

CLIMATE CHANGE RISKS TO REPRESENTATIVE GOVERNMENT IN KIRIBATI

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There is a real risk that the effects of climate change will make the low-lying, small island State of Kiribati uninhabitable. As a result of that risk, its government is undertaking programmes with other countries to relocate its people. The result of relocation, however, is that those emigrants go from being part of a total majority in their own country to being a small minority in another. This article compares the constitutional and electoral systems of Kiribati and New Zealand in order to develop some understanding of the risks to democratic representation that arise from relocation. It identifies key differences in how I-Kiribati people are represented in Kiribati and how they would be represented in New Zealand. The differences identified highlight the importance of developing relocation solutions within a legal framework that maintains those aspects of the sovereign State of Kiribati that I-Kiribati want to preserve.

Il ne fait guère de doute que les conséquences liées au réchauffement climatique conduiront, et ce à relativement brève échéance, les îles de l'État des Kiribati à être totalement inhabitables. Fort de ce constat, avec le concours d'autres États, au premier rang desquels la Nouvelle Zélande, les gouvernements successifs de cet État ont instauré une série de programmes qui tendent à organiser l'accueil sur leurs territoires respectifs des habitants des Kiribati. Ce mouvement migratoire sous la forme de délocalisation d'une population entière, s'accompagne toutefois d'une conséquence qui reste aujourd'hui souvent occultée par les pays d'accueil. En effet, une fois relocalisée en Nouvelle Zélande la population des Kiribati, passe du statut de population majoritaire d'un État souverain, statut dont elle bénéficiait dans son pays d'origine, à celui de minorité dans les pays d'accueil. Cette différence de statut s'accompagne par ailleurs de l'obligation faite aux populations des Kiribati de se

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conformer aux règles constitutionnelles de leur nouveau pays d'accueil. Or, ces règles non seulement diffèrent totalement de celles de leur pays d'origine, mais plus fondamentalement elles ne permettent pas la prise en compte du mode de représentation démocratique antérieur de la population déplacée et ce notamment lors des élections dans le pays d'accueil. Fort de ce constat, l'auteur suggère que la Nouvelle Zélande, en sa qualité de pays d'accueil, organise des mécanismes constitutionnels qui en marge du simple transfert de population, permettraient aux populations des Kiribati qui se trouvent déplacées, de bénéficier d'une représentation démocratique adéquate.

I INTRODUCTION

The 33 atolls and islands of Kiribati are becoming uninhabitable due to a range of adverse effects of climate change, most notably sea level rise.¹ Consequently, the I-Kiribati² government has a "migration with dignity" policy where it seeks to partner with Fiji and Australia to implement a strategic migration programme.³ The government recognises that relocation "may be inevitable", and aims to establish "expatriate communities" of I-Kiribati and to upskill them so that they can contribute meaningfully to the countries in which they resettle.⁴ However, relocation is "viewed as an option of last resort".⁵ Crucially, focusing on emigration rather than some means of securing *ex situ* continuity of statehood could deprive I-Kiribati of their own State.⁶ This could compound their existing challenges since the State, with a full legal personality, has a substantial influence on its nationals, *both* in how it affects people's lives and how it gives effect to people's aspirations and values. As

1 Intergovernmental Panel on Climate Change WGI *Climate Change 2013: The Physical Science Basis* (2013) at 1139; Intergovernmental Panel on Climate Change WGII *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (2014), ch 29; and Jon Barnett and Neil Adger *Climate Dangers and Atoll Countries* (Working Paper 9, Tyndall Centre for Climate Research, Norwich, 2001) at 3 and 7.

2 I-Kiribati is the demonym for people and things originating from Kiribati, both singular and plural.

3 Office of the President of Kiribati "Relocation" Kiribati and Climate Change <www.climatechange.gov.ki>; and Jane McAdam *Climate Change, Forced Migration, and International Law* (Oxford University Press, Oxford, 2013) at 202.

4 Office of the President of Kiribati, above n 3.

5 Above n 3.

6 On the separate topic of statehood, see Montevideo Convention on Rights and Duties of States 165 LNTS 19 (opened for signature 26 December 1933, entered into force 26 December 1934), art 1; and McAdam, above n 3.

Kingsbury explains, the "critical roles of the state [are] as a locus of identity and an autonomous zone of politics".⁷ And, as Lussick CJ notes:⁸

The lessons of history show that the price to be paid for failure to [uphold customs and traditions] is a heavy one – the loss forever of national identity and way of life.

Central to a State is its system of democratic representation. Whilst democracy might only be the "least bad" government system,⁹ it is the preferred governance system because of its ability to provide the maximum welfare to the maximum number of people.¹⁰ Emigrating I-Kiribati could be transformed from an outright majority in their own democratic system to a very small minority in another State's democratic system. Consequently, expatriate I-Kiribati may be affected by the "tyranny of the majority" and not be represented effectively.¹¹

In this context and in an effort to identify some of the potential "hidden" impacts of climate change, this article examines the effects on democratic representation of a hypothetical scenario in which I-Kiribati migrate en masse to New Zealand. Specifically, this analysis compares the electoral systems of the two States in the light of their constitutional, cultural and geographical contexts. That comparison identifies specific risks for I-Kiribati, should they migrate to New Zealand and lose their State, because of the relative limitations of the New Zealand democratic system to accommodate and represent I-Kiribati people and culture.

This hypothetical scenario is obviously over-simplified since, among other things, people are already relocating to Fiji on land purchased by the I-Kiribati government, and to Australia under the "Kiribati Australia Nursing Initiative".¹² This

7 Benedict Kingsbury "Sovereignty and Inequality" (1998) 9 EJIL 599 at 599.

8 *Teannaki v Tito* [1996] KIH 3; HCCC 30.94, at (I)(viii).

9 Winston Churchill famously noted "that democracy is the worst form of government except all those other forms that have been tried from time to time": Official Report, House of Commons (5th Series) 11 November 1947, vol. 444, at 206–207.

10 See *Universal Declaration on Human Rights* GA Res 217 A, III (1948), art 29(2); International Covenant on Civil and Political Rights 999 UNTS 172 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 14, 21 and 22; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 4, 8(1)(a) and 8(1)(c).

11 John Adams *A Defence of the Constitutions of Government of the United States of America: Volume III* (Piccadilly, 1794) at 291.

12 See Government of Kiribati "Fiji Supports Kiribati On Sea Level Rise" (press release, 11 February 2014); Laurence Caramel "Besieged by the rising tides of climate change, Kiribati buys land in Fiji" *The Guardian* (online ed, London, 1 July 2014); and Department of Foreign Affairs and Trade "Kiribati Australia Nursing Initiative" Australian Aid <aid.dfat.gov.au>.

fragmentation, however, will exacerbate the issues identified in this paper, since the populations of I-Kiribati will be even statistically smaller in each host country.

II GENERAL CONTEXTS¹³

Before examining the legal frameworks for democratic representation, it is important to have some contextual data about the populations, geography and cultures of Kiribati and New Zealand.

The population of Kiribati is approximately 103,000, and, ethnically, 99 per cent of residents identify as I-Kiribati or "I-Kiribati/Mix". The European population is unknown, as the census does not offer that as a possible response to the ethnicity question. Just 776 people are identified as "other" than I-Kiribati. In New Zealand, the ethnicities that people identify with are: 74 per cent European, 15 per cent Māori, 12 per cent Asian, seven per cent Pacifica, and one per cent as either Middle Eastern, Latin American or African.¹⁴

In addition to the homogeneity of ethnicity in its small population, 97 seven per cent of I-Kiribati identify as Christian, especially Catholic and Protestant. Just 51 persons (0.05 per cent) identify as having no religion. In New Zealand, 49 per cent of the population (1.9 million) identify as Christian, and 42 per cent (1.64 million) as having no religion.

Even if all I-Kiribati migrated to New Zealand, they would amount to just 2.25 per cent of New Zealand's population, which would then be approximately 4.6 million. The small community would become a small part of a different, much more diverse and much larger population compared to Kiribati's relative ethnic and religious homogeneity.

Another potential indicator of I-Kiribati's relative cultural stability is the extent that external influences are available, and one simplistic measure is the rate of internet usage, which of course permits users to access an infinite range of potential influences. In New Zealand, 80 per cent of homes have an internet connection, as opposed to just 0.4 per cent of 16,000 households in Kiribati. Fifteen per cent of the population say they "use" the internet but nearly half of those users do so at internet cafés. This suggests that internet use overall is very limited and, therefore, infrequent, and that finding indicates (albeit weakly in the absence of more

13 Unless otherwise stated, statistics in this part come from: National Statistics Office, Ministry of Finance and Economic Planning *Report on the Kiribati 2010 Census of Population and Housing: Vol 1 Basic Information and Tables* (August 2012); and Statistics New Zealand <www.statistics.govt.nz>.

14 This totals more than 100 per cent because people may identify with more than one ethnicity.

comprehensive research) that external influences on I-Kiribati culture are relatively minor compared to those on New Zealand culture.

Geographically, I-Kiribati are already spread far and wide within their own country. Kiribati's 32 coral atolls and one island are spread across 3.5 million square kilometres of the Pacific Ocean – an area greater than half the size of the Australian continent – yet its land area is just 811 square kilometres.¹⁵ The two farthest islands are 3,900 kilometres apart, the same distance as between Sydney and Perth.¹⁶ The importance of this geography is that many of the outer islands are so remote and removed from the capital that the legislative, regulatory and legal frameworks become less and less relevant the further you get out.

New Zealand's land area is 260,000 square kilometres and dwarfs that of Kiribati,¹⁷ and yet the reach of the New Zealand government is largely complete.

III LEGAL POWER SYSTEMS

Constitutions are primarily about the allocation, scope, exercise, and checks and balances of power at the national scale.¹⁸ The full content of constitutions is not only that which is embodied in law, but also in the beliefs, behaviours and cultural norms of those involved in their operation.¹⁹ The following paragraphs, however, focus only on key elements of the two States' power systems that are embodied in legal systems, particularly the central element of the electoral systems.

New Zealand's constitution is "unwritten" and derived from multiple sources. For the purposes of this analysis, the key constitutional documents are the Constitution Act 1986, the Electoral Act 1993, the Treaty of Waitangi and the Cabinet Manual.²⁰ The Constitution Act reaffirms New Zealand as a parliamentary democracy and constitutional monarchy, and as subject to parliamentary supremacy.²¹ All elements

15 World Health Organization Western Pacific Regional Office "Kiribati Country Profile 2011" <www.wpro.who.int>.

16 Kiribati Tourism "About Kiribati: The Country and Geographic Location" (13 February 2013) <www.kiribatitourism.gov.ki>.

17 Immigration New Zealand "Low Population Density" New Zealand Now <www.newzealandnow.govt.nz>.

18 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2010) at 3.

19 Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 565–567.

20 For a list of other sources of New Zealand's unwritten constitution, see Palmer and Palmer, above n 18, at 5; and Cabinet Office *Cabinet Manual 2008*, Introduction by Rt Hon Sir Kenneth Keith.

21 Constitution Act 1986 (NZ), ss 2, 10(4) and 15(1).

of the unwritten constitution are subject to change by Acts of Parliament without the need to pass through any entrenchment procedures. The Electoral Act has an exception to that generality: certain provisions – relating to the term of Parliament, voter eligibility, method of voting, and method of determining electorate boundaries – cannot be amended or repealed without the support of 75 per cent or more of members of the House of Representatives.²²

The Constitution of Kiribati 1979 is written and supreme.²³ It establishes Kiribati as a parliamentary democracy and a constitutional republic.²⁴ The Constitution is entrenched so it can only be amended by a Bill that is subject to a two-thirds majority vote of all eligible, registered voters in a referendum and a two-thirds majority in the Maneaba ni Maungatabu (House of Representatives; hereafter "Maneaba").²⁵ Overall, the allocation, scope and checks that are embedded in the I-Kiribati Constitution create stronger legal limits on the exercise of power than those in New Zealand's constitutional arrangements.

Culture may be directly infused into a constitution. In New Zealand, for example, the Treaty of Waitangi provides a principal reference to culture that protects, among other things, Māori te tino rangatiratanga (unqualified chieftainship) over taonga (sacred things).²⁶ Regarding religion, New Zealand is a secular State, so the only religious references are historical vestiges in the Bill of Rights 1688 without legal effect.²⁷

The supreme Constitution of Kiribati is forthright about culture, declaring in its preamble that "we shall continue to cherish and uphold the customs and traditions of Kiribati". That principle was part of the basis for rejecting a petition for an election to be declared void. In *Teannaki v Tito*, it was determined that the provision of gifts by an election candidate to voters was not bribery, but instead was part of a custom

22 Electoral Act 1993 (NZ), s 268.

23 Constitution of Kiribati (KI), s 2; and Laws of Kiribati Act 1989 (KI), s 4(1).

24 Constitution of Kiribati (KI), ch V and s 1.

25 Constitution of Kiribati (KI), s 69.

26 As reproduced in the Treaty of Waitangi Act 1975 (NZ), sch 1 (The Text in Māori). On the place of the Treaty of Waitangi in the New Zealand constitution, see Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office, above n 20, at 2; and Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

27 Human Rights Commission *New Zealand Action Plan for Human Rights: Priorities for Act 2005–2010* (online ed) <www.hrc.co.nz> at ch 9; Bill of Rights 1688 (UK); and Cabinet Office, above n 20, Introduction by Rt Hon Sir Kenneth Keith.

of giving gifts as a visitor called *mweaka*.²⁸ Regarding religion, the I-Kiribati Constitution reaffirms the almost-universal Christianity of the population in its opening line: "[w]e the people of Kiribati, acknowledging God as the Almighty Father in whom we put our trust, and with faith in the enduring value of our traditions and heritage..."²⁹

Apart from direct reference, culture can also be expressed in constitutions through form. In Kiribati's path to independence, a comprehensive consultation and advisory process was established to:³⁰

... devise a constitution which was better suited to the circumstances of this small island state [through] wide public discussion of the issue of what form the Independence Constitution should take.

That process was specifically designed to enable I-Kiribati to choose the constitutional elements that define governmental powers in ways that reflect I-Kiribati values: egalitarianism; the greater importance of relationships between individuals and community than individuals with other individuals; and the widespread mistrust of a central government in a State dispersed over many islands.³¹ The modern, supreme and entrenched Constitution of Kiribati reflects those values that the public process sought to enshrine. I-Kiribati migrants to New Zealand would cease to live under such constitutional culture and instead return to the Monarchy and a far more centralised government. The implications of this are discussed below.

Regarding the structure of governments, Kiribati and New Zealand, as former British colonies, both implemented the Westminster system's separation of powers, with executives,³² legislatures (which are both unicameral)³³ and judiciaries.³⁴ New Zealand's Head of State continues to be the Sovereign, and the legislature is comprised of the House of Representatives plus the Sovereign.³⁵ Being a republic,

28 *Teannaki v Tito*, above n 8, at (I)(viii).

29 Constitution of Kiribati 1980 (KI), preamble; and National Statistics Office, above n 13, at 41.

30 Howard Van Trease *Atoll Politics: The Republic of Kiribati* (Macmillan Brown Centre for Pacific Studies University of Canterbury and Institute of Pacific Studies University of the South Pacific, 1993) at 11.

31 At 11–13.

32 Constitution Act 1986 (NZ), pt 2; Cabinet Office, above n 20, at [2.3]; and Constitution of Kiribati 1980 (KI), chs IV and VII.

33 Constitution Act 1986 (NZ), s 14; and Constitution of Kiribati (KI), s 52.

34 Constitution Act 1986 (NZ), pt 4; and Constitution of Kiribati (KI), ch V.

35 Constitution Act 1986 (NZ), ss 2 and 14.

Kiribati's Head of State is the Beretitenti (president) and the legislature is solely the Maneaba from which the Beretitenti is elected.³⁶ The importance of these differences is discussed below.

Both States are common law countries and both legislatures are empowered to enact statutes.³⁷ There are additional sources of law in Kiribati: the supreme Constitution and customary law.³⁸ Customary law is statutorily defined as the customs and usages of indigenous I-Kiribati people, and it is valid law when it is not inconsistent with other published law and it has been determined to be customary law by a court.³⁹ If a customary law is recognised as a question of law, then it must be enforced.⁴⁰ Case law regarding customary law has related to elections, where claims of bribery were rejected and the actions at issue were deemed to be customary practices.⁴¹

IV DEMOCRATIC REPRESENTATION

Electoral systems can define democracy in an unlimited variety of ways that increase or decrease representation, and strengthen or weaken checks and balances on power. In general, the capacity of an electoral system to involve more political parties widens the perspectives of the electorate which reach the legislature.⁴²

New Zealand uses a mixed member proportional (MMP) electoral system,⁴³ whereby each ballot paper provides for two votes: an electorate vote and a party vote.⁴⁴ There are 63 general electorates plus seven Māori electorates (discussed further below), all with one Member of Parliament (MP) determined on a first-past-the-post (FPP) basis.⁴⁵ The remainder of the 120 seats is determined by the party

36 Constitution of Kiribati (KI), ss 30(2), 52 and 32.

37 Constitution Act 1986 (NZ), s 15(1); and Constitution of Kiribati 1980 (KI), s 66.

38 Laws of Kiribati Act 1989 (KI), s 4.

39 Laws of Kiribati Act 1989 (KI), s 5 and sch 1, para 1.

40 Laws of Kiribati Act 1989 (KI), sch 1, para 6.

41 *Teannaki v Tito*, above n 8; and *Tatireta v Tong* [2003] KIHC 1; [2003] 5 LRC 665.

42 See Sadia Rajput "Proportional Representation versus Majoritarian System" Academia.edu <www.academia.edu>.

43 Electoral Act 1993 (NZ), long title.

44 Electoral Act 1993 (NZ), s 150(3).

45 New Zealand Parliament "Electorate Profiles" <www.parliament.nz>.

vote.⁴⁶ Broadly, if the percentage of votes that a party receives is greater than a five per cent threshold, then the percentage of seats the party gains within the House of Representatives is directly proportional to their votes, irrespective of the number of electoral seats won. So, if a party gets 10 per cent of the votes, then it will have 12 of the 120 available seats. These will be comprised of party vote MPs or, if that party won electorate seats, then a combination of electorate and party vote MPs. There is a "coat-tailing" exception to the threshold rule: a party receiving less than five per cent but winning a local electorate seat will get the number of seats representing its percentage national vote. So, for example, if a party achieves only four per cent of the national vote, but it wins a local electorate, then it will have that local electorate seat plus four other seats, so five seats in total, which is four per cent of the 120 seats available in the House of Representatives. Unless dissolved earlier, the term of New Zealand's Parliament is three years.⁴⁷

One of the objectives for introducing the MMP system was to improve how well the electorate is represented – since FPP systems tend to produce only two viable parties – and to restrict Executive power.⁴⁸ Under the MMP system, no single party has yet governed entirely on its own but a majority of voters' preferences form government through coalitions or confidence and supply arrangements. A coalition is two or more parties governing together, whilst a confidence and supply agreement ensures that a governing party will have confidence of the House and supply of the budget, but the minor parties that agree to provide that confidence and supply support remain outside government as opposition parties.

The I-Kiribati system is also an amalgam of first-past-the-post and proportional representation, but differently so. The Maneaba, for which elections are held every four years, has 46 seats.⁴⁹ Forty-four are elected members, one is a "nominated member" from the island of Banaba (discussed below), and the other is the Attorney-General whose position is *ex officio*.⁵⁰ The 44 elected members come from 23

46 There are currently 121 members of the New Zealand Parliament to accommodate a statistical outcome.

47 Constitution Act 1986 (NZ), s 17(1).

48 Palmer and Palmer, above n 18, at 13–18.

49 Constitution of Kiribati 1980 (KI), s 78.

50 Constitution of Kiribati 1980 (KI), ss 53 and 63.

electoral districts that each has between one and three members.⁵¹ For those districts with only one member, the latter is elected on a FPP basis.

The remaining districts have a form of proportional representation because candidates can be elected with fewer than half the votes. However, there are only two or three members for those remaining districts and so the proportionality of the representation is much less than the direct proportions of New Zealand's MMP system. Candidates in the two or three seat districts may also need to campaign through two elections to be successful. If a candidate receives over half the votes, they are elected. However, if no candidate receives over half the votes, then a "run-off election" is held with just the top candidates, that is, the top three (for a single seat constituency), the top four (for a two seat constituency) or the top five (for a three seat constituency).⁵²

In spite of the lower proportionality of representation in the I-Kiribati system, there are other reasons why its efficacy for electoral representation may remain comparable with, or perhaps be greater than, that of the New Zealand MMP system. One of those reasons relates to the Heads of State. As a constitutional monarchy, New Zealand's Head of State is the Sovereign.⁵³ However, despite indicia of grandeur, the Sovereign acts entirely on the advice of the New Zealand government and its role is largely symbolic.⁵⁴ For example, the Sovereign's domestic representative, the Governor-General, is appointed on the recommendation of the Prime Minister.⁵⁵

Regarding New Zealand's Head of Government, that position is not in fact provided for in any legislative mechanism and, therefore, there is no legislative framework to determine how a person becomes the Prime Minister.⁵⁶ A Prime Minister is chosen by members of Parliament from its members. In practice, a person is selected by the members of their political party to be its leader and, therefore, its

51 Elections Ordinance 1979 (KI), s 5; and Parliament of Kiribati "Know the Maneaba Ni Maungatabu", <www.parliament.gov.ki>.

52 Elections Regulations 1979 (KI), regs 25–26; and Parliament of Kiribati "Run-off Election" <www.parliament.gov.ki>.

53 Constitution Act 1986 (NZ), s 2(1).

54 Constitution Act 1986 (NZ), s 3A; Cabinet Office, above n 20, Introduction by Rt Hon Sir Kenneth Keith; and The British Monarchy "The Queen's role in New Zealand" <www.royal.gov.uk>.

55 Constitution Act 1986 (NZ), s 2(2); and Office of the Governor-General "The Role of the Governor-General" <www.gg.govt.nz>.

56 Cabinet Office, above n 20, at [2.4].

candidate for Prime Minister, and that internal decision is influenced by public opinion.

In Kiribati, the public process that led to independence from Britain and the 1980 Constitution also led to the decision to become a republic. Consequently, Kiribati has a Beretitenti who is both Head of State and Head of Government.⁵⁷ Nominations for presidential candidates are made within the Maneaba from amongst its members.⁵⁸ Either three or four nominations must be made at the first sitting of the Maneaba after a general election.⁵⁹ If there are more than four nominations, a secret ballot is held within the Maneaba to identify the top four candidates that will be eligible for the popular vote.⁶⁰ Once the candidates are settled, everyone entitled to vote in a general election is entitled to vote in a Beretitenti election and the normal election process applies.⁶¹ The Beretitenti is the person who secures the most votes, and they may serve for a maximum of three terms.⁶²

After opting to become a republic with a local Head of State only as recently as 1980, I-Kiribati in New Zealand would become subject to the Monarchy again, but since the Sovereign's legal role is only symbolic, this almost certainly would have no real influence on people's day-to-day lives. I-Kiribati in New Zealand would also lose the ability to vote for the Head of Government directly, since the New Zealand Prime Minister is chosen primarily by the party. Again, this arguably has minimal importance at a day-to-day level, but there may be some sense of "ownership" of the process which I-Kiribati may prefer.

Another element of the States' democracies that influences the relative efficacy of their electoral representation is the electorates. Both Kiribati and New Zealand have independent commissions that administer elections and determine electorate boundaries based on census data⁶³ and on information garnered from consultation.⁶⁴ The I-Kiribati Beretitenti has limited powers to make certain regulations for

57 Constitution of Kiribati 1980 (KI), s 30(2).

58 Constitution of Kiribati 1980 (KI), s 32(1).

59 Constitution of Kiribati 1980 (KI), s 32(2).

60 Election of the Beretitenti Act 1980 (KI), ss 5(d) and 6.

61 Constitution of Kiribati (KI), s 32(3); and Election of the Beretitenti Act 1980 (KI), s 8.

62 Election of the Beretitenti Act 1980 (KI), s 12; and Constitution of Kiribati 1980 (KI), s 32(5).

63 Constitution of Kiribati 1980 (KI), ss 62–63; and Electoral Act 1993 (NZ), ss 28 and 35–36.

64 Elections Ordinance 1979 (KI), s 6; and Electoral Act 1993 (NZ), s 38.

administering elections,⁶⁵ but those regulations must be *intra vires* the Constitution and can only be made in accordance with advice from the Maneaba.⁶⁶

The sizes of the States' electorates differ markedly. The average population per member in Kiribati is 2,290, with a range from 295 to 11,491.⁶⁷ New Zealand has fixed minimum and maximum populations for electorates. The precise figures differ marginally for North Island, South Island and Māori seats, but the range is approximately 57,000 to 63,000.⁶⁸ Consequently, New Zealand electorate MPs serve around 26 times more constituents than I-Kiribati MPs. New Zealand's party vote MPs have no electorate, so it is perhaps most accurate to describe their constituency as their party's general constituency, which means it is somewhat fluid and lacking definition.

Statistics like these about the electorates paint only a simplistic picture but one important fact that can be derived is that there is much greater proximity between I-Kiribati members and their constituents than those in New Zealand. This suggests that there is potential for far greater influence from, and direct accountability to, those local constituents. Whilst Kiribati's population is equal to just 2.25 per cent of New Zealand's, its Maneaba – by number of MPs – is equal to nearly 40 per cent of New Zealand's House of Representatives. Rather than being excessive, perhaps the size of the Maneaba reflects one of the objectives in drafting the I-Kiribati Constitution, which was to reflect the mistrust that I-Kiribati have in central governments controlling highly-dispersed island populations.⁶⁹

Another means of enhancing representation which both Kiribati and New Zealand have adopted is to have seats in their legislatures reserved for specified subsets of their populations. In Kiribati, one of the 46 seats in the Maneaba is reserved for a representative of the Banaban community.⁷⁰ Fewer than 300 Banabans live on Banaba Island, whilst around 5,000 live on Rabi Island. Rabi Island is part of the territory of Fiji and the Banabans who live there all have Fijian citizenship,⁷¹ but

65 Elections Ordinance 1979 (KI), s 39.

66 Constitution of Kiribati 1980 (KI), ss 62–63.

67 National Statistics Office, above n 13, at 31.

68 Statistics New Zealand "Number of Electorates and Electoral Populations: 2013 Census" (7 October 2013, downloadable spreadsheet) <www.statistics.govt.nz>.

69 Van Trease, above n 30, at 11–13.

70 Constitution of Kiribati 1980 (KI), ch IX.

71 National Statistics Office, above n 13; "Rabi Island" Wikipedia <www.wikipedia.org>; and Van Trease, above n 30, at 9.

they also retain constitutional rights in and regarding Kiribati that are protected by a specific entrenchment régime.⁷² Importantly, there is a municipal Rabi Council and it selects one of its own members to be the "nominated representative" of the Banaban community, representing it in the I-Kiribati Maneaba.⁷³ In effect, it means that people who live in Fijian territory maintain influence in the legislature of Kiribati. These special provisions of the Constitution were an attempt to provide reparations and protections for exploitative events and circumstances of the past.⁷⁴

In New Zealand, seven of the 120 seats in the House of Representatives are reserved for Māori representatives.⁷⁵ This has been described as "the constitutional manifestation of the Treaty [of Waitangi]".⁷⁶ The Māori electorates vary in the size of the geographic areas they cover and they are not as discretely defined as for the Banabans. For example, the Te Tai Tongo electorate covers all of the South Island plus the Chatham Islands, whilst the Tāmaki Makaurau seat covers "only" the city of Auckland. Geography, however, is merely one consideration for defining the boundaries, along with communities of interest among Māori people generally.⁷⁷ Māori voters can opt-in to vote for a Māori electorate or they can vote in a general electorate.⁷⁸ Currently, there are approximately 230,000 Māori on the Māori Roll and 185,000 on the General Roll.⁷⁹

The special representation of Māori would obviously hold no legal significance for I-Kiribati migrants, and the special representation provisions for Banabans would lose their practical significance in New Zealand. That said, the circumstances are that Banabans would almost certainly remain on Rabi and Banaba Islands: they own Rabi Island; they have Fijian citizenship; they have roots there; and Banaba, which has a highest peak of 81 meters, is not as adversely affected by climate change as Kiribati's remaining territory, comprised entirely of low-lying atolls. The policy

72 Constitution of Kiribati 1980 (KI), ss 117, 119 and 124

73 Constitution of Kiribati 1980 (KI), s 117.

74 See K Sigrah and S M King "Banaban History Overview" (2001) Abara Banaba <www.banaba.com>; and Van Trease, above n 30, at 20–22.

75 Electoral Commission "Māori Representation" <www.elections.org.nz>.

76 Palmer, above n 26, at 20.

77 Statistics New Zealand "Māori Electoral District: Classification and coding process" <www.stats.govt.nz>.

78 Electoral Act 1993 (NZ), s 76(1).

79 Electoral Commission "Results of 2013 Māori Electoral Option" (23 July 2013) <www.elections.org.nz>.

question that New Zealand and Kiribati might negotiate in this stylised hypothetical is whether some form of special representation would be secured for I-Kiribati immigrants, perhaps as reparations for New Zealand's ever-increasing contributions to climate change. It is perhaps a certainty that this would not be as significant as reserved seats in the House of Representatives, but other models could be explored such as an advisory council and consultation requirements.

With regard to voting in elections, it is, in both countries, non-compulsory,⁸⁰ via secret ballot,⁸¹ and voters must be aged 18 years or over.⁸² In Kiribati, only citizens may vote, whereas New Zealand also allows permanent residents to vote.⁸³ This means that I-Kiribati could vote before being granted citizenship in New Zealand.

As well as being able to vote in an MP, the I-Kiribati Constitution provides for electors being able to vote out an MP. This power applies only to their local MP, but does not exist if their MP is the Beretitenti, Kauoman-ni-Beretitenti (Vice-President), Attorney-General or a Minister.⁸⁴ For removal to occur, there must be a petition lodged with the Electoral Commission signed by a majority of registered electors in the district, and then the Electoral Commission must conduct a referendum. If a majority of registered electors vote for the removal of the member, that member immediately vacates their seat and a by-election is held. There is nothing comparable in the New Zealand system.

A final key aspect of the electoral system relates to the political parties. In New Zealand's MMP system, the party vote makes it essential that political parties are formal bodies that are registered with the Electoral Commission. Parties must have at least 500 members to gain and maintain their party status,⁸⁵ and must meet various basic formalities.⁸⁶ Parties must have rules regarding membership and their candidates must be chosen through a democratic process by their members. There are currently seven parties in the New Zealand Parliament with a government made

80 Constitution of Kiribati 1980 (KI), s 64(1); and Electoral Act 1993 (NZ), s 60.

81 Elections Regulations 1979 (KI), reg 12(d); and Electoral Act 1993 (NZ), s 149.

82 Constitution of Kiribati 1980 (KI), s 64; and Electoral Act 1993 (NZ), ss 3(1), definition of "adult", and 74.

83 Electoral Act 1993 (NZ), s 74; and Constitution of Kiribati 1980 (KI), s 64 (1).

84 Constitution of Kiribati 1980 (KI), s 59.

85 Electoral Act 1993 (NZ), s 66.

86 Electoral Act 1993 (NZ), s 63.

effective by confidence and supply agreements between the National Party and three of the minor parties.

In contrast to New Zealand's formalism, I-Kiribati political parties are loose groupings with little or no structure. Members may vote according to the interests of their electorate rather than along party lines and indeed members may change allegiances between parties on a number of occasions during their tenure.⁸⁷ In the current Maneaba, there are three parties plus three independent members, and one party is governing outright.⁸⁸

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British colonization obviously took a far greater hold in New Zealand than it did in Kiribati. After signing the Treaty of Waitangi in 1840, Europeans outnumbered Māori by 1858.⁸⁹ By the time of full independence from Great Britain in 1947, New Zealand's population was 1.8 million and European culture dominated the legal system almost completely.⁹⁰ Consequently, New Zealand's electoral system reflects British origins and European cultural heritage, but of course has important Māori aspects.

In contrast, when Kiribati attained its independence in 1979, there had been less than 80 years of colonial rule and essentially no permanent British residents.⁹¹ The Governor at the time of independence, John Smith, brought his British legal paradigm to his oversight of the constitution's development, but I-Kiribati culture remained strong.⁹² That ensured that the constitutional and electoral systems were infused with I-Kiribati values and culture: becoming a republic was a rejection of British monarchy, substituted by a locally-chosen Head of State; the supreme Constitution provided protections from political expediency; indigenous culture and customary law were given legal effect; the high number of MPs relative to the small population decentralises decision-making and puts MPs in close proximity to their constituents; and the ability to vote out MPs and the lack of "party-line" voting puts

87 Parliament of Kiribati "Political Parties" <www.parliament.gov.ki>.

88 Parliament of Kiribati "Party Members" (10 April 2013) <www.parliament.gov.ki>.

89 Ministry of Culture and Heritage "Overview of NZ in the 19th century: 1840–70" New Zealand History Online <www.nzhistory.net.nz>.

90 "Historical population estimates tables" Statistics New Zealand <www.stats.govt.nz>.

91 PacLII – "Kiribati Sources of Law".

92 Van Trease, above n 30, at 11.

MPs under tighter scrutiny. These are the fundamental aspects of the I-Kiribati electoral system.

If the response to climate change continues to be a migration policy, then the I-Kiribati emigrants will lose these fundamentals of their system of democracy. The following questions arise: as I-Kiribati are forced to evacuate their nation's territory, what aspects of the State and/or community of Kiribati do I-Kiribati want to maintain, and how might those aspects be preserved?

Could New Zealand's MMP system already offer I-Kiribati migrants adequate representation and protection of culture, custom and language? The MMP system has increased the distinction between the Executive and Parliament, limited the power of the Executive, and it has also suggested that MMP has enhanced public debate over government policy.⁹³ By comparison with the preceding FPP Executive, the capacity of New Zealand's proportional representation system to involve more political parties in stable governance widens the perspectives of the electorate which reach the legislature.⁹⁴ But, ultimately, in spite of those forward steps, the MMP system still reflects a majority of voters. The very small percentage of the electorate that I-Kiribati immigrants would comprise exposes them to the "tyranny of the majority", even under the entirely unrealistic hypothetical that *all* I-Kiribati moved to New Zealand. The result of programmes focusing on migration or "climate refugees" is that the values and culture that I-Kiribati chose to embed in their supreme Constitution would be lost unless they were the subject of some form of legal recognition and protection.

It is important that the extent of loss is not exaggerated. It is perhaps fair to assume that most people do not give a moment's thought about their country's constitution, particularly in New Zealand which has had long-term, stable democracy. But, as Palmer and Palmer said in the opening of *Bridled Power*:⁹⁵

A national constitution is about power and politics on a grand scale—who exercises the power of the state, how they exercise power, how much can be exercised, whether other people and which people can stop them and how they can do it. How New Zealand's [and Kiribati's] constitution works directly affects our economy, our society, our culture and our politics.

93 Palmer and Palmer, above n 18, at 13 and 17.

94 See Rajput, above n 42.

95 Palmer and Palmer, above n 18, at 3.

Given the extensive influence of constitutions, differences that can seem minor or superficial could have significant flow on effects. Some differences are important and some are probably not. For example, some elements are broadly the same, such as Parliamentary democracy. Some of the differences are arguably more symbolic than material, such as having an elected Head of State instead of the Sovereign.

Some of the differences *could* be material, but probably have little or no effect in day-to-day lives, such as Parliamentary supremacy instead of a supreme constitution, and the potential for change to our unwritten constitution compared to the entrenched, written constitution.

Some of the differences are probably still subtle in their effect and hard to define, but nonetheless real. For example, I-Kiribati attempted to imbue their constitution with the value of egalitarianism. Although New Zealand protects equality in certain measures – such as prohibiting discrimination on the basis of ethnicity, gender, or religious belief – in other ways, New Zealand is increasingly unequal, particularly in relation to wealth distribution.⁹⁶

Some of the differences are arguably more important. Clearly the customary law of I-Kiribati would not be enforceable in New Zealand, nor would it be a defence to, say, a bribery charge. (Although it might be a mitigating factor.) This lack of protection for cultural norms is the most important difference. It is the key risk when one thinks of climate change as "carbon colonialism" or one thinks of migration solutions as "accidental assimilation" policies. Whilst the practical tests for cultural law in Kiribati have related only to one cultural practice – mweaka, that does not necessarily reveal the extent of culture throughout Kiribati's legal system.

That said, there is a perception issue which relates to "ownership" of the constitution and to our perception of ownership and belonging to our own countries. It was not all that long ago that I-Kiribati gained independence and their constitution was obviously a big part of that, along with the decisions to become a republic, to have an entrenched constitution, and to enshrine and protect cultural law. These factors are important to the sense of ownership and belonging that people have, even though that may not affect people's day-to-day lives.

There are options that need to be explored, ranging from the acquisition of new property (as has already occurred in Fiji) or indeed new territory (which would require another State to annex or otherwise make available territory for the benefit of Kiribati), through to bilateral agreements that enable extraterritorial continuity (as

96 See Bryan Perry "Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2013" (Ministry of Social Development, July 2014).

in the case of the Sovereign Military Order of Malta) or some semblance of local autonomy. These options demand sufficient good will of the public and/or sufficient leadership and interest of the Executive of whichever country or countries might offer to partner in such bilateral arrangements with Kiribati and other low-lying small island nations. Unfortunately, due to already-prevalent impacts of climate change, the I-Kiribati and others do not have strong foundations from which to negotiate.