

RELATIONAL SOVEREIGNTY UNDER A NEW CONSTITUTION: INTERNATIONAL EXAMPLES OF THE MODELS OF MATIKE MAI

Jessica Fenton

1 Introduction

There's an old reverend up in Nga Puhī by the name of Charlie Shortland who once said that there's a river. On one side of the river is Te Ao Māori and on the other side is Te Ao Pākehā, and the Treaty of Waitangi is a bridge that connects the two sides of the river...

That's my vision of New Zealand, where both sides of that river can cross freely and be totally comfortable. Don Brash can be welcomed in, can stand up and mihi and reply. I can go into a town hall somewhere and stand up and feel comfortable speaking. Regardless of venue, regardless of race you can feel comfortable in all contexts. That to me is when New Zealand will have come together and we really will be one people. At this stage I don't believe we are.

Kelvin Davis, Papakura Marae, July 2017.¹

New Zealand's political system is built on the concepts of democracy and parliamentary sovereignty. The legislature has supreme power to make law and is accountable to the public for its decisions. However, democracy and parliamentary supremacy mean minority rights, including the rights of Indigenous peoples, are vulnerable to the whims of the majority. This paper seeks to imagine a different New Zealand: one where sovereignty over the country is shared with Māori, in a form of partnership originally envisioned by the signatories to Te Tiriti o Waitangi.

One way of achieving this relational sovereignty could be through a new constitution. In 2010, the National Iwi Chairs forum founded Matike Mai Aotearoa, an independent working group

¹ Emma Espiner "Driving Don Brash Home From the Marae" (7 September 2017) Newsroom <www.newsroom.co.nz>.

tasked with setting out what an inclusive constitution might look like for New Zealand. The group suggested a series of potential models of governance to envision how our country could be governed by both Māori and Pākehā under a new constitution.

This paper acknowledges the breadth and depth of the work done by Matike Mai and seeks to determine what the group's proposed models might look like in New Zealand in practice. I begin by examining the inadequacies of our current constitution, which poses unacceptable risks to Māori rights. I then explain the models proposed by Matike Mai. Three of those models will be considered in depth, with reference to examples operating in overseas jurisdictions. My aim is to examine Indigenous self-government at work in different ways, with a view to contemplating whether constitutional transformation could result in relational sovereignty for Māori.

II Purpose

The purpose of this paper is not to compare the suggested models from Matike Mai with other models, nor is it even necessarily to evaluate which of Matike Mai's models might work best in New Zealand. Instead, this paper seeks to find parallels to these models internationally so to analyse which aspects of those international approaches might be most consistent with Matike Mai's vision for governance under a new constitution.

My intention is to determine which framework would be normatively best to achieve for Māori relational sovereignty. Considerations about what might be politically possible or palatable to the public are relevant for discussions about constitutional transformation, but they are beyond the scope of this paper. I step outside the realms of political practicality and engage in blue-sky thinking to assess how we could truly make a strong bridge between Te Ao Pākehā and Te Ao Māori.

III Māori Interests Under New Zealand's Constitution

A Present Arrangements

New Zealand's current constitutional arrangements leave Māori rights in a vulnerable position. The acquisition of sovereignty in New Zealand by the Crown has been largely justified by the Crown on the basis of cession: that in 1840, Māori ceded sovereignty to the Crown through the signing of the Treaty of Waitangi, and that this forms the foundation of our government's legitimacy.

The truth is more complex. Not only was Te Tiriti not signed by all Māori rangatira, but the Treaty of Waitangi and Te Tiriti o Waitangi are two very different texts. While the Treaty of Waitangi suggested Māori had ceded sovereignty to the British, Te Tiriti only granted *kawanatanga*, or governorship, with Māori retaining rangatiratanga. The Waitangi Tribunal found definitively in 2014 that the rangatira who signed the Treaty of Waitangi "did not cede authority to make and enforce law over their people or their territories".² Our founding document is not one that grants our government sovereignty over Māori but one that provides for a partnership between two sovereign peoples. However, since 1840, Māori sovereignty has not been sufficiently recognised by our government, and that has had a profound effect on the quality of life for Māori today.

Between 1840 and 2000, Māori lost 96% of their land: from around sixty-six million acres to approximately three million acres.³ Māori language retention has declined from 95% in 1900 to 21.3% today.⁴ The inequality Māori face in society is increasing. The gaps between Māori and non-Māori in suicide rates, unemployment, and income have all grown over the past decade and Māori, on average, die seven years earlier than non-Māori.⁵ The Crown's refusal

² Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 529.

³ Professor Margaret Mutu, University of Auckland "Implementing Te Tiriti o Waitangi: Constitutional Transformation" (guest lecture in Māori 130G class, University of Auckland, 30 January 2017).

⁴ Lisa Marriott and Dalice Sim *Indicators of Inequality for Māori and Pacific People* (Victoria Business School, Working Papers in Public Finance, August 2014) at 21.

⁵ Lisa Marriott and Dalice Sim *Indicators of Inequality for Māori and Pacific People* (Victoria Business School, Working Papers in Public Finance, August 2014) at 24.

to uphold Treaty promises influences all of these outcomes.

An illuminating example is the Foreshore and Seabed Act 2003 (FSA). The FSA was the response to the Court of Appeal decision in *Ngati Apa v Attorney General (Ngati Apa)* that overruled previous case law and allowed Māori to take claims of aboriginal title and customary title under Te Ture Whenua Māori Act 1993 to the foreshore and seabed to court.⁶ This led to an outcry from many New Zealanders based on the misinformed idea that it would deny access for non-Māori to “their” beaches. Matthew Palmer considered the public debate “vituperative and destructive” and that “elements of it were racist.”⁷ The government responded to the debate by passing the FSA, which extinguished all Māori land title in the foreshore and seabed and removed the right for Māori to seek redress in the court. The FSA has since been repealed and replaced,⁸ but it remains a chilling example of the risks Māori rights face under New Zealand’s constitution.

I suggest the FSA is also an example of what could be achieved with constitutional transformation. If Māori rights had been enshrined in a constitution that provided Māori some form of relational sovereignty at the time of the *Ngati Apa* decision, the government might have reacted differently. First, albeit depending on the particular form constitutional protection might take, Parliament is unlikely to have been unable to legislate to take away Māori rights. Second, Māori themselves might have had a stronger decision-making voice. The FSA demonstrates how easily Parliament can legislate against Māori but it also gives an indication of how constitutional transformation might change that.

B A New Constitutional Framework: Matike Mai Aotearoa

Matike Mai Aotearoa was an independent working group promoted by the National Iwi Chairs Forum in 2010. Its terms of reference were:⁹

⁶ *Ngati Apa v Attorney-General* [2003] 3 NZLR 643.

⁷ Matthew Palmer “Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution” (2006) 29 Dalhousie LJ 1 at 36.

⁸ Marine and Coastal Area (Takutai Moana) Act 2011.

⁹ Margaret Mutu and Moana Jackson *He Whakaaro Here Whakaumu Mo Aotearoa* (Matike Mai Aotearoa, Independent Iwi Working Group on Constitutional Transformation, January 2016) at 7.

To develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835, Te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition.

With this intention in mind, the working group facilitated 252 hui between 2012 and 2015, invited written submissions, and conducted one-on-one interviews and focus groups. They came up with not just a basis for a new constitution, but a series of six indicative models of how our country might be governed under this new constitution.

The models are centred on different spheres of influence allowing for kawatanga (governance) and rangatiratanga (sovereignty) to be exercised alongside one another. The working group came up with three spheres of influence: the “kawatanga sphere” where the Crown would make decisions for its people; the “rangatiratanga sphere” where Māori would make decisions for Māori; and the “relational sphere”, where the Tiriti relationship of partnership and conversation would operate.¹⁰

The working group emphasised that these models are only “indicative”: they still require detailed consideration and are intended only to provide options for the discussions moving forward.¹¹ My aim is to contribute to that conversation. This paper draws on international examples to imagine what the models might look like in an attempt to determine what aspects of certain models might best help Māori achieve relational sovereignty. Of the six proposed models, I focus on only three: the tricameral model, the bicameral model, and the unicameral model. Two of the six models were excluded on the basis that they were New Zealand-specific iterations of the tricameral model without international parallels to draw upon. The third model that was excluded, the “multi-sphere” model, splits the relational sphere into two: a mana motuhake sphere consisting of a constitutionally mandated set of direct Iwi/Hapū/Crown relationships, and a relational sphere in which unitary assemblies might meet annually. While this offers an interesting avenue for constitution-builders to consider in future, again, international examples of this model are difficult to find because of its specific applicability to

¹⁰ At 9.

¹¹ At 9.

a New Zealand context.

The tricameral model consists of an Iwi/Hapū assembly (the rangatiratanga sphere), the Crown in Parliament (the kawatanga sphere), and a joint deliberative body (the relational sphere). To imagine this model, this paper will analyse the Sámi Parliament in Norway.

The bicameral model consists of an Iwi/Hapū assembly and the Crown in Parliament. This model has no relational sphere and is made up only of the rangatiratanga and kawatanga spheres. As a potential illustration of this model in effect, this paper will consider the Cherokee Nation government in the United States, the nation of Greenland, and the Nisga'a Lisims Government in British Columbia.

The unicameral model consists of one sphere, in which the Crown and Iwi/Hapū assemblies make decisions together. This model does not have separate kawatanga and rangatiratanga spheres, it has only the relational sphere. To imagine what this model might look like, this paper will examine the current state of Indigenous sovereignty in both Canada and Bolivia.

IV Methodology

A Standards for International Approaches

I begin by analysing the Matike Mai vision to establish the standards against which I assess each international example. The Matike Mai vision for each of the spheres of influence is clearly stated in its report. The kawatanga sphere would still source its power from Westminster authority but would cease to be a “dominating power” and instead operate as a more “conciliatory authority”.¹² The rangatiratanga sphere would likewise be a “conciliatory” body but one that is “independent” with the only constraints on its power being those imposed by tikanga: that “independence is only real when it depends upon the interdependence one has in relationships with others.”¹³ And, finally, the relational sphere would sit between these two

¹² Mutu and Jackson, above n 9, at 112.

¹³ At 112.

spheres making room for that interdependence and a “sense of belonging”.¹⁴

This section of the report provides a clear steer for the models: to be consistent with the Matike Mai vision, international examples will need to provide a kawatanga sphere that is conciliatory, a rangatiranga sphere that can exercise independence, and a relational sphere that allows for interdependence between the two.

Finally, I drew one other, broader requirement from the report: that any new constitutional order should be *founded* on Te Tiriti. It is not enough to try “to assimilate it into the existing Westminster system.”¹⁵ In an international context, this means the Indigenous systems of sovereignty in different countries need to be based on Indigenous concepts of governance.

B Method

I began by looking at states with either a constitution, legislation, or a treaty that has recognised some form of self-governance for Indigenous peoples. The most useful examples are Norway, the United States, Greenland, Canada, and Bolivia. I then considered which of the models fit best the Matike Mai models. These are only comparisons: none of the Matike Mai proposed models can be expected to fit perfectly with the methods of Indigenous government that exist internationally. However, they do provide an indication of which aspects of each model have worked effectively for Indigenous peoples in other jurisdictions and therefore give us a sense of how they might operate for Māori.

Finally, I measured these international approaches against the standards set out in the Matike Mai report, to determine what aspects of the approaches were most in line with the Matike Mai vision, and could therefore be applied to the benefit of Māori in New Zealand.

V The Tricameral Model

First, I evaluate the tricameral model. There is no clear overseas example of the tricameral

¹⁴ At 112.

¹⁵ At 102.

model in action. The closest parallel is in Norway, where the Indigenous Sámi Parliament communicates with the Norwegian government through specified consultation procedures, which is somewhat analogous to the relational sphere envisaged in the Matike Mai tricameral model.

A Norway

The Sámi people are Indigenous to Fennoscandia and are a minority in Norway, Sweden, Finland and Russia. Although both Finland and Sweden have their own Sámi Parliaments, this paper focuses on Norway because over half the Sámi population lives in Norway and the parliamentary system there is the most developed.

The Sámi Parliament was established pursuant to Norwegian legislation in 1987.¹⁶ Members are elected by, and among, the Sámi people. The Sámi Parliament can raise questions of public authorities, issue statements within its mandate, and make certain decisions provided for by legislative or administrative provisions.¹⁷

1 Norway as the tricameral model

At first glance, the Sámi Parliament seems to fit into the tricameral model: the Norwegian government forms the *kawanatanga* sphere, and a separate Indigenous government forms the *rangatiratanga* sphere. The relational sphere consists of the detailed consultation rules set out between the two, which aim to “facilitate the development of a partnership perspective between State authorities and the Sámi Parliament that contributes to the strengthening of Sámi culture and society.”¹⁸

This consultation has led to concrete results, including the Finnmark Act, which was passed in 2005 after consultation between the Norwegian government and the Sámi Parliament, and

¹⁶ Act of 12 June 1987 No. 56 concerning the Sameting (the Sámi parliament) and other Sámi legal matters (the Sámi Act).

¹⁷ John B Henriksen “The continuous process of recognition and implementation of the Sámi people’s right to self-determination” (2008) 21 Cambridge Review of International Affairs 27 at 32.

¹⁸ “Consultation Duty in Sámi Matters” (28 March 2014) Government.no <www.regjeringen.no>.

which grants Sámi people greater opportunities to pursue land rights.¹⁹ The Finnmark Act established both a commission for mapping land rights and a court to make determinations based on the commission's recommendations.²⁰ It also established a landowning body called the Finnmark Estate. Sámi Parliament representatives make up half of the Finnmark Estate's board and Finnmark County Council provide the other half. The board is a governing body that "exercises a form of shared rule" over the Finnmark area.²¹ This is a clear example of the relational sphere at its best: it allows for the interdependence of the Sámi and other Norwegians who occupy the Finnmark area, and makes it possible for them to coexist through an equal partnership. This is a significant achievement.

However, in practice, the Sámi Parliament falls short of the vision set out by Matike Mai. Henriksen points out that it remains an "advisory body, with limited decision-making powers",²² while Kuokkanen argues that all three Sámi Parliaments "cannot be considered self-determining or self-governing institutions".²³ The issue is the "duality" built into the formation of the Sámi Parliament: it is expected to be "at one and the same time a government executive agency and an independent political body that is a policy-maker and prime mover vis-a-vis the state".²⁴ If the Norwegian government wishes to legislate against Sámi rights, the Sámi Parliament faces an inherent conflict. And since the Sámi Parliament has no influence over the size of the budget it administers, its ability to make meaningful decisions is diminished.²⁵ This reflects a rangatiratanga sphere that is unable to exercise real independence and, accordingly, that fails to meet the Matike Mai vision and standards outlined above.

Moreover, because the Norwegian government retains power and control over the Sámi Parliament's resources, the consultation processes cannot operate as the kind of fully-functioning relational sphere Matike Mai envisioned. If the kawanatanga sphere has discretion

¹⁹ Finnmark Act (Act No. 85 of June 17, 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark).

²⁰ Torvald Falch, Per Selle and Kristin Strømsnes "The Sámi: 25 Years of Indigenous Authority in Norway" (2016) 15(1) *Ethnopolitics* 125 at 133.

²¹ At 133.

²² Henriksen, above n 17, at 32.

²³ Rauna Kuokkanen "Self-determination and Indigenous Women – 'Whose Voice Is It We Hear in the Sámi Parliament?'" (2011) 18 *International Journal on Minority and Group Rights* 39 at 39.

²⁴ Falch, Selle and Strømsnes, above n 21, at 130.

²⁵ At 132.

over the funding of the rangatiratanga sphere, it has the potential to dominate the consultation.

2 Are there aspects to be applied in New Zealand?

Applying the tricameral model in New Zealand would require creativity. It would likely involve creating an entirely new Māori assembly or granting a range of powers to an existing group that has an Indigenous mandate. The latter, for instance, might mean creating a separate assembly out of the Māori electorate MPs, or empowering a body like the National Iwi Chairs Forum with greater authority. But both these options might be vulnerable to the same curtailments of sovereignty that the Sámi face unless the Indigenous group were made independent and given power (or at least the opportunity to negotiate) over their own budget, and to make their own laws.

Lars Adam Rehof argues that choosing to stay within state structures in the way the Sámi have may be beneficial to Indigenous peoples as they can find mutual interests with the government (although this may require compromise).²⁶ The Finnmark Act is one example of the benefits of working within the state structure. Nonetheless, these benefits still come at a cost to Sámi sovereignty meaning that the Sámi government is not operating on its own terms, which was the fourth requirement of Matike Mai.

While the consultation processes provide an example of a state collaborating with Indigenous people, if the state is dominant in that consultation then it is not real collaboration or a true demonstration of the joint decision-making envisioned in Matike Mai in creating the relational sphere. Real transformation through the tricameral model would require New Zealand to depart from Norway's approach by creating a relational sphere that encourages true partnership and an independent Māori body that could do more than simply advise the government.

Nonetheless, the Norwegian approach offers a successful relational sphere New Zealand could

²⁶ Lars Adam Rehof "Human Rights and Self-Government for Indigenous Peoples" (1994) 61 Nord J Intl L 19 at 33.

follow at a more *local* level. The Finnmark Estate, as discussed above, is a relational sphere much closer to that which was intended by Matike Mai: its equal division of representatives on the board acknowledges the interdependence of the two peoples and enables them to work together.

Further, an analogous example of this kind of relational sphere already operates in New Zealand. The Tūhoe settlement authorised a new legal identity for Te Urewera National Park to be represented by a board made up of equal numbers of Crown and Tūhoe representatives.²⁷ The Crown's apology and redress during this settlement shows it taking on a more "conciliatory" role, while Tūhoe gain greater independence through the Mana Motuhake redress. Moreover, the board that will manage Te Urewera Park is a good example of a relational sphere between Māori and the Crown being formed although it is worth noting that the representatives are acting in the interests of Te Urewera not on behalf of the Crown or Tūhoe as would occur in a relational sphere dedicated to the governance of the country.²⁸ Nonetheless, this provides a valuable example of how a relational sphere between the Crown and Māori has already been instituted in one part of the country and indicates that relational sovereignty is not unattainable.

VI The Bicameral Model

In this section, I consider the bicameral model. The best examples of functioning bicameral models are the tribal nations in the United States of America, Indigenous self-rule in Greenland and the Nisga'a Lisims Government in British Columbia, Canada.

A Tribal Nations in the USA

Indigenous peoples' residual sovereignty has always been recognised within the USA's constitutional structure.²⁹ Native Americans are diverse peoples that exercise their sovereignty

²⁷ Deed of Settlement, Crown-Tūhoe (signed 4 June 2013).

²⁸ Deed of Settlement, Crown-Tūhoe (signed 4 June 2013).

²⁹ John R Vile *A Companion to the United States Constitution and its Amendments* (4th ed, Praeger, Westport (Connecticut), 2006) at 47.

in different ways. I focus on the Cherokee Nation.³⁰

In 1831, Justice Marshall declared that the Cherokee Nation was not a foreign state but a “domestic dependent nation” with its relationship to the United States resembling “a ward to his guardian”.³¹ A year later in *Worcester v The State of Georgia* he went further calling it a “distinct community” finding that the Cherokee people’s economic dependence on the US did not “divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts”.³² While the Cherokee Nation is not considered to have exactly the same authority as a foreign state would, it still holds sovereignty over its own territories and people. However, it is important to note that this sovereignty has been historically ignored by the United States government. Despite Justice Marshall’s rulings, the Cherokee people were still forced off their lands in 1838, many at gunpoint. This removal to designated “Indian land” became known as the “Trail of Tears” and as many as 4000 of the 15,000 Cherokee people who were forced to relocate died on the journey.³³ This serves as a sobering reminder that even when written into law, Indigenous peoples’ rights can be disrespected and ignored.

Today, however, the Cherokee Nation is in a much stronger position. It is a federally-recognised government with “sovereign status granted by treaty and law” and a mission statement committed to protecting Cherokee peoples’ “inherent sovereignty”.³⁴

It has been argued by some critics that the manner in which the government operates is too strong an echo of Western legalism, and might “evolve into a Trojan horse of cognitive assimilation.”³⁵ But while it is true that the Cherokee Nation’s government consists of three distinct branches, as with the Western system, critics overlook the unique adaptations in Native American government. The legislative body, for example, is known as the “Council of the Cherokee Nation” and consists of 17 elected members who are citizens of the Cherokee Nation by blood.³⁶ Similarly, in place of the Executive branch, the Cherokee Constitution sets

³⁰ “Our Government” Cherokee Nation < <http://www.cherokee.org/>>.

³¹ *Cherokee Nation v The State of Georgia* 30 US 1 (1831) at 2.

³² *Worcester v The State of Georgia* 31 US 515 (1832) at 561 and 582.

³³ Elizabeth Prine Pauls “Trail of Tears” (6 April 2017) Britannica Academic <academic.eb.com>.

³⁴ “Our Government” Cherokee Nation < <http://www.cherokee.org/>>.

³⁵ Russel Barsh “Putting the Tribe in Tribal Courts: Possible? Desirable?” (1999) 8 Kan J L & Pub Pol’y 74 at 75.

³⁶ Constitution of the Cherokee Nation of Oklahoma (1975), Article 6.

out that Executive power is vested in the “Principle Chief” for a period of 4 years and they are elected in the same manner and on the same day as the elections for the Council.³⁷ While the Cherokee Nation has adopted a Western framework, it runs its own government on its own terms.

1 *The United States as the bicameral model*

The relationship between the Cherokee Nation and the United States Government provides an example of how the bicameral model might operate. The Cherokee Nation is the rangatiratanga sphere, separate from the kawanatanga sphere of the United States Government. There is no direct relational sphere between the two. Nonetheless, the two governments have found ways to communicate.

However, some of the ways the two spheres have found to communicate place limits on the Cherokee Nation’s relational sovereignty. One clear example of this is the doctrine of Congressional plenary power, a judicial development of the late 19th and early 20th centuries which allows Congress to pass legislation in Native American territories to override Native American laws.³⁸ This power was justified on paternalistic grounds and goes directly against the ruling in *Worcester* that the Cherokee nation is a domestic dependent nation entitled to self-government.³⁹ This demonstrates that law can develop in ways to limit Indigenous sovereignty.

It is the kawanatanga sphere in this case that fails to meet the standards I set out earlier: the United States Government has continued to operate as “a dominating power that is arrogant in its indivisibility and unchallengeability”, and has not made the necessary shift towards being a “conciliatory authority”.⁴⁰

³⁷ Article 7, Section 1.

³⁸ Claire Charters "Comparative Constitutional Law and Indigenous peoples: Canada, New Zealand and the USA" in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham (UK), 2011) 170 at 179.

³⁹ Charters, above n 38, at 180.

⁴⁰ Mutu and Jackson, above n 9, at 133.

2 Are there aspects we should apply in New Zealand?

Unfortunately for our purposes, this approach rests on the residual sovereignty recognised under US constitutional law that Native Americans retained despite colonisation. This was the foundation for the legal characterisation of Native American tribes as domestic dependent nations. Māori residual sovereignty has not been recognised in a similar way and Māori did not retain active sovereignty over certain areas of land to the same extent that tribes such as the Cherokee Nation did, so this kind of territorial-based sovereignty would be harder to establish in New Zealand. However, the Tūhoe settlement, mentioned earlier, is an example of Māori being granted at least co-governing rights over a particular area of land.

B Greenland

In 2009 Denmark passed the Greenland Self-Government Act (SGA), which introduced greater self-government but not yet full independence for Greenland, which is a majority Indigenous nation.⁴¹ Under the SGA Denmark retains control of a range of important constitutional offices including the Supreme Court and the defence force, but is expected to involve Greenland in issues of foreign relations and current affairs that affect Greenland.⁴² Moreover, the Act explicitly recognises the right of the people of Greenland to make decisions in the future regarding their own independence.⁴³

1 Greenland as the bicameral model

Greenland fits into the bicameral model neatly: the spheres of influence between Denmark and Greenland are quite separate and Greenland is free to establish many laws for its own nation. While Greenland is still economically dependent on Denmark, which “creates a certain disequilibrium in the relationship”, it is currently exploring resource extraction possibilities, which could lead to greater economic self-sufficiency and to a rangatiratanga sphere closely

⁴¹ Rauna Kuokkanen “‘To See What State We Are In’: First Years of the Greenland Self-Government Act and the Pursuit of Inuit Sovereignty” (2017) 16 *Ethnopolitics* 179 at 179.

⁴² At 183.

⁴³ Act on Greenland Self-Government 2009, s 21(1).

aligned with the Matike Mai vision of independence.⁴⁴

It is worth noting that this independence is not complete: some Greenlanders see the presence of a large number of Danish civil servants in the Greenland government as evidence of an ongoing “indirect, subtle colonial control”.⁴⁵ This could indicate a refusal of Denmark as the kawanatanga sphere to let go of its status as a “dominating power”. Nonetheless, the people of Greenland have attained a degree of relational sovereignty seen in few other countries.

2 Are there aspects we should apply in New Zealand?

The bicameral model as applied in Greenland would be very unlikely to work in New Zealand largely due to the differences between the two countries. In Greenland, the Indigenous people are in the majority with Inuit peoples making up 88% of the population.⁴⁶ Moreover, Denmark and Greenland are geographically divided, which makes allowing relational sovereignty for Greenland far simpler. Rehof notes that in a country like ours, where the immigrant population is living in areas of Indigenous habitation, “the legal and practical problems may increase accordingly”.⁴⁷ While Greenland in many ways fulfils Matike Mai’s vision of Indigenous sovereignty, the differences between our countries mean there are few aspects of this approach that we could successfully implement nationwide in New Zealand.

C Nisga’a

On May 11 2000, the Nisga’a Treaty came into effect and established a new “open, democratic and accountable Nisga’a Government” in British Columbia.⁴⁸ The Nisga’a government is divided into three groups: the Nisga’a Lisims Government, which governs the Nisga’a nation, the four Nisga’a Village Governments, which govern the Nisga’a villages, and the three Nisga’a Urban Locals, which is a provision that ensures Nisga’a who are outside the Nass Valley can still

⁴⁴ Lars Adam Rehof “Human Rights and Self-Government for Indigenous Peoples” (1994) 61 Nord J Intl L 19 at 29.

⁴⁵ Kuokkanen, above n 41, at 191.

⁴⁶ Kuokkanen, above n 41, at 180.

⁴⁷ Rehof, above n 44, at 29.

⁴⁸ “Nisga’a Treaty” Nisga’a Lisims Government <www.nisgaanation.ca>.

participate in the Nisga'a Lisims Government.⁴⁹ The Nisga'a Lisims Government and Nisga'a Village Governments have law-making authority over Nisga'a lands, including authority over education, child and family services, Nisga'a citizenship, marriage, police operations, and environmental protection.⁵⁰

1 Nisga'a Lisims Government as the bicameral model

The Nisga'a Lisims Government is an example of the bicameral model functioning effectively. It is entitled to make certain decisions for the Nisga'a people and to exercise its rangatiratanga while enabling the Crown to exercise its kawanatanga. Here, the Treaty itself is crucial in ensuring a functioning relationship between the two parliaments: through conversation and consultation at the time the Nisga'a Treaty was signed, the Nisga'a government and the Canadian government have set out the ways in which they can work together and coexist.

The Nisga'a government may make laws in a variety of areas and have principal authority over some areas, including the Nisga'a language, citizenship, culture, and the administration of government.⁵¹ But all Nisga'a laws operate alongside federal and provincial laws on a "meet or beat basis". For example, Nisga'a laws regarding child welfare take priority over federal or provincial laws if they "meet or exceed federal or provincial standards for child protection".⁵² Arguably, this limits the independence of the Nisga'a people's rangatiratanga sphere because the Nisga'a government does not determine the standard it has to meet. However, it also provides for an exercise of Nisga'a sovereignty that aligns cohesively with the Canadian government. In this sense, it facilitates and allows for the interdependence of the two peoples and therefore operates within the restrictions that tikanga should place on the rangatiratanga sphere.

2 Are there aspects we should apply in New Zealand?

The Nisga'a Lisims Government gives us an example of an Indigenous government exercising

⁴⁹ *Campbell v British Columbia (Attorney General)* 2000 BCSC 1123 at [38].

⁵⁰ "Understanding the Treaty" Nisga'a Lisims Government <<http://www.nisgaanation.ca>>.

⁵¹ "Understanding the Treaty", above n 50.

⁵² "Understanding the Treaty", above n 50.

its rangatiratanga at a more local level in a specific geographical area of the country. It is not impossible to imagine a similar form of power being exercised by specific Iwi around the country enabling them to make laws that coexist harmoniously with legislation.

This could result in more of a focus on kura kaupapa, or whānau-based restorative justice. The “meet or beat” requirement could serve as a baseline for enabling Māori laws to take priority, while allowing them to act alongside the government’s laws, accounting for the all-important interdependence.

VII The Unicameral Model

I examine here examples of the unicameral model functioning in Canada and Bolivia.

A Canada

Canada’s Indigenous history resembles New Zealand’s in many ways. A significant Indigenous population formerly occupied the country prior to being colonised by European powers. In 1867 the Constitution Act paved the way for an absolute assumption of sovereignty by Canada over Indigenous peoples.⁵³

Constitutional law reform in the 1980s, however, signalled a change in the status quo. In 1982, Canada passed a new Constitution Act, which included an important provision for Indigenous peoples. Section 35 states “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁵⁴ And, unlike the Canadian Charter, s 35 is not expressly subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵⁵ The courts have the power to strike down legislation they find inconsistent with s 35.

⁵³ Charters, above n 38, at 174.

⁵⁴ *Constitution Act, 1982*, s35(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁵⁵ Canadian Charter of Rights and Freedoms, s 1.

Campbell v British Columbia provides an example of the operation of s 35.⁵⁶ Three members of the opposition party in government brought a claim arguing the settlement legislation that enacted the Nisga'a Treaty violated the Constitution Act 1982. One of their arguments was that, because it sought to give legislative jurisdiction to the Nisga'a Nation's government, the legislation was inconsistent with state sovereignty that was shared exclusively between the federal and provincial governments.

The British Columbia Supreme Court held, however, that First Nations' residual sovereignty continued and might be partially protected by s 35 of the Constitution Act because it guaranteed the right to aboriginal title in its full form including "the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions."⁵⁷ This case illustrates the manner in which s 35 can be used to uphold Indigenous rights.

Section 35.1 of the Constitution Act is also significant. It provides that before there can be any amendment to the protections of aboriginal peoples in the Act, Parliament is required to hold a constitutional conference with Indigenous peoples and discuss this with them. Matthew Palmer argues that this has contributed to the Canadian custom of negotiations with Indigenous peoples, and may have led to the discussion surrounding the Charlottetown Accord in 1992 (which although defeated in the referendum opened up further conversations about Indigenous self-government).⁵⁸

1 *Canada as the unicameral model*

In a certain sense, the Canadian position reflects an excellent exercise of the unicameral model. By entrenching Indigenous rights to aboriginal title and to decision-making in the Constitution, the Indigenous sphere of influence is brought within the Crown's sphere of influence. Both *kawanatanga* and *rangatiratanga* exist together – and if the *rangatiratanga* of Canada's Indigenous peoples is challenged, they can seek redress within the *kawanatanga* sphere via the

⁵⁶ *Campbell v British Columbia (Attorney General)* 2000 BCSC 1123.

⁵⁷ At [137].

⁵⁸ Matthew Palmer "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie LJ 1 at 24.

courts. This is a functional way of protecting Indigenous rights that could offer a model for New Zealand to follow.

However, there are two major flaws with Canada's version of this model. First, the rights of Indigenous people are not actually protected as effectively as we might initially imagine. While s 35 protects Indigenous rights, the courts have developed an extensive series of tests that Indigenous groups must fulfil before they will recognise those rights. In order to prove aboriginal title under s 35, for example, Indigenous groups must show "exclusive possession of territories at the time of the transfer to the Crown", which can require "elaborate and sometimes difficult to prove evidence".⁵⁹ And, since many Indigenous groups were nomadic, expecting them to prove exclusive possession of territories is unreasonable. The independence of the rangatiratanga sphere is limited because, in order to achieve that independence, the Indigenous people must first meet a number of difficult legal tests.

The second flaw is that the Constitution Act does not, in and of itself, grant Indigenous peoples relational sovereignty. In applying it, some courts have "drawn back from directly endorsing self-government as being required by section 35 apart from governmental agreement".⁶⁰ In this way, the Canadian approach fails to fulfil the final standard: rather than being founded on the basis of Indigenous concepts, Indigenous peoples' rights here are simply slotted into a Westminster system. This cannot amount to an effective unicameral model because the Indigenous peoples are not on a level playing field with the Crown – a recurrent issue that many of these examples face. There is no real partnership operating. This falls short of the Matike Mai vision for the unicameral model.

2 *Are there aspects we should apply in New Zealand?*

The Canadian approach would need to be changed significantly if it were to work in New Zealand. For one thing, much of s 35 is premised on the fact that Indigenous peoples in Canada retained title in certain areas despite colonisation. Section 35 "does not revive extinguished aboriginal rights" but provides protection to rights that were still *existing* at the time of the

⁵⁹ Charters, above n 38, at 175.

⁶⁰ Palmer, above n 59, at 24.

Constitution Act.⁶¹ Since aboriginal title is difficult to prove in New Zealand and most Māori title to land has been lost or extinguished, if the Canadian approach were to be applied directly, Māori would be unlikely to gain rights of sovereignty over particular areas of land. However, the Constitution Act also protects treaty rights, so following this approach, rights granted to Māori under the Treaty of Waitangi *would* be protected by the equivalent of a s 35 provision – potentially including the right to rangatiratanga.

However, Palmer argues that the differences between the Canadian and New Zealand jurisdictions in this area are “more apparent than real.”⁶² He suggests that New Zealand’s “politicized” constitution is just as effective at protecting Māori rights as the “judicialized” Canadian system would be, because it encourages public debate and grants Māori proportional representation.⁶³

The Canadian Constitution Act 1982 is a move in the right direction for Indigenous rights but it does not go far enough. While following this approach and entrenching the Treaty of Waitangi into supreme law (as has been suggested by Geoffrey Palmer and Andrew Butler) is a relatively attainable goal, it will not achieve true relational sovereignty for Māori.⁶⁴

For the unicameral model to be true to the Matike Mai vision, it would require more than simply the addition of Māori rights into the existing Westminster system. Instead, in a unicameral system, Māori need equal representation alongside non-Māori, and need to have a guaranteed voice in decision-making not just constitutional safeguarding. If we were to follow the approach taken in Canada we would not be building a bridge between two worlds. Instead, we would be forcing Māori to cross over to Te Ao Pākehā to make a case for their basic rights. If we want to build a new constitution, we would need to do better.

⁶¹ *Campbell v British Columbia (Attorney General)*, above n 56, at [19].

⁶² Palmer, above n 59, at 37.

⁶³ At 35.

⁶⁴ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2017).

B Bolivia

The Bolivian Constitution, promulgated by President Evo Morales in 2009, granted political rights of autonomy and self-determination to Indigenous groups providing for Indigenous control over the ancestral territories they continued to inhabit.⁶⁵ Article 2 of the Constitution makes clear the intention of the government to grant greater autonomy to Indigenous peoples.⁶⁶

Given the pre-colonial existence of indigenous peoples and nations', these groups are entitled to autonomy, self-government, and recognition of traditional institutions.

Article 30 also states that local Indigenous political institutions are a part of the state while Article 269 holds that the nation is broken down into different levels of government and these levels include Indigenous territories. Articles 289 and 290 also hold that, within these territories, Indigenous peoples are entitled to autonomy and self-government. The recognition of these Indigenous self-governing entities could contribute to the building of "multiple political spheres".⁶⁷

1 Bolivia as the unicameral model

At first glance, Bolivia is an example of a unicameral model that provides its Indigenous people with relational sovereignty. Bolivia's Indigenous peoples are entitled to autonomy, self-government, and recognition of traditional institutions but they remain part of the state albeit at a different level. The rangatiratanga and kawanatanga spheres are brought together as one without preventing the Indigenous people from exercising their relational sovereignty.

Of course, much of this is merely theoretical. As Almut Schilling-Vacaflor points out, "a new constitution that foresees important reforms will not necessarily have the desired impact, for

⁶⁵ Pascal Lupien "The incorporation of indigenous concepts of plurinationality into the new constitutions of Ecuador and Bolivia" (2011) 18 774 at 786.

⁶⁶ Constitution of Bolivia 2009, Article 2.

⁶⁷ Almut Schilling-Vacaflor "Bolivia's new constitution: towards participatory democracy and political pluralism?" (2011) 90 European Review of Latin American and Caribbean Studies 3 at 16.

example, when the particular socio-political context is obstructive to social change.⁶⁸ Jason Tockman notes that, since the coming into force of the new Constitution, few Indigenous communities have actually chosen to exercise their new rights to greater autonomy.⁶⁹

This could be attributed to the fact that to embrace their autonomy under the new Constitution, Bolivia's Indigenous must still operate within the government's framework. One example of this is in terms of territory: Indigenous territorial jurisdictions have to comply with colonial-era boundaries rather than the Indigenous traditional, pre-colonisation territorial boundaries.⁷⁰ There is an inconsistency between the territories Indigenous people seek to exercise self-governance over and the territories the government considers they are entitled to exercise self-government over. Likewise, these new institutions of Indigenous self-governance are required to adopt governmental structures (including legislative, administrative and executive branches) that do not always reflect Indigenous values.⁷¹ Indigenous people can exercise autonomy but only in a manner in keeping with the dominant power's conception of territory and governance structure. This does not allow for a true exercise of relational sovereignty.

It is also worth noting that, while the Constitution removes hierarchies between different territorial entities, the central government of Bolivia is still constitutionally superior to these entities, which suggests that it could overrule the autonomy of Indigenous territories if it so chose.⁷² The Bolivian government retains its role as a "dominating power" rather than shifting to a new "conciliatory body" envisioned in the Matike Mai Report.

Despite their constitutional protection, the rights of Indigenous Bolivians to self-government remain vulnerable. Indigenous peoples will not gain relational sovereignty simply because the government decrees it in their Constitution unless it also provides them with a foundation from which they can exercise relational sovereignty. After all, "a new legal norm cannot create a

⁶⁸ At 11.

⁶⁹ Jason Tockman "Decentralisation, Socio-territoriality and the Exercise of Indigenous Self-governance in Bolivia" (2016) 37 Third World Quarterly 153 at 154.

⁷⁰ At 155.

⁷¹ At 166.

⁷² At 156.

new society”, even though “it can help to transform it.”⁷³

2 Are there aspects we should apply in New Zealand?

While there are issues with the practical way Indigenous autonomy in Bolivia is unfolding, I believe the concept of smaller Indigenous groups exercising self-government in accordance with their own norms is an interesting and useful precedent for New Zealand’s purposes. It opens up possibilities of smaller natural groupings, like iwi or hapū, acquiring relational sovereignty while still operating as a part of the state. However, for this to work effectively in New Zealand, the dominant government must not be constitutionally superior to iwi or hapū. We would also have to avoid requiring Māori to adhere to colonial-era territorial boundaries, as has occurred in Bolivia. It is worth noting it might be difficult to assess overlapping boundaries between iwi.

As with all the power-sharing arrangements, adopting this approach would undermine parliamentary sovereignty in New Zealand. This is an obstacle, as the idea of having more than one sovereign in a state has been described as “an anathema to New Zealand’s constitutional ethos and structure”.⁷⁴

However, it is worth noting that, as little as a decade ago, Bolivia was also hostile to concepts of relational sovereignty: Indigenous calls for self-determination were “equated with separatism” and seen as a threat to democracy.⁷⁵ Yet Bolivia has now incorporated Indigenous demands and is slowly developing into a properly pluralistic state. Is it so hard to imagine that, with campaigning and hard work, New Zealand could eventually do the same?

VII Conclusion

A How Could New Zealand be Governed?

As emphasised at the beginning of this paper, the comparisons with international jurisdictions

⁷³ Schilling-Vacaflo, above n 68, at 17.

⁷⁴ Charters, above n 38, at 181.

⁷⁵ Lupien, above n 66, at 791.

have been just that – comparisons. It is difficult to take governing structures of other states and Indigenous peoples and directly apply them here due to our unique local context. Nonetheless, these international approaches illustrate some of the positive and negative ways certain models proposed in the Matike Mai report might develop and assist us in assessing which aspects New Zealand should adopt or avoid.

1 The tricameral model

The Sámi Parliament does not offer us a good example to follow as regards the tricameral model. Its inability to determine its own budget or make decisions for Sámi people without legislative permission from the dominant government means it is not exercising real independence, an important value for the rangatiratanga sphere. If we were to move forward with a tricameral model, the rangatiratanga sphere would need to have greater economic independence and decision-making power than the Sámi Parliament.

However, while the relationship between the Sámi Parliament and the Norwegian government does not provide us with a tricameral model true to the vision of Matike Mai, one of the outcomes of that relationship does. The Finnmark Estate, with a board comprised of both Norwegian and Sámi representatives, illustrates a relational sphere focused on interdependence and partnership rather than domination by one party. The Tūhoe settlement provides a New Zealand example of this aspect of the Norwegian approach. This illustrates how a relational sphere could operate here.

2 The bicameral model

While the approach of both the United States and Greenland would be difficult to apply in New Zealand due to our populational and structural differences, the United States offers an interesting example of how a rangatiratanga sphere might operate. The Cherokee Nation's governing body operates within a largely Western structure of discrete legislative, executive, and judicial branches. But each of those branches work in a uniquely Cherokee manner; down to the executive role being held by a "Principle Chief". This suggests that Māori could feasibly adopt some Western governing foundations for the sake of ease and familiarity but still could

still exercise uniquely Māori methods upon these foundations.

However, I believe the approach from which New Zealand can learn the most is that of the Nisga'a Lisims Government. The Nisga'a government works effectively at a local level to ensure its people's sovereignty but still operates alongside the kawanatanga sphere. The most interesting aspect of this approach is the concept of a "meet or beat" policy wherein the Nisga'a Lisims Government's laws must meet or beat the standards of the federal or provincial laws to take precedence. If this were to be employed in New Zealand I believe it would be important for Māori to have an equal say in setting those standards to ensure they were intended to benefit all peoples. Provided the standards were agreed upon between the rangatiratanga sphere and the kawanatanga sphere, and it could be practised by individual hapū and iwi, this is a good compromise, and a good example of the tikanga concept of interdependence operating effectively.

3 The unicameral model

Canada's approach to Indigenous self-government through Section 35 is far from what is envisioned in Matike Mai: it demonstrates Indigenous rights being shoehorned into a Westminster system and a kawanatanga sphere intent upon retaining its dominance. This approach reveals the issues with only protecting Indigenous rights through a written constitution and indeed commentators like Matthew Palmer have suggested that Māori may be in a better position here, with no constitutional protection, than Canada's Indigenous people are with s 35.⁷⁶ This approach illustrates what we should avoid when seeking to provide for Indigenous sovereignty under a unicameral model.

However, the Bolivian approach is a different kind of unicameral model; one in which smaller Indigenous groups are able to exercise self-government over their own people in accordance with their own norms but still operate within the state governing structure. There have been issues with the approach taken in Bolivia and, if we were to apply it in New Zealand, the kawanatanga sphere should not constitutionally dominate the rangatiratanga spheres, even if

⁷⁶ Palmer, above n 59.

these were broken down into smaller groups such as iwi or hapū. It is also worth noting that in Bolivia Indigenous peoples make up a majority of the population and hold positions of power, including the presidency at the time the Constitution was passed. This has made it easier to incorporate Indigenous demands into the Constitution than it would be in New Zealand.⁷⁷ But Bolivia still provides an approach that allows for Indigenous people to exercise sovereignty under a unicameral model and, moreover, it provides an example of a country which, less than a decade ago, was hostile to the concept of relational sovereignty, yet is now moving towards it.

B Overall Observations

The goal of this paper is not to choose which model is “best” for Māori nor to recommend which should be pursued. If the above analysis proves anything, it is that all face significant obstacles in their formation. Nonetheless, I wish to make a few observations about which aspects of these international approaches New Zealand should endeavour to incorporate when undertaking constitutional transformation to implement relational sovereignty.

The board of the Finnmark Estate in Norway shows us that a relational sphere can be established and can be beneficial for relations between the kawanatanga and rangatiratanga spheres. The “meet or beat” approach used between the Nisga’a Lisims Government and the Canadian government likewise demonstrates how the kawatanga and the rangatiratanga spheres might work together to achieve goals that best suit peoples as a whole and a nation. And finally, although it has faced practical issues, the structure of the Bolivian governing system demonstrates how smaller natural groupings might exercise sovereignty over their own people, which I believe provides an exciting prospect for Māori iwi and hapū.

C Implementation

Of course, as acknowledged at the beginning of this paper, all of this is largely blue-sky thinking. There are numerous issues that an attempt to implement such a constitutional transformation

⁷⁷ Lupien, above n 66, at 790.

would face.

First, there are the obvious practical problems. How would those in the rangatiratanga sphere be elected, or held accountable for their roles? How would it be ensured they were best representing the views and needs of the Māori people? Consideration must also be given to the issue of dividing resources between the Crown and iwi and hapū. Another concern would be the place of the judiciary and whether a different Constitution would mean a different justice system for Māori. These are all complex issues that speak to the inherent tension between rangatiratanga and parliamentary sovereignty.

However, the greater obstacle would be the opposition from the Crown and much of New Zealand to such a constitutional change. As the Constitutional Advisory Panel's report makes clear, many New Zealanders still refuse to acknowledge the Treaty's place in our history and believe it should have no role in how our country is governed.⁷⁸ Margaret Mutu has described how the participants in the Matike Mai hui were asked to consider how they would want the country to be governed if it could be changed tomorrow, but the truth is, any attempt to centre Te Tiriti in our nation's decision-making will face enormous resistance.⁷⁹

D The Need for Change

Nonetheless, the practical issues detailed above should not create limits around how we talk about constitutional change. The way we govern our country cannot be changed tomorrow but that does not mean it cannot be changed at all or that we should refrain from engaging in these difficult constitutional conversations. The tendency to revert back to considering the practicalities of constitutional transformation restricts the potential for a real discussion of what we want for our country's future. It could be argued that approaches such as those set out by Geoffrey Palmer and Andrew Butler are more practical and certainly more achievable in the short term. But I believe settling for less by attempting to fit Māori rights into a Western system would be a grave loss. The chance to change a constitution does not come along

⁷⁸ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (New Zealand Government, November 2013) at 32.

⁷⁹ Mutu, above n 3.

frequently. We should not waste an opportunity for change by settling for a slightly-improved status quo. Moana Jackson argues that “where you start the debate from determines what the debate will be about”.⁸⁰ This debate should not be about where Māori rights fit within our current system. The debate cannot begin within those confines.

After all, the models proposed in the Matike Mai Report were only ever intended to be indicative; a launching pad for further discussion. If the Treaty of Waitangi is a bridge that connects Te Ao Māori and Te Ao Pākehā, then this discussion involves evaluating the bridge: testing it for weaknesses, looking at whether it could be built more effectively, and attempting to find a way to get more people to cross it. This paper has attempted to take part in that discussion and to contribute to the evolving conversation.

⁸⁰ Malcolm Mulholland and Veronica Tawhai “Constitutional Transformation: An Interview with Moana Jackson” in *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 327.