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New Zealand's Magna Carta: Navigating the Recognition of He Whakaputanga o Niu Tireni Within Domestic Law and Pathways for Māori Self-Determination

I. Hei Timatanga Kōrero

He Whakaputanga has long been neglected in legal scholarship, given that recognition risks undermining the legitimacy narrative that the foundation of the modern New Zealand constitution began with the "cession" of sovereignty at Waitangi on 6 February 1840.[1] This myth of cession has stubbornly remained within the legal system, which explains why the legislature and judiciary refuse any legal recognition of He Whakaputanga.[2] Nonetheless, He Whakaputanga remains significant, particularly to Ngāpuhi, given that the document reaffirms tikanga and Māori principles of power.[3]

This essay briefly explores He Whakaputanga's historical context before discussing its current status within domestic law. Following this analysis, this essay will propose and examine various methods of granting He Whakaputanga legal recognition, including statutory recognition and judicial interpretation. Ultimately, this essay emphasises that proper recognition of He Whakaputanga cannot be achieved within the existing constitutional settings. Instead, constitutional transformation must occur to honour the mana of He Whakaputanga and the intentions of the rangatira who signed the document.

II. Tāhuhu Kōrero

A. Signing of He Whakaputanga

The early nineteenth century saw rapid growth in contact between Māori and Europeans, driven by an increase in traders and missionaries.[4] Māori primarily maintained control over their relationships with Pākehā, expecting newcomers to respect local tikanga.[5] This was evident,

[1] Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 195.
[2] *Ngaronoa v Attorney-General* [2017] 3 NZLR 634 at [59].
[3] At [59].
[4] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 12.
[5] At 157.

for example, through the 1831 petition to King William IV, signed by 13 rangatira, which raised concerns about the lawlessness of British subjects.[6]

Britain subsequently appointed James Busby as British Resident to address disorder among its subjects.[7] However, Busby sought something more significant – to establish a national congress to pass laws and resolve disputes in a manner similar to British courts.[8] Busby was aware that Māori political organisation was fundamentally based around the hapū, however, he believed a formal assembly would serve the Crown's interests while controlling British subjects in a land where he lacked legal authority.[9] Despite Busby's ambitions, the idea of a unified polity was not a new phenomenon amongst northern rangatira.[10] Māori communities had engaged in various new methods of governance, including regular meetings with other hapū, to discuss and debate pressing concerns. Busby's efforts culminated in 1835 when 34 rangatira signed He Whakaputanga at Waitangi. Recognising He Whakaputanga's significance, Britain acknowledged its validity and the sovereign authority of the newly declared United Tribes of New Zealand.[11]

While He Whakaputanga is often regarded as the "parent" of Te Tiriti o Waitangi, its importance transcends mere chronological precedence.[12] He Whakaputanga was an unambiguous assertion of Māori mana and sovereignty, articulated through the concept of "tino rangatiratanga" (absolute chieftainship) enshrined within the document.[13] Moana Jackson asserted that Te Tiriti only reaffirmed the ideals that rangatira had subscribed to within He Whakaputanga, underscoring its enduring significance in the ongoing pursuit of Māori self-determination.[14]

B. He Whakaputanga in Domestic Law Today

Despite its importance as a constitutional document for Māori, He Whakaputanga has little to no recognition within domestic law. The Court of Appeal has firmly established the Treaty of Waitangi as the starting point for the legitimacy narrative of New Zealand's constitutional

[6] At 157.
[7] At 57.
[8] At 329.
[9] At 157.
[10] At 157.
[11] At 184-185.
[12] At 503.
[13] At 12.
[14] At 430.

arrangements.[15] In *Easton v Wellington City Council,* the Court clarified that He Whakaputanga neither affects judicial jurisdiction nor the applicability of legislation.[16] These decisions underscore the prevailing narrative of cession, which views Te Tiriti as a valid transfer of sovereignty that nullifies any effects of He Whakaputanga.

While there has been a tendency to neglect and dismiss He Whakaputanga within academic debate, the document has nevertheless attracted recent attention due to the *Te Paparahi o Te Raki* report released by the Waitangi Tribunal.[17] Here, the Tribunal strongly emphasised that authority remained with hapū before and after the signing of He Whakaputanga, the first time that any institution recognised the legitimacy of the document.[18] Perhaps the obiter of Ellis J in *Easton* emblematise the future of He Whakaputanga within domestic law:[19]

> Possibly, there are constitutional conversations [around He Whakaputanga] – perhaps of the kind envisioned by Mr Easton – yet to be had. But for now, the courts are not the place for that conversation, and the Court of Appeal's decision is the word that is binding on me.

Recognition of He Whakaputanga within domestic law faces significant challenges, given that Parliament possess virtually all lawmaking power.[20] Any recognition of He Whakaputanga in statute relies heavily on Parliament's political will, a task complicated by historical narratives that remain deeply entrenched within the legal system.[21] However, as discussed below, alternative legal avenues exist that could be pursued as an alternative to statutory recognition.

III. Ngā Tūtohutanga

A. Legislative Change

The primary way that the Crown could recognise He Whakaputanga within domestic law is through statute. However, any statutory recognition of He Whakaputanga should uphold the mana of the document.[22] This means that the original intentions of the rangatira who signed He Whakaputanga ought to be honoured.

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[15] *Ngaronoa,* above n 2, at [59].
[16] *Easton v Wellington City Council* [2020] NZHC 3351 at [24].
[17] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1.
[18] At 502.
[19] *Easton,* above n 15, at [24].
[20] Lydia O'Hagan "Parliamentary sovereignty as a barrier to Treaty-based partnership" (LLM Research Paper, Victoria University of Wellington, 2014) at 5.
[21] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 527.
[22] Dean R Knight and Edward Clark, "Regulations, Disallowable Instruments and Other Delegated Legislation" *Regulations Review Committee Digest* (7th ed, New Zealand Centre for Public Law, 2020).

1. *Amending existing legislation requiring consideration of principles*

To circumvent binding obligations, the Crown opted to introduce "principles" of the Treaty of Waitangi into legislation instead of acknowledging its total weight.[23] These abstract principles aimed to capture the sentiments and intentions of the Treaty.[24] The Court of Appeal in *Lands further* developed the substance of these principles to include reciprocal obligations of partnership, reasonableness, and good faith.[25] As the jurisprudence developed, these principles evolved into the widely recognised partnership, protection, and participation framework.[26]

Similarly, the Crown could consider incorporating legislative principles that recognise the underlying sentiment and intentions behind He Whakaputanga within specific Acts, such as the Resource Management Act (RMA).[27] Drawing from key themes highlighted within *Te Paparahi o Te Raki,* such principles could require the Crown to honour concepts like mana (authority/status), he whakaminenga (collective unity), kīngitanga (sovereign power and authority) and rangatiratanga (absolute sovereignty) in decision-making.[28] Additionally, a principle of partnership could acknowledge the historical alliance between Māori and the Crown, as reflected in He Whakaputanga.[29]

While politically favourable, there are issues with distilling He Whakaputanga into abstract principles instead of textual interpretation. Abstract principles inherently require the judiciary to define and develop its substance. Judicial interpretation primarily borrows from Pākehā legal doctrines, which often diverge from Te Ao Māori perspectives and values.[30] For example, one focal theme within He Whakaputanga is the concept of sovereignty.[31] In Te Ao Pākehā, sovereignty resides with civil government, which is hierarchical and supreme that all must conform to.[32] In Te Ao Māori, sovereignty has been retrospectively interpreted to mean mana, which encompasses authority and power.[33] Given the judiciary is an innately Pākehā institution,

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[23] Edward Willis "The Treaty of Waitangi: Narrative, Tension, Constitutional Reform" (2019) 2 NZLR 185 at 200.
[24] Janine Hayward "Principles of the Treaty of Waitangi" (16 January 2023) *Te Ara – the Encyclopedia of New Zealand* < https://teara.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapono-o-te-tiriti-o-waitangi/page-1>.
[25] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 at 703.
[26] "The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal" in *He Tirohanga O Kawa Ki Te Tiriti O Waitangi* (Te Puni Kōkiri, 2001) 74 at 77-106.
[27] See Resource Management Act 1991, section 8.
[28] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 171-179.
[29] At 171.
[30] Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association" (2009) 12 Journal of Pacific Law 56 at 62
[31] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 9.
[32] At 9.
[33] At 9.

there is a significant risk of the courts misconstruing He Whakaputanga, which only serves to undermine the document's mana.

2. *Act of Parliament*

An alternative approach to the principles-based method could involve drafting a new statute incorporating He Whakaputanga. Such an Act would legally bind the Crown to abide by Māori assertions of sovereign power and authority over their land and protect tangata whenua from any threats to their mana.[34]

While an Act of Parliament holds significant legal authority in New Zealand's legal system, statutory recognition of He Whakaputanga would be a monumental task.[35] Politically, the Crown has demonstrated little inclination to share power with Māori, as evident by events like the Foreshore and Seabed controversy. Despite the Court of Appeal affirming that the transfer of sovereignty did not affect customary property,[36] the Crown passed legislation extinguishing customary rights to the foreshore and seabed.[37] Moreover, the current Sixth National Government has actively resisted co-governance efforts, diminishing the prospects of recognising He Whakaputanga through legislation.[38]

Another difficulty with statutory recognition is the potential impact on broader Māoridom. While He Whakaputanga contains signatures outside Tai Tokerau, it is often regarded as Ngāpuhi-centric, as reflected by the Ngāpuhi tikanga and dialect evident throughout the document.[39] There will be a challenge in ensuring the document demonstrates the tikanga of all iwi while upholding the original intentions of the signatories. As such, any statutory recognition of He Whakaputanga must not favour one iwi at the expense of wider Māoridom.

Additionally, the *Te Paparahi o Te Raki* report highlights significant differences between the Māori and English texts of He Whakaputanga.[40] The English version – the Declaration of Independence – suggests the document was a unilateral declaration by the signatories rather than an enforceable agreement or Treaty.[41] Meanwhile, Māori interpreted He Whakaputanga as

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[34] At 183.
[35] Legislation Design and Advisory Committee *Legislation Guidelines: Fundamental constitutional principles and values of New Zealand law* (September 2021) at 22.
[36] *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [49].
[37] Foreshore and Seabed Act 2004, section 11.
[38] Cat Woods "Māori Face a Reversal of Rights Under Coaliation Govenrment" *Law Society Journal* (online ed, Sydney, 13 February 2024).
[39] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 163-171.
[40] At 171.
[41] At 198.

an enhancement of their mana while deepening their alliance with Britain.[42] Despite these discrepancies, the Tribunal concluded He Whakaputanga as the authoritative text, acknowledging both the clear intentions of the signatories and the need to honour the historical context.[43]

B. Executive Decision-making

1. Policy decisions

An alternative to legislative action could involve integrating He Whakaputanga into the policy process by leveraging the role of the public service. The public service, comprising government departments, plays a vital role in formulating and executing government policies while delivering services to the public.[44] Embedding He Whakaputanga considerations throughout the policy process could offer a more viable and practical approach to legal recognition.

Some government agencies, such as the Ministry of Business, Innovation and Employment (MBIE), already recognise Te Tiriti obligations in the policy process by working with iwi and hapū Māori.[45] Similarly, departments could acknowledge He Whakaputanga's validity by aligning their mission statements with the four fundamental concepts of the document.[46] This approach ensures that departments actively consider any implications on He Whakaputanga throughout the policy process. While this approach lacks any *direct* legal enforcement of He Whakaputanga, it ensures that the government is guided by a proper understanding of the obligations under the document when passing legislation.[47]

However, there are challenges to implementing He Whakaputanga in policy. For instance, given the limited public awareness of the document, there is a risk of misinterpretation.[48] Government agencies may conflate their He Whakaputanga and Te Tiriti obligations despite the distinct themes present within the two documents.[49] Additionally, without statutory recognition or jurisprudence, interpreting and applying He Whakaputanga in policy frameworks may prove difficult for departments to interpret and apply the document. Thus,

[42] At 198.
[43] At 199.
[44] Public Service Act 2020, section 11.
[45] Ministry of Business, Innovation and Employment *Annual Report 2021/22* (18 October 2022) at 8.
[46] Waitangi Tribunal *Te Paparahi o Te Raki,* above n 1, at 171.
[47] Department of the Prime Minister and Cabinet *Treaty of Waitangi Analysis* (26 January 2023).
[48] Carwyn Jones "E oho! He Whakaputanga and He Puapua" (Auditorium (Taiwhanga Kauhau, National Library, 28 October 2021).
[49] Above n 47.

while integrating He Whakaputanga into the policy process is a potential indirect avenue towards legal recognition, it must be done carefully to avoid misinterpretation.

C. Judicial Interpretation

1. He Whakaputanga as an interpretative aid

Statutory interpretation holds immense significance in shaping the legal landscape of Aotearoa, driven by the judicial movement towards the purposive approach when ascertaining the meaning of a provision.[50] Within the purposive approach, the Court actively considers "legislative aids" in interpreting the statute, such as legislative history, context, and consistency with existing rights.[51] While statute remains at the apex of lawmaking, He Whakaputanga could indirectly influence the legal system by serving as an interpretive aid in statutory interpretation.[52]

There are certain limitations to the purposive approach. For instance, judges may not use this discretion to justify rewriting a statute.[53] Glazebrook J necessitated that within this 'gap-filling' exercise, any conclusion that a judge arrives at when interpreting legislation must be envisaged by Parliament.[54] This limitation restricts the scope for applying He Whakaputanga, particularly in those instances where a provision clearly contradicts the obligations under the provision. Nonetheless, in matters impacting Māori rights, considerations of He Whakaputanga may indirectly strengthen the document's position within the law.

However, the judiciary has been reluctant to recognise the status of He Whakaputanga as an interpretive aid. For instance, in *Ngaronoa,* the Court of Appeal refused to accord He Whakaputanga discrete status as an extrinsic aid in interpreting statutes.[55] In *Easton,* the High Court affirmed that He Whakaputanga had no effect on judicial jurisdiction, nor did the document alter the applicability of statutes.[56] This stance suggests that statutory recognition is a prerequisite for He Whakaputanga to inform statutory interpretation. As illustrated within

[50] John Burrows "The Changing Approach to the Interpretation of Statutes" [2002] 42 VUWLR 981 at 983.
[51] Legislation Act 2019, section 10.
[52] Cathy Nijman "Ascertaining the Meaning of Legislation" (2007) 38 VUWLR 629 at 631-634.
[53] Susan Glazebrook "Filling the Gaps in Rick Bigwood (ed) *The Statute – Making and Meaning* (LexisNexis, Wellington, 2004) at 153-165.
[54] At 155.
[55] *Ngaronoa,* above n 2, at [60].
[56] *Easton,* above n 15, at [24].

Ngaronoa, the courts are unwilling to subsume He Whakaputanga over Te Tiriti as the starting point of New Zealand's constitutional legitimacy narrative without Parliament doing so first.[57]

IV. Ngā Huringa ki te Ture Kāwanatanga?

This essay's focal argument is that tinkering with the law is insufficient to honour He Whakaputanga. Without fundamental constitutional transformation, the power imbalance between the Crown and Māori will continue.

A. Matike Mai Aotearoa Report

On Waitangi Day 2016, the Independent Working Group on Constitutional Transformation (IWGCT) unveiled the landmark *Matike Mai* report, outlining seven pivotal recommendations for constitutional reform in Aotearoa.[58] Among these recommendations are six proposed constitutional "models" founded upon He Whakaputanga and Te Tiriti. Each model relies on the concept of "spheres of influence". For instance, the "rangatiratanga " sphere empowers Māori decision-making, the "kāwanatanga" sphere permits the Crown to govern its people, and the "relational" sphere facilitates joint decision-making between the parties.[59]

A longstanding proposal for constitutional change is the reinstatement of New Zealand's upper house, which is considered necessary to restrain Parliament's virtually unbridled power under unicameralism.[60] *Matike Mai* suggests a bicameral model that includes an iwi/hapū upper house alongside the Crown in Parliament.[61] This model would ensure that any law passed by Parliament is consistent with He Whakaputanga, including upholding the tino rangatiratanga and mana of hapū Māori.[62] Additionally, the bicameral model requires both Māori and the Crown to constructively work together within the legislative process, which inherently aligns with the idea of a Māori-Crown alliance envisaged by He Whakaputanga.

However, a challenge with bicameralism is that Māori remain entrenched within the colonial Westminster system.[63] An alternative model could involve adopting a tricameral model comprising an iwi/hapū assembly, the Crown in Parliament, and a joint deliberative body to

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[57] *Ngaronoa,* above n 2, at [60].
[58] *He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, January 2016) at 11.
[59] At 10.
[60] Andrew Stockley "Bicameralism in the New Zealand context" [1986] 16 VUWLR 377 at 377-378.
[61] *The Report of Matike Mai Aotearoa,* above n 58, at 105.
[62] Catherine Delahunty "Stepping up to Matike Mai" *E-Tangata* (online ed, Auckland, 27 March 2022).
[63] Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and Its Impact on Māori" (2019) 8 Land 2 at 11.

address this issue.[64] This model would enable Māori to make decisions in accordance with tikanga as envisaged by He Whakaputanga. Furthermore, there are examples of this model operating in practice. In Norway, for instance, the indigenous Sámi population elect representatives to the Sámi Parliament, which has jurisdiction over education, land administration, and language matters.[65] Norway's unicameral Storting (Norwegian Parliament) may not issue instructions to the Sámi Parliament.[66] Representatives from both bodies regularly convene to discuss fundamental issues affecting the Sámi people.[67] While not a perfect replica of the model envisaged by the IWGCT, this model could be a viable solution towards Māori self-determination.

The constitutional transformation proposed by *Matike Mai* cannot happen overnight, given it requires enormous political and public support due to the profound impact on existing constitutional arrangements. However, despite this challenge, with Māori projected to comprise a third of all New Zealand children by 2038 and growing momentum for self-determination, the possibility of such transformation within this generation appears feasible.[68]

V. Hei Whakatepe

Each proposal outlined in this essay aims to accord varying legal recognition towards He Whakaputanga. However, the presence of parliamentary sovereignty within New Zealand's constitutional arrangements is a barrier to any power-sharing agreement between the Crown and Māori. Merely tinkering with the law only further subsumes He Whakaputanga into Te Ao Pākehā and risks undermining the mana of the document. Ultimately, there can be no proper legal recognition of He Whakaputanga within the current constitutional settings. True recognition of He Whakaputanga must come from outside the existing system through constitutional transformation.

[64] *The Report of Matike Mai Aotearoa,* above n 58, at 10.
[65] At 63-64.
[66] The Sámi Act (Norway) 12 June 1987.
[67] Erna Solberg and Sven-Roald Nystø "Procedures for Consultations between State Authorities and The Sámi Parliament [Norway]" (press release, 14 August 2018).
[68] "One in three children projected to be Māori" (29 September 2022) Stats New Zealand < https://www.stats.govt.nz/news/one-in-three-children-projected-to-be-maori/>.