CHAPTER 18

Constitutional Transformation

An Interview with Moana Jackson

One of the questions I often get asked is a simple but I think really important one, and that is 'what is a constitution?' People talk about constitutional change and constitutional reform, and often I think they either aren't sure of what it means or they see it only in terms of Pākehā concepts. One example is when people discuss the issue of constitutional change by advocating the establishment of a republic, because if you start discussions about constitutional issues with a republic then you are starting with just another Western European constitutional construct like the current parliamentary system. The only difference is that a republic has an elected president instead of a hereditary king or queen. I think it is really important that our people start the debate from a Māori point of view.

What is that starting point?

For me a constitution is just a kawa or the rules that people make to govern themselves. The kawa of the marae is the constitution of a marae; it's the rules that govern how people should behave on the marae. If we start talking about it in that sense then we escape what I call the 'Treaty Parachute Syndrome'. There is a Pākehā belief, and a lot of our people believe it too, that the Treaty of Waitangi

was something new – that it fell out of the sky on the sixth of February by parachute and we had never known what a treaty was before. Every iwi, however, has a history of hundreds of years of treaty making. We didn't call them treaties, but if a treaty is just an attempt by nations to reach an agreement on an issue then our people did that all the time. For example, we made agreements about trade and agreements about inland hapū having access to the coasts. The tatau pounamu – the agreements we made after conflict – were also treaties.

So the Treaty wasn't a novel or intimidating idea for our people, and neither should a constitution be. We have had kawa for hundreds of years, and all we need to do is extend the idea of kawa beyond the marae as it was before 1840, when there was a kawa of this land. It was the governing construct and the rules that determined how, for example, Ngāti Kahungunu would function within Ngāti Kahungunu, and then how Ngāti Kahungunu would relate to Ngā Puhi, or Tūhoe, and so forth.

As with so much of what has happened to our people in colonisation, the Crown has shrunk or restricted kawa to a set of rules pertaining to one little hectare of land – it is no longer seen as a legal base for regulating conduct within and upon the whole whenua. However, I've found that if we talk with our people about a constitution as being a kawa, then that's a concept we easily understand. If we can then remember that the very idea of a constitution is indeed part of our history and our rights then it's also easier to find a Māori base for a kōrero which will hopefully move beyond a republic or some other Pākehā idea – we can encourage a debate which is Māori.

If we don't do that, if we begin from a Crown starting point, whether it is a republic, or an upper house of parliament, or whatever, we limit the options and allow the Crown to frame the debate. It's like starting to talk about a river as part of a Treaty claim, for example, and then accepting that the Crown owns it: the debate then is no longer about mana or rangatiratanga but about

how we might co-manage it, which isn't the same thing. Where you start the debate from determines what the debate will be about.

Where does that starting point lead us?

The second point that flows from that for me is that you've got to look at a process for constitutional transformation, rather than constitutional change or constitutional reform. That might just seem a play on words, but the difference is really important. Constitutional change or reform presupposes we are just going to accept the status quo the colonisers have established. It implies that we will just tutu around with the Westminster system. On the other hand, constitutional transformation indicates we are going to have something different – we are going to find something transformative, something new. I prefer to talk about that.

And if we talk about constitutional transformation we are also necessarily talking about transforming the constitutional process that has done so much harm to the meaning of the Treaty and to the well-being of our people. We actually talk about dealing with all of the legacy of colonisation. In that context I think it is important that we use words like 'governance' really carefully because it is often used by the Crown as a limited authority that it can delegate to someone else. The Crown constantly delegates rights of governance to local bodies, to quangos and so on, but it never delegates or even questions its assumed power to delegate: to be the government with the final declarative say on all issues.

Yet that's what the constitution debate should be about. It shouldn't be about iwi becoming like a Rotary club or a sports club and having a right of management: it has got to be about iwi being governments, because that's what we were before 1840. This is where our kōrero needs to start.

So is the Declaration of Independence relevant?

Yes. Declarations of independence are usually made for one of two reasons. The first is that people declare their independence as a

statement that they want to be free from someone else's rule and want the right to have their own government. The second is that people declare their independence to remind the world that they are already independent and have their own system of government. The United States Declaration of Independence is an example of the first type of declaration, because it was a statement by the people in the thirteen colonies in 1776 that they no longer wanted to be governed from England – they wanted to govern themselves in their own way.

When our tīpuna, mainly in the north, got involved with the Declaration of Independence between 1835 and 1839 it was a statement to the world of our mana and our rangatiratanga – it was a declaration of the second type that we made to re-state our inherent independence. The immediate reason for it was to deal with the fact that the colonisers were increasingly ignoring our kawa and tikanga. It was also necessary because the colonisers were of course ignoring their own law in a most fundamental way. Throughout Europe there was in fact a long-standing convention that if say an English person went to France he or she would accept the jurisdiction of the French Government – they would be governed according to French law. Similarly if the French went to Italy they would accept the jurisdiction of the Italian constitution. But when they went to the lands of those whom Rudyard Kipling called the 'lesser breeds', the inferior races, they refused to accept the jurisdiction, the government, that was already there. They assumed that 'racially inferior' peoples didn't have real governments, and so they refused to accept our kawa and effectively ignored the law of the land.

Subsequently, in 1835 some of our people said 'enough is enough' and used their own experience and what had been learned in visits overseas to declare our independence and remind the colonisers that they were entering a land with its own law and governing systems. The Declaration actually outlined a new institution to do this, the Confederation, and the old people recognised that it was something

we had to grow into, which is why we used the term 'tamarikitanga', in relation to its pan-iwi or inter-nation base.

But the right to govern was not new to us – we were just declaring it and trying to find a new form for it. It was a process of constitutional transformation in the sense that it was built upon our own ancient ideas.

What is the relevance of Te Tiriti o Waitangi in this debate?

It is crucial because it is the base upon which a proper and just constitutional relationship between our people and the Crown was meant to be established in the first place. We need constitutional transformation to restore Te Tiriti. We also need it to frame any constitutional debate in Māori terms and to reclaim Māori perceptions about the Crown-Māori relationship. For example, if the same rangatira who signed the declaration decided five years later to treat with the Crown as representatives of independent polities then one would expect that the basis of that treating would be to further guarantee our independence: to further guarantee our right to govern ourselves. The Treaty in fact would be a reaffirmation of the constitutional realities outlined in the Declaration.

In that sense then, whatever authority we allowed the Crown in Te Tiriti had to be in line with the reality of our ongoing independence, since we were trying to find a mechanism whereby individual colonisers would actually have to do what they were meant to do in terms of respecting our jurisdiction – and we were prepared to recognise that the Crown should have the responsibility to ensure that they did. That recognition might seem unusual to some people, but it was no different to the kind of situation that might have arisen if, say, some manuhiri infringed the kawa of a marae – our people would have expected that in the first instance the rangatira of the manuhiri would sort the wrongdoers out. It would be their responsibility to ensure their people behaved according to

the kawa and respected the rules of the marae they were visiting. We would expect the same thing to happen today, and I don't think it would have been unusual or inconsistent for our rangatira in 1840 to expect Pākehā to 'sort out' their own people while acknowledging our kawa and our continuing independence. If a constitutional debate is to have real meaning, the Treaty and the Declaration must be read in tandem with our history and tikanga.

What other context is relevant to a constitutional discourse?

In my view any constitutional debate has to acknowledge that tikanga reality, and also be aware of what has happened to it in colonisation. There is a Mohawk writer, Kenneth Deer, who said that the only thing consistent among all of the treaties the colonisers signed with indigenous peoples is that they signed them for their own purposes and broke every one they made. Any constitutional discourse has to recognise that fact.

To the colonisers treaties were part of a long diplomatic tradition, but in colonisation they were also part of the process of dispossessing indigenous peoples. In fact Caren Fox has described colonising treaties as a device used 'to infiltrate the territories of indigenous polities and to justify ... claims to ... sovereignty during the spread of Empire'. Thus whenever the colonisers wanted to take an indigenous land they never said 'tomorrow we are going to move in and dispossess the indigenous peoples in a particular place', but rather they used the euphemism of 'annexation': they said 'tomorrow we will annex such and such a place'. Treaties were the favoured mechanism of 'annexation' because they enabled the colonisers to claim they were acting honourably.

In each case the colonisers accepted as a given that they had a right to take whatever land they wanted provided they could invent a whole lot of laws to enable them to achieve their aims. Thus when you read all the English documents leading up to 1840 the whole

debate within the Colonial Office is about 'how can we annex this land according to our law?' – it is never about whether it is morally right to do so, and it is certainly never about whether it might be in breach of our law and our constitution.

Military conquest was not a plausible option in 1840, but as had been the case throughout the Americas a Treaty seemed to offer a means of securing the colonisers' objectives with minimum cost while also promoting the idea that they wished to 'protect' us. But then when the Treaty did not seem to be attracting enough Māori signatories the Crown abandoned all pretence of honour and used one of their legal inventions to declare that our land belonged to Britain because they had 'discovered' it. So we had Governor Hobson claiming the north by right of discovery and one of his officials, Major Bunbury, claiming the south. Just as Columbus and countless others had done before them they presumed they could simply take the land of a 'lesser breed' by raising their flag and claiming that the ritual legitimately transferred everything to them.

That's a nonsense, but unless we read the Treaty alongside those two unilateral acts of discovery, and unless we know something about where the right of discovery came from and what a crass and illogical claim it was, then we can easily be seduced into thinking that the subsequent Crown claims to constitutional authority are somehow legitimate, when in our law they clearly aren't. And unless we measure the parameters of a constitutional debate with that in mind we end up with reform rather than transformation.

Is sovereignty relevant to the discourse?

Sovereignty of course is the way that the colonisers have always framed constitutional issues – it is their understanding of political power and the base upon which they established their government systems here. What is interesting is that over the years they have argued among themselves about how they got it, and they have usually claimed that we 'ceded' it to them in the Treaty. However, our people

have consistently contested that claim, and there are now Pākehā jurists and politicians who find that stance somewhat uncertain, so they have invented a new theory which suggests, as Michael Cullen did during the foreshore and seabed issue, that sovereignty was not given in the Treaty but was acquired over time. They adopt a theory invented by a Pākehā jurist called Jock Brookfield who argued that a colonising country can acquire sovereignty if through time there is a 'revolutionary' overthrow of the existing political order. The difficulties they have in defining how they acquired the sovereignty to set up the current constitutional system not only illustrates the flawed logic of most colonising law but also further highlights the need for a more honest and honourable constitutional system.

Is there an international or globalisation context to the debate?

Yes. A durable constitutional system must acknowledge that no polity can be an isolated island. It must have values and systems that allow for good relationships that are as open as whakapapa. Of course the first responsibility of a constitution is to ask 'how do the people in this place wish to make rules about their own lives?' However, in determining what happens 'at home' the constitution has to marry independence with a need for interdependence, something our tīpuna were always acutely aware of.

Yet the need for the inter-nation relationships that we recognised through whakapapa was never made subject to outside interests. The kawa in Kahungungu was never determined by what happened in the kawa of Tainui or Ngāi Tahu, because while we were relatives we also respected each other's own mana and rangatiratanga. A good kawa, a good constitution, would allow that to continue.

One of the difficulties with globalisation, as distinct from internationalism, is that it infringes unduly on the independence of nations for economic rather than relationship reasons. It is also inherently problematic for Indigenous peoples because it is really just

a revamped version of the laissez faire economic policies adopted by colonising states in the eighteenth and nineteenth centuries which permitted the free trade in goods taken from the lands of Indigenous peoples who were colonised and far from free. A proper process of constitutional transformation would enhance the relationships but not confuse economic development with rangatiratanga.

Is the United Nations Declaration on the Rights of Indigenous Peoples relevant?

Yes. All human rights instruments are relevant to a tikanga-based idea of constitutional transformation. For example, the Convention on the Rights of the Child has some basic manaaki concepts within it, and if you developed a constitutional process that wasn't based on manaakitanga and didn't acknowledge the taonga that are our mokopuna then it wouldn't be a Māori constitutional process.

For me, a Māori governing system would actually have a greater potential for compliance with international human rights laws than the Westminster system, because at its most basic level tikanga is only a matter of finding or doing what is right. Te Tiriti was signed by our tīpuna in the hope of securing tika relationships, and in that regard the United Nations Declaration provides a model of similar aspirations that would be really helpful in deciding the values we needed to underpin constitutional transformation.

How should the constitutional debate proceed?

With time. As with everything else a transformation requires time and space for considered debate and education. For me the most important aspect of that is the need for the kōrero to start first with Māori speaking with Māori. In a sense the Crown is irrelevant to that. It would be good to just start among ourselves by saying 'let's have a kōrero about constitutional things'.

I think that the way the new Bolivian constitution was developed is a good example of how this could be done. In many ways it's the

nearest thing in the world to a constitution that has come from an Indigenous kaupapa. It was easier to develop there than it would be here, in the sense that the Indigenous peoples are the majority in Bolivia, but it was also harder because they have been colonised for something like 500 years. However, one of the reasons why I really admire President Evo Morales, besides the fact that he is Indigenous, is that he said 'let's take time', even though on one hand he had Indigenous peoples saying 'we want the transformation now' and on the other he had the descendants of the Spanish colonisers (their Pākehā, if you like) saying 'we don't need or want it'. So they took time, partly to reassure Pākehā that they were not going to be driven into the sea, and partly to allow the Indigenous peoples to talk through what they wanted. Because they had been governed by a Spanish system for so long there was no way things were going to shift overnight, but in the end the actual dialogue didn't take that long. What was important was that they took the time to whakawhitiwhiti kōrero in order to get the kaupapa right.

The Bolivian constitution is also helpful I think because it's so different and so non-colonising. It's not perfect, but it starts by saying that the prime law of the land is vested in Pachamama, the earth mother. It doesn't start with parliament or members of parliament: it starts with the earth. It seems to me that when we look at how we governed ourselves prior to 1840 we started from a similar philosophical base. We began with the whakapapa of relationships, and not just those between humans but the whakapapa of everything. We started with the earth, the rivers, the seas, the forests and the mountains because they are a part of us.

Taking the time to consider constitutional transformation will enable us to do the same again to get the values right, rather than jumping straight into an existing or non-Māori model. We would be able to ask the kaupapa questions – 'what do you want government to do, and how would a constitution ensure it was done in a tika way?' That's a more important issue than asking straight away what

sort of institutional form it would take, because unless we get the values right the model will not be transformative.

For example, if we started with something like a parliament you would inevitably end up with decisions that are made through conflict. That is how that system works: its values assume that conflict resolves a polarity of views, when in fact there are other ways of reconciling difference that mediate rather than feed off conflict.

But that presumption comes from a different set of foundational values, which would then inform a different decision-making model. If you make a decision where conflict is part of the process, because humans will disagree, that is fine, but if the whole process is structured on 'them' and 'us', 'left wing' 'right wing', and so forth, that's not a transformative model. To get acceptance and understanding that such a different approach is both necessary and right requires courage, and it certainly will take time.

So constitutional transformation is really social change as well?

Yes, and in a country like ours it is also about decolonisation and finally settling all that colonisation does: not just the taking of land or resources but the taking of power. I realise that that too is a process that takes time. It's getting our people to the point where we have the trust in ourselves to again think of our law when we talk about law, and to think about our constitutional values and systems when we talk about constitutions. For me it is being able to believe again that our tīpuna had the wit and wisdom to govern themselves – that they didn't need somebody else to tell them what to do. Once we believe that again, then we can talk about how we can do that in the twenty-first century. That is a real challenge because colonisation is so pervasive, but what gives me hope is that there are now more people talking the constitutional talk than there were ten years ago, and certainly more than there were twenty years ago.

Are there as many Pākehā ready for the transformation?

Probably not, but there are also more of them than there were twenty years ago. I think most politicians are aware that it's an issue now that isn't going to go away, so they are more aware of it as well. I am sure that most politicians only see it as a tinkering with their system, but if we let that constrain our debate we will never get the kind of constitutional shift that is required. Many will simply say of course that we are being unrealistic, but I believe we shouldn't let that determine whether we as Māori have the debate that we need. Kawa is really just about framing how reality is perceived, and we either accept that it is 'just' and 'right' to finally address the disempowering of our people through constitutional transformation, or we don't. I hope that we will be brave and wise enough to change reality.

Contributors

Hohaia Collier

Ngāti Porou and Te Whānau a Apanui.

Hohaia Collier is the director of Māori and administration, accounting methods and hapū development degree programmes at Te Wānanga-o-Raukawa. He has a military background, having served extensively throughout New Zealand and overseas in a thirty-year career that eventually saw him appointed as the sergeant major of the Army, the most senior non-commissioned post in the Army. He was inducted as an Officer of the New Zealand Order of Merit in the 2000 Queen's Birthday Honours for his contribution to the New Zealand Army and for the promotion of cultural understanding. He graduated with a bachelor of administrative leadership from the University of New England in 2000 and holds a master of Māori laws and philosophy (2005) and a master of mātauranga Māori (2007). His interests include preserving the bush, waterways and beaches, kai Māori and advancing educational opportunities for Māori. Hohaia and his wife Maria live in Paraparaumu Beach.

Professor Arohia Durie

Ngāti Porou, Rongowhakaata and Ngāi Tahu.

Professor Arohia Durie has qualifications in home science, sociology and education. After teaching in primary and secondary schools in New Zealand, she joined the Department of Education at Massey University and subsequently became the foundation head of the School of Māori