

“THIS IS NANA NIN TALKING ON BEHALF OF MY MOKOPUNA AND YOURS”: A MĀORI VISION OF CONSTITUTIONAL REFORM

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I. Introduction

In 2012, Nin Tomas participated in the Te Papa Treaty Debates series.² That year, the theme of the series was ‘Pathways to the Future’ and Nin was part of a session entitled ‘A Long Conversation – The Constitutional Review’.³ Nin’s presentation explored ways of thinking about a “Māori-based, New Zealand constitution”. Her presentation reflected three things that I think of as being typical of Nin’s contribution to legal scholarship. First, she internationalised the issues faced by Māori by drawing on examples of Indigenous rights issues from other parts of the world. Second, despite locating the issues in an international context, her analysis was nonetheless rooted in Māori values and principles and centred around the Māori community. Third, she addressed the social context of law by making it personal – focusing attention on the ways in which all of us interact with and are affected by law. So, when she said “This is Nana Nin talking on behalf of my mokopuna and yours”, this was not merely a rhetorical flourish, but rather encapsulated the thinking that sits behind the entire paper. That is, ultimately, grand constitutional theorising is only important because it affects people and communities. Furthermore, we all have a stake in constitutional reform because of the human (as opposed to the legal or constitutional) relationships that connect us.

II. Internationalising Māori

The first thing that Nin did in her Te Papa address was to set the issue of constitutional reform in context – in both international and historical context. Often the discussion of the Treaty of Waitangi and constitutional reform in Aotearoa can be insular – the

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² “Treaty Debates: A Long Conversation—The Constitutional Review” (2 February 2012) Te Papa Museum of New Zealand <www.tepapa.govt.nz>.

³ Nin Thomas “Treaty Debate 2 (2012)” (5 February 2012) Radio New Zealand <www.radionz.co.nz>.

world outside does not speak to our situation because our Treaty is unique, our history is unique, our tikanga and our way of doing things in these islands in Kiwa's great ocean is unique. This is true, of course, as far as it goes, but as Nin and others have pointed out, that does not mean that we should forever look inwards. In her paper, Nin turned her gaze outward. She turned first of all to 18th century Europe and, in particular, the great constitutional changes wrought by the French Revolution. She noted that, through this revolution:

[t]he French changed the rules of engagement by changing who ruled and how it was done. The fundamental human principles identified at the time as being important to justify the shift were "fraternity, liberty and equality".

However, Nin also noted that, in many important respects, the new Constitution still served an elite:

But this shift to representative government occurred in a society already deeply enamoured with capitalist ideas and individualism. And so power moved sideways to protect the interests of the bourgeoisie. Although the new constitution theoretically included the poor as "people" they were not citizens, legislators, judges, these offices and voting were restricted to citizens who were land-owning, literate, older Euro-descendent males. The poor stayed where they were – at the bottom.

Nevertheless, this might be said to illustrate a phase of constitutionalism that reflected a move to democratization and the establishment of responsible and representative government. Nin points out that this eventually led to a 20th century form of constitutionalism. This saw a transformation from colonial to post-colonial constitutions in states controlled by colonial powers where Western systems of democratic government had been established as part of the colonisation process:

Africa and the Pacific are examples of a two-step process. First step – colonisation. In both regions modern, macro-level western-type governments were superimposed onto societies whose history, social structure and socio-political organisation was totally different to that of the West.

Commerce was often a key driver of the colonial project and, Nin suggests, this is evident in the colonial constitutions:

Underpinning these constitutions were the same capitalist values that encouraged extraction of resources from the region, with little return. The granting of property rights protected exploitation and ensured that it could happen. It protected itself in the name of progress. The hollow shell left of Nauru after it had been strip mined of phosphate is a graphic and tragic example of this.

Nin went on in her paper to contend that the post-colonial constitutions of the 20th century remained an uneasy mix of customary law and the structures of the colonial state:

After the second world-war the international community decided to end colonization. A series of new constitutions marked the largely peaceful handing over of colonial power to the locals. The new Constitutions are a legacy of contradictions between the legal principles that are entrenched in European historical processes, and the customary law that governs the daily lives of the people according to their own history and traditions. Throughout the Pacific, colonial judges and western expert advisers are still powerful actors in administering the state.

If a constitution should engage the soul of the nation and protect the people it covers, then these constitutions struggle. At best they represent societies in which customary systems based on traditional rules of sharing compete with capitalist protections for those with wealth, education, modern individual rights and gender rights. Women and children are particularly vulnerable in these societies.

The final group of constitutions that Nin considered in her address was a group that she identified as being more inclusive and less exploitative:

The third type of constitution is the 21st century constitution based on participatory democracy and relationship building. The South American constitutions of Venezuela, Ecuador, and Bolivia are examples of this. These constitutions have socialist leanings. By socialism I mean state regulation of major industries to benefit the people who live there. Where the state has been reformulated to be more inclusive and has taken measures to counter the capitalist ethic of protecting individual property rights over community rights to basic resources such as water, and are trying to ensure that resources are shared in a more equitable manner.

Nin made particular reference to the Bolivian Constitution and its environmental protections, which she compared to the Māori ethic of kaitiakitanga:

The Bolivian Constitution recognises different nations within the nation state, which it calls plurinational; and Bolivia is an example of a bottom up constitution. The constitution was written by a constituent assembly representing 26 Indigenous nations. It protects the diversity of nature – Pachamama – and recognises that human diversity is a product of the fact of nature’s diversity. This requires a shift in how we perceive our world and our place within it. In this new plurinational state, the nations are listed in the Constitution as ALL being guardians of Pachamama – or in Māori terms with which you are all familiar, kaitiaki. It is a shared role with a specific purpose. Under the Constitution, no-one can be jailed for acting in protection of pachamama. Is this protection real? Last year Brazil wanted to forge a highway through Bolivian Indigenous lands into Peru in order to export its soya beans to China. The Indigenous kaitiaki of the land objected. They successfully argued their actions were to protect Pachamama and were constitutionally protected. But this highlights the tension between, on one hand, the need for development and its legal protection, which has been an essential part of the development of western nations since the 18th century, and the worldview of the Indigenous which perceives Pachamama to be a living entity that is no longer freely available to be exploited for profit by privileged individuals (most of whom were foreign-owned companies).

Nin suggested that the important thing to note about these constitutions was their inclusiveness, though also warned that these constitutions still had to grapple with the balance between a capitalist ethic and other community rights and aspirations for how society ought to be structured:

What is significant about the new South American constitutions is their inclusive, participatory nature, and that the change-makers called upon the poorest elements of society to not only participate, but to give shape and form to their new constitutions. What they still have to negotiate is the tension between development and protecting economic individual rights, which gives power to transnational companies as individuals on the one hand, and the social relationships that exist on the land and to the land, on the other.

III. Māori-centred Analysis

In her paper, Nin then moved to set out how Māori values sit within the context of international constitution building. Throughout this part of the paper Nin drew on lessons from the South American experience, making particular reference to the provisions of the Bolivian Constitution.

Nin used the Māori concept of aroha as the foundation for a Māori vision for constitutional reform. She described the concept of aroha as follows:

Aroha is a positive emotion that can be extended beyond the self to include others. I have translated it as “respect” but it means at heart the conscious care of and for others. It is duty-based rather than rights-based.

From that general societal value, Nin teased out three basic constitutional principles:

Aroha ki te tangata:	respect for others
Aroha ki te whenua:	respect for the land
Aroha ki nga mokopuna:	intergenerational obligations

The principle of aroha ki te tangata (respect for others) directs us to explore more effective models of representative government that in particular (in light of the Treaty of Waitangi partnership) address Māori participation and engagement in our democratic institutions.

Aroha ki te tangata = respect for others, envisages a different construction of the state as the fundamental body representing society. In South America the formal participation of *assemblies* in the governing structure of the state provides an alternative to the way representative democracy operates in Aotearoa New Zealand. A constitution would provide models for engagement that are acceptable to Māori. Direct democracy could be hapū, iwi and community-based. The fact that only 54% of Māori voted as opposed to 75% rest of NZ tells us that alienation of some sort exists amongst Māori. We won't find out unless we ask. And having asked, we then need to include.

The environmental ethic, embedded in Māori relationships to land and the natural world and given practical effect in the Bolivian Constitution, is reflected in the principle of aroha ki te whenua.

Aroha ki te whenua = respect for the land, would accept land as a living entity on which our future depends. It would protect Māori tribal relationships to their territories and provide a role for Māori in decision-making concerning their resources in ways that current structures do not. The South American example is instructive here in that immediately after passing the Constitution, the President of Bolivia, who has more power than John Key or Jerry Mateparae combined could ever exercise, tried to override it to satisfy the interests of economic development of neighbouring Peru. Although it took enormous effort, the constitutionally protected defence of Pachamama principle has, so far, held him in check. The notion of defending the land against economic exploitation demands a stretch of the imagination away from centuries old ideas of resource exploitation and private accumulation being god-given rights with minimal responsibility for any detrimental collateral damage.

The third underlying principle that Nin addressed was the recognition of intergenerational obligations encompassed in aroha ki ngā mokopuna.

Aroha ki ngā mokopuna requires us to extend our thinking framework into the future – to accept that we have intergenerational obligations to our grandchildren and their children – to provide a durable legacy for them. To do without so that they can have more. It reverses the current trend of short-term gratification being okay.

By placing these principles at the heart of her paper, and at the heart of her vision for constitutional reform, Nin articulated a determinedly Māori-centred analysis. The discussion of the international context that preceded this Māori-centred analysis ensured that the discussion of Māori principles took place against a backdrop of existing mechanisms that seek to implement similar ideas or values. Basing a constitution on the principles of aroha ki te tangata, aroha ki te whenua, and aroha ki ngā mokopuna could not, therefore, be portrayed as ‘unrealistic’ because Nin based her analysis on real constitutional instruments and processes that are already being used in other parts of the world.

IV. Law as Personal Relationships

Those Māori principles, based on the fundamental value of aroha, lead into Nin’s characterisation of constitutional reform as being future-focused and ultimately concerned with our relationships to one another:

This is Nana Nin talking on behalf of my mokopuna and yours! The nuts and bolts of managing the relationships I have outlined will have to be worked through in a process that involves everyone. It will be costly and time consuming if it is properly conducted. And it will definitely result in a shift in governing power, even if it retains many of the institutions of western government. Transformation cannot be superimposed from above – and ideally, must reflect the relationships revealed by the uplifting of society.

This conceptualisation of law (and perhaps especially constitutional law) as being about personal relationships is a notable feature of a Māori world view, as illustrated by the principles upon which Nin focused. That is not a conceptualisation that is exclusive to Māori but relationships are certainly central to tikanga Māori and, to some extent, everything in the Māori world is filtered through that relationship/whānaungatanga lens.

Perhaps just as important is the language that Nin chose to use to convey her thinking here. These issues are made directly personal because Nin explicitly inserts herself and the audience into the constitutional conversation. We are all implicated and we are all responsible for constitutional reform.

V. Real, Practical and Personal

Throughout her paper, Nin's approach was to make the issues of constitutional reform real, practical, and personal. She looked at the international context to illustrate the drivers of constitutional change and to provide examples of what a process of constitutional reform might look like in Aotearoa. And she directed our attention to the relationships involved to drive home the importance of what was at stake. That she did this with her usual strength and style was no surprise. Nor was it a surprise that she explained that her credibility in these matters was defined less by her position as a legal scholar and more by her status as a grandmother of Māori children and the mana that comes with that role. After all, that was Nana Nin.