THE REPORT OF PROFESSOR JAMES ALLAN ON HE PUAPUA:

The radical prescription for undermining democracy and the rule of law

DEMOCRACY ACTION

Note: This analysis focuses largely on commenting upon the substance of, and recommendations in, the '2019 Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand' which was delivered to the Ardern Labour government in 2019. The authors of that Report gave their Working Group Report a name in the Maori language, namely 'He Puapua'. On the very first page of that same Report they defined this term as follows:

"He puapua" means "a break", which usually refers to a break in the waves. Here, it refers to the breaking of the usual political and societal norms and approaches. We hope that the breaking of a wave will represent a breakthrough where Aotearoa's constitution is rooted in te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples.

You cannot be any clearer or more upfront than that. The He Puapua Report amounts to a call to break the existing political and societal norms. It is, in effect, a plea (combined with a hazily sketched out sort of roadmap) for a new constitution for New Zealand – one that deals very much in group rights and identity politics and that downplays the benefits and value of New Zealand's longstanding Dicey-inspired unwritten constitutional model that has majoritarian, 'count all voters the same', parliamentary sovereignty at its heart.

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DEMOCRACY ACTION

Democracy Action is committed to promoting respect for democratic principles in New Zealand. We advocate for a fair and just society where all citizens enjoy equal political status, equal voting rights, and equal treatment before the law.

However, despite being one of the oldest continuous democracies in the world, today our democracy is facing threats we haven't seen before. These extraordinary challenges undermine our core democratic values and equality of citizenship.

The current Government has embarked on an ambitious programme to reformulate our constitutional arrangements, driven largely by a desire to implement a plan to recognise the United National Declaration on the Rights of Indigenous Peoples, and embed te Tiriti o Waitangi (the Treaty of Waitangi) into our constitution.

In 2019 the Government commissioned a plan to realise the United Nations Declaration on the Rights of Indigenous Peoples. The resultant report - He Puapua - suggests a pathway to what the report calls 'constitutional transformation'. This includes exploring the option of creating a senate or upper house in Parliament that would scrutinise legislation for compliance with te Tiriti o Waitangi and/or UNDRIP. Other indicative options proposed include the establishment of a Māori-controlled health agency with oversight and control of Māori health-related spending and policy; a Māori court system based on tikanga, along with the abolition of prisons; and the handover of 'appropriate' public conservation land to iwi/hapū.

Although Labour claims He Puapua is simply a report and not official Government policy, several of the report's recommendations have already been implemented, or are in the process of being implemented.

As the New Zealand public has largely been left out of this conversation, Professor James Allan, Garrick Professor in Law at the University of Queensland, and constitutional law expert, has been commissioned to write an analysis of the He Puapua Report, setting out the likely implications for New Zealand's liberal democracy and what this means for the people of New Zealand. This report is the outcome of this analysis.

It is hoped Professor Allan's report sparks a national conversation about the future of our constitutional arrangements and is considered in any future UNDRIP implementation or realization plans that are proposed by this Labour Government.

Table of Contents

A) Introduction and Overview

Towards the end of 2021 Professor Allan was approached by the Executive Director of the thinktank 'Democracy Action' to ask if he would consider writing an analysis of the New Zealand Government commissioned, He Puapua Report ('the Report'). This report is the outcome of this analysis.

In a further development, the government announced (11 April 2022) that the Prime Minister and Cabinet has confirmed that a draft plan on how government can honour its obligations created by the United Nations Declaration on the Rights of Indigenous Peoples would be made available for public consultation. For this reason, Democracy Action intends to commission a future analysis which will examine legislative initiatives related to the outcome of public consultation.

This Analysis:

- Provides an overview of the Report itself, including its main themes and recommendations;
- Identifies the premises (spoken and unspoken) upon which that Report rests; and
- Offers some preliminary comments on, and criticisms of, the Report and its recommendations.

To support those comments and criticisms, this Analysis also elucidates some of the key concepts that sit in the background of this Report, quietly supporting its recommendations. In each instance a particular view or understanding of the concept or value is simply assumed, but never defended. In each instance there are other, better, understandings of these values or concepts, just as there are serious criticisms to be made of the understandings implicitly adopted in the Report.

These values or concepts include:

a) the nature of democracy (and why the implicit understanding of democracy adopted in the Report is too morally pregnant and too dependent on the moral worldview and druthers of the Report's authors);

b) the concept of the Rule of Law (and how the Report implicitly requires the differential treatment of individual citizens based solely on inherited qualities, a big problem for most understandings of this procedural value or concept);

c) international law (in particular how it works, how it meshes with domestic law, and whether it has much of a democratic genealogy); and

d) the desirability of the constitutional transformation that the Report proposes (in blunter terms, why any written constitution looking anything like what the Report suggests would be far less desirable than the status quo, or New Zealand's current unwritten constitution).

In each instance, this Analysis argues that when these concepts are brought out into the open, and looked at directly, what the Report offers is unattractive and undesirable. The Report may well call for the breaking of existing political and societal norms. And no doubt no current set of political and societal norms anywhere in the world is perfect. In the human world we are always dealing in something other than utopian outcomes. But the Report's proffered alternatives are all considerably worse than what now exists.

These alternatives trade in group rights thinking and in identity politics. They significantly downplay the benefits of New Zealand's longstanding unwritten constitutional arrangements that have delivered some of the most rights-respecting outcomes in the democratic world. And the Report's alternatives do so based on little more than a hazily sketched out sort of roadmap to somewhere, an ill-defined and ill-specified somewhere that is not the here-and-now status quo and that has hefty dollops of treaties, written constitutionalism and judicial oversight all jumbled together in whatever that somewhere ends up resembling.

Put succinctly, the Report asks New Zealanders to leap without looking because there is nothing actually offered to look at, nothing concrete. And it asks New Zealanders to do so despite their country having one of the democratic world's most commendable, rights-respecting track records going (i.e., in any comparative sense, where the comparator is some real-life other country rather than some hazily imagined utopia).

After this elucidation of these core concepts this Analysis finishes with some concluding remarks that make reference to governmental actions that may already be linked to this Report and its recommendations.

Overview of the Report

The Report consists of 106 pages, covering preambles, an executive summary, an introduction, brief initial sections on roadmaps and draft engagement plans of the approach the authors have taken, as well as two appendices at the end (the first of these being the text of the United Nations Declaration on the Rights of Indigenous Peoples and hereinafter 'the Declaration'). In between all that is the meat of the Report. This is comprised of five themes. In order these are (to the best of my understanding where the Report opts to use the Maori language):

1. Self-determination or perhaps sovereignty ('rangatiratanga');

2. Maori participation in State decision-making ('kawanatanga karauna');

3. land, territories, resources;

4. right to culture ('nga taonga');

5. equity and fairness.

The first theme (self-determination) has as its self-declared goal that 'Maori will be exercising authority over Maori matters as agreed by Maori' (p. 27). This will include 'exclusive and/or shared jurisdiction over their lands, territories and resources and over matters to do with … culture' (p. 27). It is unclear what 'as agreed by Maori' means, be it that Maori would have a veto in negotiations with the Crown or that Maori would have the last word.

Much in this theme is founded or rested on international law and what it supposedly countenances (eg., p. 27). A claim is made about the need for greater space for Maori to exercise self-determination or sovereignty with further references to past calls for power-sharing options and constitutional change (p.29). The Report makes passing references here to 'the impact of colonisation', the need to draw jurisdictional boundaries and relatedly the need to strengthen Maori decision-making processes (all p. 29).

There are calls to look to overseas examples vis-à-vis arrangements with Indigenous peoples (p.30). Then there is the assertion that the current constitutional structure in New Zealand is 'the primary impediment to the realisation of rangatiratanga [what I take to be self-determination or sovereignty]' (p.31). Indeed, the Report sees the problem as 'systemic' (p.31).

Immediately thereafter the Report notes that the move towards this increased Maori sovereignty 'will require considerable resourcing' (p.31) and even that '[t]he Crown's main contribution to capacity-building will be in resourcing' (p.31). Put more directly or bluntly, the call here is for all New Zealand taxpayers to pick up the tab for all this, including for intra-Maori consultations 'to determine what self-determination/rangatiratanga means for Maori' (p. 32).

Then, and whether a political party explicitly takes this to an election or not, the Report asserts that the Crown needs to start 'build[ing] capability and internally lay the groundwork for constitutional change' (p.33). Various possible models are mooted (p.34), the gist of all of them being that significant powers are to be transferred to Maori. Nowhere is it made wholly clear who or what counts as 'Maori' – is it a tribal elite, a genetic test, something more open-ended?

Public education campaigns and school ones too are demanded to push the case the Report favours (p.34). Again, general taxpayers are to foot these bills. A process for constitutional change is again demanded (p.35). And then this first theme finishes with pages of charts that include calls for public sector training around the Declaration, the holding of a Maori constitutional convention, further working groups, the Crown giving up power and all of it paid for by general taxpayers.

The second theme (Maori participation in state or society-wide decision-making) has as some of its self-declared goals that 'Maori participation in central and local government will be strong and secure; Maori will have a meaningful, and sometimes dominant voice in resource management decisions … and Maori will be providing for Maori' (p. 42).

A 2010 Report of the Expert Mechanism on the Declaration ('EMRIP') is claimed to require that a state obtain from Indigenous peoples their 'free, prior and informed consent (FPIC) on all matters that affect them' (p.43). It is plain that holding an election in which all citizens are counted equally and all have an equal vote for political parties, the winners of which will then decide matters for everyone during that electoral term, is not considered by the Report as something that satisfies their enunciated FPIC test.

Nor is it obvious or clear what, if any, are the limits that might restrict an 'all matters that affect them' test. In theory this could encompass every decision any elected legislature ever made.

This second theme then calls in aid past UN human rights treaty bodies' recommendations (pp. 43-44), a 2019 EMRIP Advisory Note, the Waitangi Tribunal (p. 44) all to give a very partnership-between-two-groups view of the ideal decision-making process for New Zealand. The Report then makes reference to the Constitutional Advisory Panel's 2013 report as a grounds for not just retaining guaranteed Maori seats in Parliament but entrenching this set-up (p.46).

The Report then calls for:

- the strengthening of Maori representation in local government (p.47),

- strengthening legal recognition of the Treaty of Waitangi (as at present under New Zealand's constitutional arrangements a treaty is not part of the domestic law and cannot be enforced by unelected judges unless it has been incorporated into a statute – see p.47 and more on this below),

- extending Treaty of Waitangi obligations to all delegated Crown bodies (p.48) and

- ensuring FPIC (free, prior and informed consent) principles for Maori are inserted into the Resource Management Act ('RMA', p. 49).

Not surprisingly the Report also endorses the Waitaingi Tribunal recommendations as regards the RMA, some of which are more political than legal, if not party political, and which again require general taxpayer monies to fund them (p.49). All of this and more is recommended in the Report, with an underlying motif being 'by Maori, for Maori' (see p.51). Again, this second theme finishes with a bunch of charts.

The third theme (land, territories and resources) has as some of its self-declared goals that there will be a 'significantly increased return of Crown lands and waters … greater relinquishment of Crown … authority over land, resources and taonga … [and] a successful bicultural joint sphere of governance and management of resources, taonga and Crown lands' (p. 58). Here the Report also envisions better known or understood 'iwi tribal boundaries' (p.58 and 62, the reader being left to wonder what this more explicit marking of tribal boundaries is meant to achieve in the longer term).

The constant refrain of 'more resourcing needed' – aka government will have to spend more of the general taxpayers' monies – pops up with regularity (see p.61). In this part of the Report there are calls for such things as a 'formal acknowledgement that Maori maintain legitimate rights and interests in respect of all Crown lands', that 'Maori freehold land [be excluded] from the Public Works Act 1981', and that 'Maori freehold land [be exempted] from rates' (all on p.62).

There is also a call to 'facilitate the return of land to Maori' (p. 63) in various ways and beyond the purview of Treaty settlements. Interestingly, this call is fused with a plea that this return be combined with an amendment of the Public Finance Act 1989 so its costs are hidden from view (or as the Report puts it 'to avoid the impact that the return of Crown land has on the Crown "books"' (p. 63)).

The Report here wants Maori to 'receive royalties for the use of particular natural resources such as water, petroleum and minerals … [and not just that but also for] Maori to be involved in trade negotiations to protect resources …' (p. 64).

So it would not be stretching matters to say that there are some sweeping claims or demands being made here. This third theme concludes with only two charts.

The fourth theme (right to culture) has as its core self-declared goal that Maori 'will be exercising authority over all aspects of their culture' (p. 68). Not surprisingly, this will require 'strengthening intellectual property laws' (p. 72) and even less surprisingly it will need 'increased funding' (p. 76). Some more ideas are given on page 74. These include the expected ('museums to be fully bicultural', 'building on the compulsory teaching of history announcement to ensure the curriculum reflects the diversity of Maori history' and 'increasing the number of Maori governors … in all publicly funded media') and the incredibly woke and, frankly, idiotic ('ensuring that matauranga Maori [Maori knowledge, though the Report does not define this term] is equally valued and resourced as Western science').

Science is science, to be frank. It has delivered the most spectacular increases of human welfare, increases that no one could have imagined even a century ago. And all people, all New Zealanders, benefit from the advances driven by this so-called 'Western science'. For the Report to suggest that somehow this scientific worldview and method is tainted due to where it emerged in the world, or that it offers no better answers (in medicine, in food production, in international travel, pick any field you want) than traditional knowledge does, is laughable. The claim can only be advanced because most people are too polite actually to laugh.

This fourth theme also finishes with only two charts.

The fifth and final theme covered by the Report (equity and fairness) has as its over-riding self-declared goal that 'there will be equity between peoples' (p.78). This connotes an outlook founded on group rights and identity politics. And that implication is seemingly made plain over the page when the Report baldly states firstly that 'we understand "equity" to mean equality in substance' and secondly that 'this does not necessarily mean treating everyone the same [on the individual level]' (p.79). In other words, the Report opts for the goal of equality of outcome (not of opportunity) and (sometimes) makes plain that outcome is not to be measured at the level of the individual, but of the group.

How people are to be assigned to these two groups – Maori and non-Maori – is never made clear. Nor is who or which body is to be the decision-maker in this bifurcation exercise made clear. As mooted above, is the test of who is to count as 'Maori' to be a genetic test, to be decided by a tribal elite, or to be something more open-ended still? The Report never says nor even hints at an answer.

That said, after making those explicit claims about equality of outcome and not focusing on the individual, we see on the very same page of this Report (p.79) the authors claiming that 'equity … includes equality at the individual level … as well as equality between peoples'. The reader might think that the almost certain sometime conflicts between individual outcomes and group outcomes (however defined) is simply being wished or magicked away in this Report.

But even that is uncertain. Because soon thereafter the Report concedes that 'there can be tension between collective rights … and individual rights… [and] it is important that

collective rights do not automatically give way to individual rights and non-Indigenous interests' (p. 79).

If all that does not offer something to every vantage going it is not clear what would. The Report is suggesting that the government will not have to treat everyone the same, but that equality at the individual level still matters (how much is unspecified), while simultaneously advising that collective rights ought not to lose to individual rights, not automatically or necessarily at any rate.

This Analysis will return to this 'have your cake and eat it too' topic below. Here, it simply notes that what the Report offers is either an exercise in 'we want a group rights focus but let's give a bit of something to everyone' politicking or it is flat out incoherent.

This fifth theme also, and rightly, points to the negative social welfare statistics for Maori (p.80 onwards). It returns to making claims about the 'Maori idea of well-being [being] holistic' (p.80, but based on very scant support in the footnotes). It does not suggest or claim but rather 'it recognises that colonisation has damaged the status of Maori women' (p.83, italics added) which is surely a highly contestable or at least debatable claim. The Report moves on to advocate that 'all prisoners [be given] the right to vote', that 'all relevant legislation [be reviewed] to ensure it reflects the Declaration' and that 'equitable outcomes for Maori [be made] a legislative goal' (all p.85). After calling yet one more time for more resources or transfers of general taxpayers' monies (pp. 86-87), and issuing a plea for more Maori control (p.87), this last theme finishes with pages of charts.

Underlying Premises of the Report

The explicit, or spoken, premises undergirding the Report are clear. Maori should exercise authority over Maori matters. (What 'Maori matters' encompasses, however, is left an open question. So too is the question of whether the reach or aegis of 'Maori matters' is a stable, one-off division of the pie or is to be an ongoing, flexible, capable-of-being-ratched-up-in-the-future slicing of the pie.)

Land and resources need to be returned to Maori. Considerable resourcing (or less obfuscatingly put, more taxpayers' monies) needs to be given to Maori to make these things happen.

Maori need to have a bigger say in resource management decisions as well as in local and central government. Better still, these new arrangements need to be locked in.

Accordingly, the current constitutional structures in New Zealand need to be jettisoned in favour of some unspecified alternative – unspecified save that it will be some sort of written constitution which has incorporated into it the Treaty of Waitangi.

The unspoken addendum here is that the Treaty of Waitangi and this whole new written constitution will have strong judicial review at its heart. That means the judiciary will be able to invalidate the statutes of the elected legislature for being inconsistent with this new written constitution (in some broadly similar way to which things operate in Canada and the United States). Likewise, this entrenchment will include entrenching the guaranteed Maori seats in Parliament.

A further big premise of the Report is that group outcomes matter a lot, seemingly more than individual ones. Equity is to be understood in terms of delivering those, rather than in terms of equality of opportunity or of old-fashioned Rule of Law values. And much weight, an incredible amount in fact, is placed on international law (most obviously the Declaration but also customary international law). Indeed, an unspoken premise throughout this Report is that where international law conflicts with domestic law – statutes passed by the democratically elected legislature and even case law decided by the New Zealand judiciary – that the former has greater worth or legitimacy and hence ought (usually??) to prevail. That position implicitly, or unspokenly, adopts a particular understanding of democracy and of how best to understand the concept of democracy. That understanding is highly contestable and in no way self-evident as this Analysis makes clear below.

The Report seems also to rest on the implicit view that there are two main players in all of this, two that count at any rate. One of those players falls under the aegis or rubric of 'Maori'. The other is everyone else or the Crown or the government or all non-Maori. These two players or actors are never defined. Yet it is clear that individual New Zealanders with all their myriad outlooks, preferences, ambitions, goals, druthers and the rest are merely secondary actors to these two big players who will negotiate and educate and move these mooted reforms forward. This premise can of course be cashed out in the language of a 'partnership' but that barely disguises the fundamentally illiberal assumptions at work here. Moreover, where the populations comprising the two partners are so uneven in terms of raw numbers, this implicit model again raises very big questions about democracy and legitimacy.

B) Preliminary Comments on the Report's Recommendations

This Report often reads like a wish-list of outcomes that one might see emerging from a university Maori Studies Department. Brand new written constitution? Tick. Based on an equal partnership between Maori and non-Maori (or the Crown or the government)? Tick. To the extent that many or most New Zealanders will not be overly sympathetic to these sweeping proposals do we need to 'educate the public'? Tick. And do so at the taxpayers' expense? Tick. Give international law an implicit but clear pre-eminence or pride of place in terms of its importance as a valid and legitimate source of law? Tick. Focus on groups not individuals? Tick. Make a bland sort of socialistic equality of outcome the core concern rather than a far more liberal equality of opportunity? Tick. Demand yet more money (better described as 'resources') from taxpayers for all of this? Tick. That and more of the same gives the flavour of this Report.

There is also more than a little hint of condescension scattered throughout the Report. For instance, '[w]e consider Aotearoa has reached a maturity where it is ready to undertake the transformation necessary to restructure governance to realise rangatiratanga Maori' (p. iii, with a very similar sentiment expressed very similarly on p.4). Likewise, but less overtly, a similar tone is struck with the various mentions of the need for 'a strong education campaign'.

Meanwhile difficult issues are glossed over, issues such as who will count as a Maori, the exiguous democratic credentials of international law itself, whether New Zealanders would be given a binding referendum vote on any package of reforms that emerged from these two-party insider negotiations, whether intra-Maori decision-making procedures would have to pass some sort of democratic hurdle, and so on.

Yet another difficulty, perhaps an inevitable one, is that those who lack Maori language skills will find the Report is sometimes wilfully obscure. Are we talking about sovereignty or self-determination and which variant of which? What, precisely, is 'kawanatanga karauna' or 'nga taonga'? Readers not fluent in Te Reo, even those who are, will now and again feel they are wandering around a Report filled with the smoke of obfuscation.

Of course, in some ways the Report's goals are perfectly sensible and would be shared by the vast preponderance of New Zealanders. Maori social welfare statistics are far below the median level and across all sorts of areas. Lifting these is a worthy goal and one that needs doing. However, whether that requires the sweeping constitutional and legal change mooted by the Report is quite another matter. Indeed, whether that mooted constitutional and legal change would in fact bring about those desired social welfare improvements is another matter. And it is one that can be doubted by reasonable people.

The main goal of this Report is to advocate for a good deal more power-sharing by the Crown with Maori, or at least with Maori tribal groups, than exists at present and to do so by relying heavily on the Declaration.

The exact level of that desired power-sharing is kept unclear but hints that the goal is a 50-50 split are scattered throughout. Still, the government of the day appears to have asked for precisely the sort of document that the authors of this Report delivered. Hence, it is no criticism of the authors of the Report that that is what they delivered.

C) Pillars of the Report that Require Elucidation and Puncturing

1) The Nature of Democracy

As was noted in the introduction above, some of the key concepts that sit in the background of this Report, quietly supporting its recommendations, need to be elucidated. This Analysis will consider the four main ones. In each instance a particular view or understanding of the concept or value is simply assumed by the Report, but never defended. In each instance there are other, better, understandings of these values or concepts, just as there are serious criticisms to be made of the understandings implicitly adopted in the Report. Let us start with the nature of democracy.

Of course, in a rhetorical sense everyone in the developed world purports to be a democrat and to be on the side of democracy – or at any rate, very few openly say otherwise. That said, the concept of democracy is a broad church.

The debate on how best to understand it cannot be resolved by looking the word up in the dictionary. The dispute is a normative or moral one. How ought we to understand the idea or concept of democracy, given that it can plausibly be (and is) understood in different ways?

In a big picture sense there are two main competitors. There is a thin conception and a thick conception[1] – or if you like, a mostly procedural versus a far more morally pregnant notion – and the concept of democracy is easily broad enough to encompass both. The thin understanding focuses on how governments are selected. 'Majority rules' or 'letting the numbers count' or 'rule by the people' lies at the heart of the thin, procedural understanding, the one this writer endorses.

This thin account puts other moral questions outside of whether a jurisdiction counts as democratic or not. It is an understanding that allows one to say 'this is a democracy, but in these particular respects it is one that many see as bad or deficient or even wicked'. If a reader thinks it better to leave such notions as whether individual rights were upheld to a desirable level or whether the position of some minority group's rights were sufficiently safeguarded outside of, and separate from, the question of whether a particular jurisdiction counts as democratic then that reader prefers the thin account.

By contrast, in many law schools today (not to mention throughout much of the judiciary and the press) there are assuredly many people who are not supporters of majoritarianism. To varying extents and in different ways they reject the view that the least bad procedure for resolving disagreements within a society (including when it comes to issues about rights) is to let the numbers count. If you were unkind you might say that they long for a bit of aristocracy, albeit of a modern juristocracy variant.

Yet as such people still wish to be called 'democrats' and to be on the side of democracy, they prefer a fat, morally laden conception of democracy that allows them to forswear majoritarianism but still claim to be democrats. In essence, they build in a substantive requirement that there be sufficiently good rights-respecting outcomes before a jurisdiction gets to count as a democracy.

So, for those who prefer a fat conception of democracy it is clear that democracy is not at all the same thing as majoritarianism. Instead, on the fat, morally overlain understanding, democracy has at least two aspects – i) a head counting, majoritarian aspect and ii) a morally good outcomes, this was rights-respecting in what played out aspect (where ii) is not determined by i)). In other words, it builds a substantive test onto the mostly procedural, 'how are decisions made' determination.

Thus according to one quite common account by those in favour of the fat, morally pregnant understanding, majority rule alone will not suffice to garner a jurisdiction the label 'democratic'. Majority rule needs to be tempered by placing in the hands of the judiciary the power to ensure that legislation (passed by a representative majoritarian legislature) can be struck down or invalidated[2] when it is held to be inconsistent with, say, certain enumerated rights or moral entitlements and when that inconsistency is held (again, by the judiciary and on the basis of these judges having voted amongst themselves to resolve their own disagreements, so 5 always beats 4 for top judges whatever the substantive merits of their judgments) not to be reasonable or justifiable.

There are many possible variants on that theme. The appealed to moral oversight might come from, say, United

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1. What follows is a brief precis of parts of what the author of this Analysis previously argued at length in a top legal philosophy journal. See, James Allan, 'Thin Beats Fat Yet Again – Conceptions of Democracy' (2006) 25 Law & Philosophy 533-559.

2. Or at least reinterpreted using a statutory bill of rights' reading down operative provision to give an outcome at odds with what the enacting legislature seems to have intended but which the judges deem to be more rights-respecting. This is where the power given to judges partly lies with New Zealand and British-style statutory bills of rights. Professor Allan has written on this at length. For but one example see James Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in (eds. Campbell, Ewing and Tomkins) The Legal Protection of Human Rights: Sceptical Essays (Oxford University Press, 2011), 108-126.

Nations experts overseeing a convention or treaty instead of from domestic judges. Or from elsewhere again. But remember, with any appeal to a moral test or to some claim about what is moral or rights-respecting people will disagree about the moral credentials. The morality of the claim is not self-certifying. Always and everywhere the claim that 'this is the moral route' will be overseen by (and collapse into the view or opinion of) fallible human beings whose views simply are not self-certifyingly correct. They are just opinions and ones that will not convince some, many or most others – even when the claim that 'this is the moral path' comes from, say, United Nations experts overseeing a convention or treaty or from domestic judges. Or from anyone else again.

Moreover, in all of these fat, morally pregnant understandings there are two aspects to the understanding of democracy – a procedural head counting, majoritarian aspect with a substantive rights-respecting, morally good outcomes aspect added on.

It is abundantly clear that this Report can only be understood as resting on some sort of fat account or understanding of democracy, not a thin one. Remember, majoritarianism or 'letting the numbers count' is at the core of the thin, procedural account of democracy. Take a world of reasonable disagreement between reasonable people (ones with whom you would happily share a beer) over all sorts of social policy line-drawing issues. Then resolve those line-drawing disagreements by counting everyone (regardless of inherited and immutable characteristics) as equal and letting them vote for representatives who will in turn vote to resolve those issues and you have the gist of the Diceyan, New Zealand, unwritten constitution – perhaps the most democratic in the world if you favour the thin account. Moreover, that majoritarian resolution of any issue is just for now because there will be future elections and possibly different resolutions afterwards.

That, then, is the thin, procedural understanding of democratic decision-making and it means some citizens on the losing side of particular debates and resolutions will not like the substantive decisions ultimately taken. They might even think them rights-infringing. As noted above, the thin account leaves open room to assert 'this jurisdiction is a democracy, but in this case here some of us think it has made a wrong, bad, deficient or even wicked decision'.

On that thin understanding the Report is advocating for non-democratic reforms, full stop. A partnership model of decision-making shuns democracy in favour of something else on any thin account. That shunning is magnified when one of the two claimed partners represents quite a small percentage of the population.[3]

So does emphasising group outcomes and collective rights. So does all talk of 'equity' rather than equality. (That is because equity complaints are most often cashed out by singling out some desired – almost never a dangerous or undesired – job or place or material benefit and then, firstly, looking at the percentage of the general population with some trait or other and then, secondly, looking at the current percentage of the holders of the job, place or benefit with that same trait and pointing to a disparity in the two percentages. The statistics – applied arbitrarily to this not that – do the work rather than treating people as autonomous individuals with differing preferences, goals, plans, druthers, abilities, work ethics and the like. And this lends itself to group rights type thinking, as is found in the Report, an outlook which fits uneasily into any thin account of democracy.)

To be blunt, the hived-off Maori seats in Parliament also sit uneasily with any procedural account of democracy – seats the Report seeks to entrench in some new written constitution. So does any assumption that international law (for whose credentials see below) ought in any way to gainsay or over-ride domestic law.

Accordingly, there are good and powerful reasons for preferring the thin understanding of democracy. Least importantly, it has the benefit of providing greater clarity than understandings of democracy which build in fatter, more substantive accounts. As less is rolled up into the concept it is clearer whether the criteria to be part of the group – to be counted as a democracy – have been met. The thin, proceduralist conception is also more honest as it leaves considerably more scope than fat versions to say 'this is a democracy, but in this regard a bad or wicked one'. On fat accounts with all sorts of other moral evaluations already wrapped into the understanding this is brutally difficult to do.

In addition, and as noted above, the thin conception postpones all the other moral judgements and evaluations till later. On the thin account, therefore, first you decide if the jurisdiction is a democracy and then you decide how good a democracy it is related to other moral and rights-related criteria. How is that more honest? Because the thin conception of democracy makes it harder for some observer or assessor or committee making fairly radical reform proposals to smuggle in his, her or their own moral sentiments and worldview.

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3. This analysis leaves open the question of what percentage of the New Zealand population would count as Maori. Whether it be 10, 13 or 16 percent that is nowhere near the percentage that would fall under the aegis of 'non-Maori'. Likewise, this analysis merely notes the problem of how to allocate those who would otherwise fall into the Maori camp but who wish not to be so lumped – for instance those Maori who opt to be on the general electoral rolls. Leaving all such issues to one side, it is plain that the group or identity model of decision-making (call it 'the partnership model' if you wish) is not compatible with any version of majoritarian decision-making.

Put differently, 'did everyone get a fair vote to pick the government?' is one thing and 'how ought we best to resolve these myriad other rights-related or moral or minority group issues?' is another.

Meaning it is harder for the reformer or assessor to smuggle in their own moral sentiments and druthers when you keep them separate. The evaluations take place later and tend to be more open and in the public. That makes it easier for them to be contested by dissenters.

Go back to the Report now and its various recommendations that undercut and diminish majoritarian understandings of democracy. On the procedural understanding of democracy this Report is urging a form of aristocratic, over-the-heads-of-regular-voters decision-making. Go down the fat, substantive path, however, and allegations of being anti-democratic are less clear and more obfuscated. Substantive, fat accounts of democracy build excessive moral criteria (too much moral overlay if you want, and all of it decided by some group other than the voters letting the numbers count) into the concept of democracy.

How much 'good moral outcomes' outweighs how much 'going over the heads of the voters'? And so, if you happen to agree with the substantive moral positions being put forward, you have scope to say 'this is democratic' – even while diminishing majoritarian decision-making at the 'how made?' or first step. It is a neat trick. Just as keen bill of rights supporters can argue that institutional arrangements that hand power – often huge chunks of power – to an unelected committee of ex-lawyers is nevertheless perfectly democratic (being fans of the fat account), this Report can just barely be seen to be in keeping with democracy provided one adopts a very fat understanding.

The problem, again, is that fat conceptions significantly loosen the connection between democracy and letting the numbers count or majority rule. Implicitly, therefore, this Report is nothing if not in that fat, substantive camp. It has to be. Otherwise, it would be plain that the bulk of its recommendations diminished democratic decision-making. The same point could be made about its over-reliance on appeals to international law, as we shall soon see.

Here is another way to think about the dispute between thin and fat understandings of democracy. Supporters of 'majority rules' as the authoritative decision-making procedure in society ultimately think that the greater danger in an established democracy such as New Zealand is of some cordoned-off elite (the judges, United Nations experts, Maori tribal leaders) getting too big for their unelected boots and resolving too many of the contentious, hotly debated line-drawing disputes that can be thrown up when interpreting the abstract, amorphous and often indeterminate provisions in written constitutions or international treaties or the Treaty of Waitangi down in the quagmire of day-to-day detail.

Adherents of the fat conception of democracy tend to believe the greater danger is the moral and political sensibilities of the majority of their fellow citizens and voters. Proponents of the fat account have in a way given up on the sentiments and beliefs of ordinary citizens. They fear a weak judiciary far more than a powerful one. The authors of this Report are explicit and implicit supporters of the fattest of fat, most substantive understanding of democracy out there. Otherwise, they could not be classed as supporters of democracy at all.

Or put it differently yet again, this time less kindly. Even the fat conception of democracy places some weight (at the first step) on the procedural, majoritarian aspect of how decisions are made in society. Yet this Report places next to no weight on that first step. It reads as being wholly antithetical to what most people – and to what this writer suspects the vast preponderance of New Zealanders – understand by 'democracy' and by 'democratic decision-making'.

2) The Rule of Law and differential treatment of individuals based on inherited, immutable characteristics

It is equally plain that the Report implicitly seeks, at times, the differential treatment of individual citizens based solely on inherited, immutable qualities (assuming, of course, that who can be classed as 'Maori' will not be watered down to a self-identifying test where anyone can qualify if he or she so desires).

That sort of differential treatment of individual citizens is hard to square with the core elements of the Rule of Law – general rules, known in advance, applied to everyone, able to be understood and complied with, that sort of thing. Yes, there is equivocation and weasel words but, on the whole, the Report recommends or asks for special, differential treatment by group. And if there is differential treatment by group then that pre-supposes (or ensures) that there will correspondingly be differential treatment at the level of the individual. The law will treat two individuals differently due solely to some inherited or immutable characteristic.

This is not what most observers would consider to be in keeping with Rule of Law values or indeed with the wider liberal worldview. Nor would voters likely vote for this if they were explicitly asked.

3) International Law and the desirable extent of its authority and sway

One of the remarkable aspects of the Report is just how much weight or emphasis it places on international law to attempt to legitimate its recommendations, ones that to a significant extent conflict with any procedural understanding of democracy as well as with some aspects of the Rule of Law.

To be more specific, the Declaration is repeatedly invoked and then treated as being at least as legitimate as domestic law (mostly notably statutes passed by the democratically elected Parliament). The Treaty of Waitangi also serves that legitimating function but to a lesser extent in this Report.[4]

Yet any explicit argument that international law is as legitimate and authoritative as domestic statute and case law would be implausible, even laughable, for anyone who cared much at all for democratic legitimacy – since even the substantive, fat conception of democracy includes the thin, procedural first step and so values counting each citizen as equal to 'let the numbers count'.

Still, laughable or not, this Report (implicitly and at times explicitly) does just that; it puts international law on the same authoritative plane as that of one of the world's oldest and most successful democracies – and this Analysis explicitly characterises New Zealand in those precise terms.

Let us turn, therefore, to include a brief consideration of the opaque, undemocratic and (comparatively speaking) illegitimate nature of international law.[5] There are two sorts. The sort most lawyers (and virtually all lay-people) will be aware of and will think of when someone refers to international law is the treaty-based sort. Countries get together and agree to a treaty or convention. Not all countries sign them. Not all countries ratify them. Some that do are democratic countries; other that do are not – indeed some that sign are out-and-out authoritarian regimes.

Amongst the democratic countries (even just the rich, English-speaking ones), the process for entering into and ratifying treaties will vary. More particularly, these processes will vary in terms of the democratic legitimacy they bestow on that convention or treaty. The democratic credentials of entered-into treaties are highest, by far, in the United States. Americans take treaties seriously. That is because treaties with other countries – bilateral ones too, not just multilateral ones – cannot come into force in the US until they have been passed by the elected upper house, the Senate, on a two-thirds in favour, super-majoritarian basis. (Readers might ask themselves if the Declaration would have come into force in New Zealand were that American process in effect.)

Taking treaties and conventions seriously in that way is not true of the United Kingdom; not true of Canada; not true of Australia; and not true of New Zealand. In these Westminster system countries, the executive branch of government can ratify treaties without any veto resting in, or any need to win a vote in, the legislature (either house and be it majoritarian, super-majoritarian, or anything else).

To give an example, President Bill Clinton could and did sign the Kyoto Treaty but it could not in any way bind the United States until being approved in the Senate, which approval never ended up being given.

Put bluntly, in the Westminster tradition of which New Zealand is a part the executive branch of government – and let us be even more blunt speaking, that means the Prime Minister and possibly, but only possibly, the majority of his or her Cabinet depending on the then existing political realities – is not forced to obtain the approval of elected legislators to ratify a convention. No, the executive branch, using what is known as the prerogative power,[6] can sign, enter into, and ratify treaties and conventions all on its own. And that is why in such countries treaties and conventions are deemed not to be part of domestic law unless and until some or all of their provisions have been incorporated into an enacted statute passed by the elected Parliament.

Yes, judges may have peripherally nibbled away at this orthodoxy in the last few decades but at its core the claim remains. If you go to court in New Zealand (or Britain or Australia or Canada) you cannot point to a ratified treaty as a valid source of law in some domestic dispute or in the domestic legal sphere more widely. It has no legal force.

So had the Report been relying on a convention or treaty as the authority to legitimate its recommendations that would have been suspect enough. But Declarations are not even conventions or treaties; they have an even lower status than that. Unlike treaties, Declarations explicitly create no new legal obligations. Yes, they are made applicable domestically in Westminster countries the exact same way as conventions or treaties, under the prerogative power. But they do not even purport to create new legal obligations.

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4. Separate Analyses will be produced on other aspects of the current government's move to implement the key aspects of the He Puapua project. Hence, left outside the scope of this Analysis is the Treaty of Waitangi's proper reach over these matters as well as any in-depth look at what the government has already done with respect to water and health.

5. What follows is a very brief precis of parts of what the author of this Analysis previously argued at length in an American law review. See, James Allan, 'Ineffective, Opaque, and Undemocratic: The IOUs of (Too Much) International Law and Why a Bit of Skepticism is Warranted' (2013) 50 San Diego Law Review 833-866.

6. Readers can think of the prerogative power as it applies in the UK, Canada, Australia and New Zealand in these rough-and-ready terms. In English history at one point the monarch, almost always a king, had virtually all the power. Over time, in a non-linear way, most all of this power was won by the elected legislature giving us parliamentary sovereignty. There were small areas in which the king's prerogative power remained in play – entering into treaties and declaring war being amongst the most prominent. It was just that the move to more democratic arrangements from the early 19th century on also meant that this power – these prerogative powers – were overwhelmingly exercised by Cabinet and the Prime Minister. In form, by the monarch and in her name. In substance and reality, by those elected legislators who were part of the winning party at the last election and who were part of the Cabinet. So prerogative power is big ticket executive power exercised by the Prime Minister and to some extent Cabinet. The democratic credentials of this sort of law, therefore, are considerably attenuated and exiguous in comparison to laws made by the elected legislature.

The UN Declaration on the Rights of Indigenous Peoples (again, this Analysis has been referring, and will continue to refer, to it as 'the Declaration') falls into that 'this purports to create no new legal remedies' category. Accordingly, its democratic credentials in New Zealand as a supposed legitimating agent of widespread reform are somewhere between incredibly spartan and virtually invisible. Remember, when then Prime Minister John Key (with or without the strong support of his Cabinet, we cannot know) decided to ratify the Declaration that, and that alone, sufficed to ensure that it was ratified; it was not put to Parliament nor to the voters in a plebiscite or referendum.

The Declaration's legitimacy (and relatedly its authority) stems from that and nothing more than that. It is a slender reed on which to build an edifice of the sort the Report attempts to construct.

The second, less well-known type of international law is also worth briefly describing. This is the sort that does not flow from treaties and conventions and declarations. This is known as customary international law. You do not discover its content by looking in legal texts that were agreed between countries. No, this customary international law is inferred from the practice of states (or in more lay-people friendly terms, of countries). You need an inference from a consistent and general practice of states and once it has been identified (and note that this general state practice has to be something that is followed out of a sense of legal obligation) then it becomes part of customary international law.

Perspicacious readers will have noticed that in the two previous sentences this Analysis used the passive voice – 'is inferred' and 'has been identified'. That was done to make a point. The passive voice allows writers to mask or gloss over the important question of who gets to do all the inferring, identifying and deciding just when it is and is not that states or countries are following some practice or other. And when it is that they are following it out of a sense of legal obligation. Use of the passive voice can give the subtle impression that these practices somehow identify themselves or that some unerring being is doing so, one exercising infallible judgement. It hides the fundamental issue of who, precisely, it is that makes these inferential judgement calls.

The answer to that 'who?' question is publicists.[7] Many of these publicists are legal academics or law professors. Not all law professors of course. You have to be someone who is knowledgeable and writes in the field of international law. But technical mastery is not enough. You have to have 'sound' views, what Harvard law professor Mark Tushnet calls 'soundness'. Tushnet puts it this way:

> Soundness seems to require that one be committed to the project of international law, that is, to the proposition that nation-states ought to resolve an ever-increasing number and ever-wider range of their disputes pursuant to existing and emergent rules of international law …[8]

For the purposes of this Analysis perhaps we can be a bit blunter. No one gets to vote for these legal academic publicists. They have no democratic warrant at all. Even if all law professors shared broadly similar views to the population at large or to those of the median voter (and that is plainly not the case) this would be an immensely unrepresentative group. It is made more so by the fact that any law professor sceptics about the proper role of international law are not counted; they do not get included in the group who comprise publicists. Tushnet puts it rather drily as follows:

> This feature of the process of becoming a publicist gives the academic field some degree of self-containment. One is writing in part for other legal academics, to achieve and sustain one's position as a publicist. But only in part, because one is also writing for others committed to the project of international law, including notably decision-makers in institutions that clearly do make international law, such as judges on international tribunals and members of the International Law Commission.[9]

True, this is just that portion of publicists who are law professors. There are also the international law judges, the fifteen judges who sit on the United Nations' International Court of Justice or ICJ. But with or without the judges we can see the basic democratic credentials of this subsidiary sort of international law is low to non-existent, and even lower than that of treaties.

Meanwhile as for any claims to even-handedness, here is how the late Lord Rodger, then on the UK's new Supreme Court (and previously a Law Lord on the Judicial Committee of the House of Lords, both being Britain's top court at different times) assesses this secondary sort of international law:

> My impression is that much of the writing on public international law to which we are referred is slanted towards a particular result that the writer wishes to see prevail as the

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7. See the Statute of the International Court of Justice, article 38. This tells us that it is 'the most highly qualified publicists' who have the role of determining this secondary or subsidiary sort of international law.

8. See Mark Tushnet, (2010) 29 University of Queensland Law Journal 19 at p.20.

9. Ibid.

law. It often appears that the writers have, say, a particular human rights agenda and that their book or article is written with a view to securing that it will come to form part of the corpus of writings which help to shape the law. Indeed, often the writers sit on some international tribunal or other body which deals with the same matter. On occasions, however, it is difficult to see how the writer's argument is to be squared with the wording of the particular international instrument in question – however desirable the result may be.[10]

This Analysis raises these points about customary international law because it is not just the Declaration that is made to do a lot of work in the Report. Also given more than a little weight is a Report and an Advisory Note of the Expert Mechanism on the Declaration. On the Lord Rodger's account, the people who staff these bodies have, from time to time, been known to have 'a particular human rights agenda' and to make claims that are 'difficult … [to] square with the wording of the particular international instrument in question'.

Let us finish this section the way it began and repeat that one of the remarkable aspects of the Report is just how much weight or emphasis it places on international law to attempt to legitimate its recommendations. When it is made clear how lacking in democratic character and input this sort of law is, one could be forgiven for thinking any recommendations based on it should first be put to a nationwide referendum or explicitly made part of a political party's election manifesto or promises and taken to an election before being implemented.

4) Constitutional Transformation Evaluated

The Report makes explicit and numerous calls for constitutional transformation in New Zealand. In effect, the Report is calling for New Zealand to move to adopt a written constitution. In some unspecified way it is calling for the Treaty of Waitangi to be entrenched into this new written constitution. Similar intimations as regards the Declaration can also be found.

The key point to remember about any such transmogrification or re-shaping of New Zealand's constitutional arrangements is that it will be highly likely to increase the power of the unelected judiciary (and other non-elected bodies and officials), and to do so to a noticeable degree. It will be the courts that oversee future legislative compliance with any and all norms entrenched within this new instrument.

That, of course, is exactly why the Report seeks to move to some new set of constitutional arrangements in the form of a written constitution. Whatever its precise details this new set-up will give less power to the voters. This is inevitable for the simple reason that New Zealand's current constitutional arrangements are, in the opinion of the author of this Analysis, the most majoritarian (and in that procedural sense, most democratic) in the world.[11]

These current arrangements, by the way, are the ones that were in place when New Zealand was the first country in the world to give women the vote in 1893; when New Zealand was the first country to do anything remotely equivalent to setting aside four seats in Parliament for Maori, to be elected by Maori men, back in 1867; when New Zealand was arguably the first country to bring in social welfare laws; when New Zealand completely restructured its economy in the 1980s; when New Zealand changed its voting system in 1993 for the 1996 election.

Like these outcomes or dislike them, they were responsive to the will of the voters and came into being on the basis of 'counting each person equally, giving each an equal say, and letting the chips fall where they may, but only until the next election'. It is just that sort of egalitarian majoritarianism, the cornerstone of New Zealand's constitutional status quo with Diceyan parliamentary sovereignty at its heart, which this Report seeks to alter in some not well-defined way.

The author of this Analysis sees that desire on the part of the Report as its most radical and its most undesirable feature. Of course, were any such transmogrification or constitutional rejigging to be put to the voters in an open and transparent way, New Zealanders could have their say. Fine. Alas, all of the Report's talk of 'internally lay[ing] the groundwork for constitutional change' (p.33), 'guid[ing] the wider public conversation about constitutional change' (p. 35), a 'dual governance model [between groups, Maori and non-Maori, to be clear]' (p.29), the various mentions of the need for 'a strong public education campaign' (p.viii, inter alia), constitutional change requiring a country to have 'reached a maturity where it is ready to undertake the transformation necessary to restructure governance' (p.4, inter alia, with the implication that opponents would simply be immature) and the like does not leave readers confident that open and transparent methods of legitimating constitutional change – maybe a referendum, maybe an election fought explicitly on the issue – were at the forefront of the Report's authors' minds here.

D) Concluding Remarks (with a reference to

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10. Lord Rodger of Earlsferry, 'Judges and Academics in the United Kingdom' (2010) 29 University of Queensland Law Journal 29 at p.39.

11. To put all the cards on the table, the author of this Analysis is an unashamed fan or supporter of New Zealand's current constitutional arrangements. He has written in support of them in various places. For one example see James Allan, 'Against Written Constitutionalism' (2015) 14 Otago Law Review 191-204. For another, out soon and of book length, see James Allan, The Age of Foolishness: A Doubter's Guide to Constitutionalism in Modern Democracies (Academica Press, US, 2022 – forthcoming).

Governmental Actions Thus Far)

This is a radical Report. Its recommendations are radical. Were those recommendations to be fulfilled to any considerable degree they would undercut majoritarian democracy; they would impinge upon elements of the Rule of Law; and they would exchange newer, worse, more aristocratic constitutional arrangements for older, better, more democratic ones.

At times the Report deals in condescension, verbiage and arguably deliberate linguistic obfuscation. There are repeated calls for more and more and more taxpayers' monies. To attempt to legitimate the Report's recommendations international law is made to do a great deal of work, too much work. Putting international law on the same plane as (or possibly even on a higher plane than) the domestic law of one of the world's oldest and most successful democracies is a tough sell, to put the point as kindly and as generously as possible.

None of those points in the preceding paragraph runs contrary to the possibility that the authors of the Report have delivered just what the government that commissioned the Report wanted. Indeed, the fact that that commissioning government has already taken steps in the areas of water and health to fulfil the spirit and general exhortations of the Report certainly suggests this is a plausible possibility.

The purpose of this first Analysis has been to examine in some detail the underpinnings of the Report, to lay out its conceits and first principles, and to show that these are unlikely to be widely shared or desired by the preponderance of New Zealanders. Whether an opposition political party will want to make use of this Analysis to fight back against its worldview and its suggested changes is something only time will tell.

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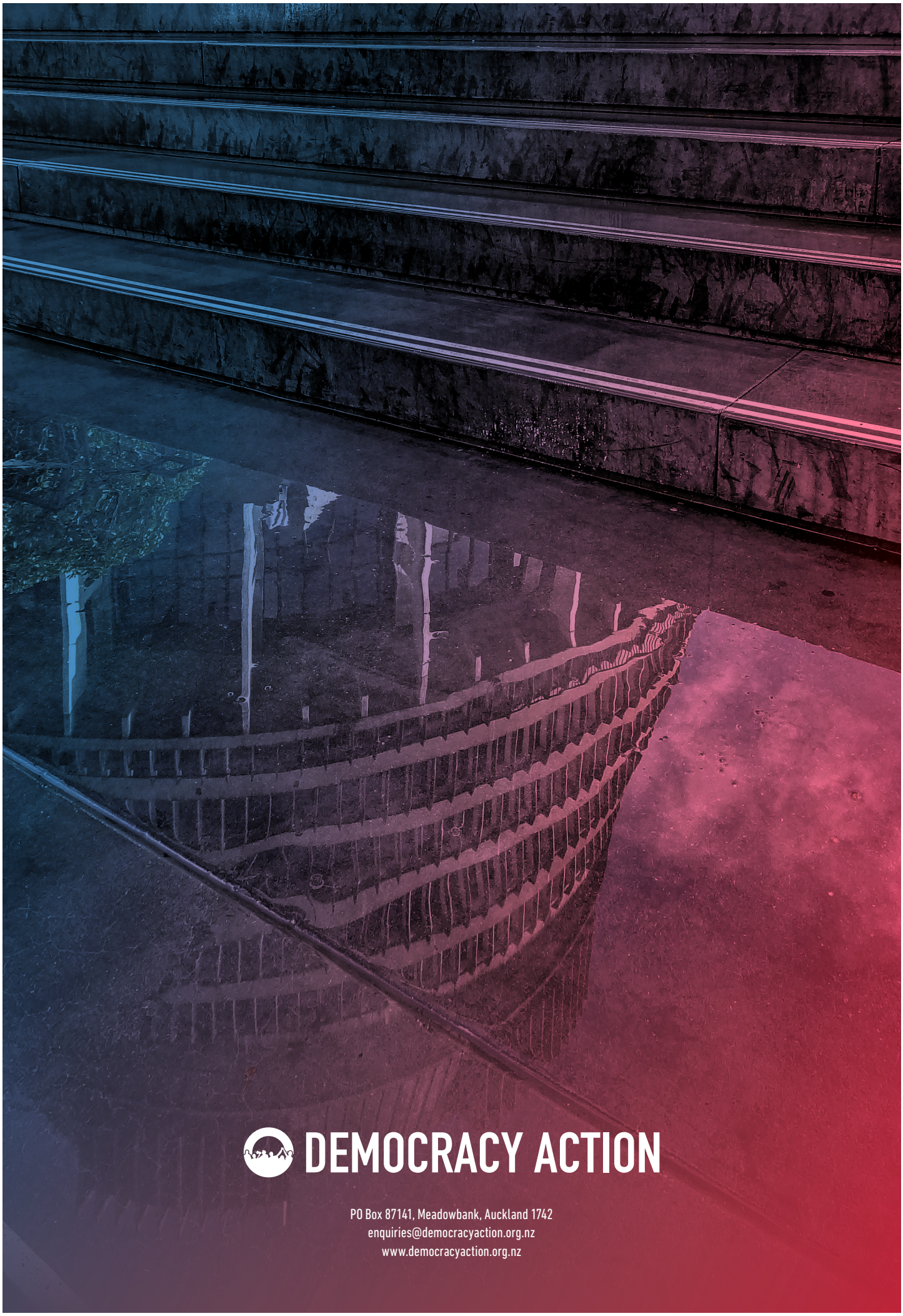
All views expressed in this Analysis are his and his alone. This Analysis was submitted to Democracy Action on May 20th, 2022.



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