Urewera*. Instead, it vaguely suggests that:¹²

- The Treaty "may" indicate limits in our polity on majority decision-making; but it does not suggest the nature of those limits, in what circumstances those limits might apply, and who decides.
- "Māori rights and interests" under Article 2 are "sometimes" accorded a special recognition; again, there is no indication of what these rights and interests are, in what circumstances they may be recognised, what "special" recognition involved, and accorded by whom.

¹¹ Ani Mikaere, "Collective Rights and Gender Issues: A Maori Woman's Perspective", p.82

¹² Sir Kenneth Keith 'On the Constitution of New Zealand: An introduction to the Foundations of the Current Form of Government', in the Cabinet Manual (2023), at pp. 2-5

- In some situations “*autonomous Māori institutions have a role within the wider constitutional and political system*”; but what kind of institutions, who decides, and how autonomous they are within a system of Crown sovereignty are not explained.
- “*A balance has to be struck between majority power and minority right. ... Indeed, those with authority to make majority decisions often themselves recognize that their authority is limited by ... the Treaty of Waitangi*”; in other words, the Crown, having claimed unilaterally that authority to exercise majority power, can legitimately determine what limits it will recognise, or not recognise, for the “minority” mana whenua.

The Principles of the Treaty of Waitangi Bill 2024 showed how fragile these vague considerations are. First, under a deal between political parties in the crown’s Parliament, a minority party with under 9% of the vote unilaterally constructed a set of “Treaty principles”. Those principles were an extreme version of “Treaty principles” developed by the Crown’s courts and bureaucracy since 1987. Already, Treaty principles reinforced the Crown’s sovereignty and its power to decide whether and how to consult Māori and protect their interests, on matters the Crown sees as important. Māori were required to be “reasonable” and “cooperative” in return.

The Treaty Principles Bill showed that even those weak principles could be eliminated with the stroke of a legislative pen, in the knowledge that doing so breached Te Tiriti o Waitangi. The Crown’s public servants were told by Cabinet directive to implement that Coalition Agreement. Whether the Bill was passed or not came down to a political calculation by parties with a majority in the Crown’s Parliament. Even Māori MPs participating within the system were severely censured for protesting the Tiriti breach with a haka.

The Crown’s assumed power to treat

As part of its narrative, the Crown asserts that: “*The Executive is responsible for negotiating international agreements/treaties*”. It then seeks to portray a semblance of democracy and accountability in a way that overstates Parliament’s role and understates the impact of international agreements, especially trade and investment treaties.

The suggestion that Parliament exercises oversight of treaties after they are signed through select committee review and by requiring implementation through domestic law is simplistic and inaccurate.¹³ The Executive claims the power to *negotiate, sign* and *ratify* such agreements as an exercise of Crown prerogative. By doing so, the Crown can adopt binding and enforceable legal obligations that have direct domestic effects, including constraints on future action by Parliament and on policies and practices outside of legislation.

¹³ “The role of the Executive is to govern (or administer) the country.” Wai 3300, #B14, at [15].

Sir Kenneth Keith concurred that more law is now made through international processes and the “*powers of national governmental institutions are correspondingly reduced*”. As the Wai 2522 Tribunal acknowledged, these agreements can impact directly on the Crown’s compliance with its Tiriti obligations and deny Māori the responsibilities, duties, rights and interests affirmed under Te Tiriti o Waitangi:¹⁴

The consolidation of investment and trade provisions in an agreement of this scale makes the TPPA’s exceptional reach and significance difficult to dispute [and] its intertwining of investment, traditional trade, and services means its scope is very broad. ... Future New Zealand governments cannot act domestically in ways that contravene TPPA provisions. New Zealand’s policies, subsidiary legislation and exercise of Ministerial and regulatory authority discretions must align with the TPPA, even if changes to statutes are not required. Such agreements impose obligations on the Crown which constrict domestic policy.

Other international treaties that are created and operate outside of any parliamentary scrutiny, let alone any exercise of rangatiratanga, can result in trade sanctions for breaches of agreements, and monetary awards in the case of breaches of investment treaties. The “chilling effect” of those legal and fiscal risks can see governments back off action that is objected to by foreign investors or other states that are parties to those agreements.

Parliament is rarely required to incorporate trade and investment treaties into statute, except to the limited extent that a treaty requires changes to existing law, often just changing tariff schedules. Where Parliament does need to legislate, the executive can rely on its majority to ensure its passage. Domestic bills are released publicly and subject to several stages of parliamentary debate and submissions that can result in recommended amendments. By contrast, international treaties can be kept secret throughout the negotiations until they are signed. Select committees provide perfunctory parliamentary scrutiny of them after-the-fact of signature and currently allocate individuals 5 minutes and groups 10 minutes to speak to submissions on treaties that are 20 to 30 chapters long. Parliament has no authority to change those agreements.

Constitutional Kaupapa (Wai 3300) needs to deliver

As the Tribunal in *Te Raki* made clear, the Rangatira believed they retained, not ceded, their mana – including in the international domain, under Te Tiriti o Waitangi. The Crown’s unilateral assumption of an exclusive prerogative to make treaties, including far-reaching trade and investment treaties, far exceeds the limited authority that was conferred on kāwanatanga and denies Hapū the right and ability to exercise self-determination in a manner consistent with Tikanga Maori. It therefore constitutes a fundamental breach of Te Tiriti. At present, Māori have no decision-making power, or even a seat at the table when decisions are made on whether

¹⁴ Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement. Urgency Inquiry*, Wai 2522, 2016 at pp.15, 17, 44

to negotiate a treaty, what to negotiate, with whom, what objectives to seek, what compromises to make, what exceptions to insist on and whether the process and deal are tika.

As part of its prerogative, the Crown even claims the exclusive power to determine the status and impact of international treaties that specifically deal with Indigenous Peoples. The Crown has still not adopted the ILO's Indigenous and Tribal Peoples Convention 169 or the Nagoya Protocol that provides a legal framework for the fair and equitable sharing of benefits arising from the utilization of genetic resources.

New Zealand was one of four colonial states that voted against the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and only adopted it quietly in 2010. In 2023 the National/ACT/NZ First coalition government announced it would not recognise the Declaration as having any binding legal effect on New Zealand, relegating it to purely symbolic value. The failure to reference the UNDRIP in the list of human rights instruments in Crown's Statement of Constitutional Principles further highlights its ability to pick and choose which international instruments and which Māori rights it considers constitutionally significant.

The Tribunal in the Wai 3300 inquiry will need to address and resolve these violations of He Whakaputanga me Te Tiriti through applying *Te Raki* to the present day and produce powerful recommendations of constitutional transformation, including in the international domain.