Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights

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Introduction

A nation that contemplates a bill of rights – whether constitutional or statutory – must have some vision of what it wants to achieve. Is it, as with the United States in 1789, to affirm a set of existing values against the possibility of future erosion? Or perhaps, as in South Africa in 1994, to mark a break from the past and set fresh values to which future governments must aspire? Might it be elements of both – the vision varying according to the nature of the particular value or right? After all, civil and political rights are relatively well established in modern democracies; candidates more for affirmation than aspiration. But indigenous peoples' rights seem different. The very idea of them is fairly new. Internationally, they are still, as it were, under construction. The United Nations Declaration on the Rights of Indigenous Peoples (2007) is a waypoint, but there is a considerable distance to go. Thorny questions about self-determination and autonomy arise. All this means that the content of indigenous rights, the language to use in expressing them in a domestic human rights document, and the consequences of doing so, are much less clear than with civil rights.

A certain amount of caution can therefore be expected in drafting rights for indigenous persons, yet the sentiment that something should be included will be strong. As it happens, that was not quite true when the New Zealand Bill of Rights Act 1990 was drafted, but there were special reasons for that. This essay was written for a gathering of those interested in the possible effect of an Australian bill of rights in matters of religion and culture – and written in advance of any suggested text for an Australian bill of rights. In what follows I shall examine the impact on New Zealand's indigenous people – the Maori – of the New Zealand Bill of Rights. My hope is that this may shed some modest light that assists in finding Australia's path, if only by articulating reasons why Australian and New Zealand history may be on different paths.

It should be said at the outset that individual Maori persons obviously enjoy all those individual rights that New Zealand's Bill of Rights bestows on every person, through the use of standard bills of rights language such as "Everyone has the right to freedom of expression" or "No one shall be deprived of life …". But this essay is about the impact of the Bill of Rights on Maori as a *people*, or, more accurately, as a collection of *iwi* (tribes). One particular right is relevant to the preservation of group rights. It is s 20, derived from article 27 of the International Covenant on Civil and Political Rights,[2] and it provides that members of an ethnic, linguistic or religious minority "shall not

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be denied the right" to "enjoy the culture, speak the language, or practice the religion of that minority". This is a right for persons in minority groups, and is accessible only by persons in such groups. If Australia were to enact a bill of rights that drew similarly on the ICCPR, it may well end up with something like New Zealand's s 20.

In that sense, article 27 (and the domestic counterparts that it may inspire in national bills of rights) is like a "default setting" for indigenous rights. Purpose-built indigenous rights clauses may be seen as too complex or contentious. But because indigenous peoples are generally also minorities in their state, and because minority rights are likely to be included in a bill of rights if the ICCPR is taken as a guide, then minority rights will provide a measure of protection for indigenous peoples (even though they are for the benefit of non-indigenous minorities as well).

My essay concludes that the New Zealand Bill of Rights has had relatively little impact in the field of Maori issues. This may seem a paradox, because on most measures the Maori dimension of New Zealand life and law is alive and well, and indeed has grown significantly during the 20 years that the Bill of Rights has been in force. But the lack of recourse to the Bill of Rights on Maori issues is no real surprise. As with most civil rights, the right of minorities to enjoy their culture, speak their language and practise their religion is affirmed in the Bill of Rights as an abstract and "high-level" principle. It sets a standard for law and practice to meet. The real work of rights-protecting and advancing is performed by ordinary statutes, by regulatory regimes, and by the policies and actions of government and its agents. When, as has been the case in New Zealand since the mid-1980s, there is political will for advancing Maori interests through ordinary law and policy, one should not expect significant recourse to the higher level abstractions of a Bill of Rights.

Indeed, it is significant that the most important cases about Maori rights in the 20 years since the Bill of Rights was enacted have been based on the common law or on statutory affirmations of the principles of New Zealand's founding treaty, the Treaty of Waitangi (1840), with no mention of the Bill of Rights at all. When there *has* been recourse to the Bill of Rights, it turns out that the standard set by s 20 of the Bill of Rights (read in light of the international human rights law that lies behind it, as interpreted by the Human Rights Committee in cases about article 27 of the ICCPR) is understood in terms of *process*. That is, s 20 and article 27 are taken to require consultation and good faith by Government in relation to Maori when their interests are affected. This replicates well-settled domestic understandings about Government-Maori relations, already reached through domestic law such as Waitangi Tribunal opinions and judicial decisions in administrative law cases. These understandings are based on the Treaty of Waitangi and are not dependent in any way on the Bill of Rights. In short, the Bill of Rights has not added anything new to what was happening anyway.

The language of Maori rights in New Zealand remains "Treaty rights", not "Bill of Rights-rights", nor even "human rights". If anything, the Bill of Rights and human rights have been regarded as being in a slight tension with Maori

Treaty rights, in that special measures for advancing Maori interests may require justification for any discriminatory impact they have upon others. But there has been no significant court finding to this effect either, only rumblings. So at this stage the Bill of Rights neither helps nor hinders Maori interests. So far as Maori are concerned, the Bill of Rights is really a side-show to the main event which is the Treaty of Waitangi and the political weight that the Treaty carries.

The salience of all this for Australia turns ultimately on local Australian factors. The critical one is whether the current regime for indigenous Australians is dealing satisfactorily with the relevant issues, or whether it needs to be called to account against higher level principles in a bill of rights. If so, what should those principles be? In short, when it comes to indigenous rights, is the Australian Bill of Rights to be affirmative or aspirational? Is it to entrench or transform?[3] The answer to that question will influence consequential questions about drafting and consultation.

To develop these points, it assists to start with background about the New Zealand situation.

1. Evolution of the Maori dimension of New Zealand

The Treaty of Waitangi in English

The Treaty of Waitangi signed in February 1840 is the fulcrum of contemporary debate about issues affecting Maori. Its text has proved quite serendipitous, the language neatly articulating critical issues affecting indigenous peoples in colonised countries. Is there room for a measure of indigenous self-determination and autonomy, for accommodation of distinctive culture practices within the law of the state, and for consultation on matters affecting Maori interests? That the Treaty speaks to these questions is serendipity indeed, given the apparently accidental way the Treaty text was settled: two versions, one in English and one in Maori, with neither being an exact translation of the other.

The Treaty's origin lies in the decision of the English Government in 1839 to seek a cession from Maori chiefs of their sovereignty over the islands of New Zealand. Captain William Hobson was despatched to secure that cession. Within days of his arrival, without having been given any suggested draft, Hobson prepared and obtained the first signatures on the treaty that became

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[3] This probably presents the choice a little starkly. A fuller treatment would make the point that even purported affirmations of existing rights still lend themselves to progressive or radical interpretations by successive generations of judges (and indeed legislators). Such an outcome is not excluded by that brand of originalism in interpretation that regards rights as affirmations of principle that fall to be applied even in ways that a founding generation could not have foreseen. That this is so probably explains why bills of rights debates so quickly turn into debates about the respective roles of judges and law-makers in deciding what rights mean, and whose opinion will have the final say.

known as the Treaty of Waitangi. The Treaty was drafted in English but, for obvious reasons, translated into Maori. That translation was the work of the Reverend Henry Williams, a missionary resident in New Zealand since 1823 and proficient in Maori.

The Treaty in English comprises three brief "articles": by article 1 the Maori cede their sovereignty to Queen Victoria; in article 2 the Crown guarantees Maori the continued enjoyment of their "lands, estates, forests, fisheries and other properties" for so long as they wish to retain them; and in article 3 Maori are guaranteed equal rights along with British subjects. It is, therefore, an early form of human rights treaty: affirmation of Maori property rights and a general right to equality – albeit as quid pro quo to a cession of sovereignty. (An oral addendum at Waitangi, but not at subsequent signings, added a guarantee of religious liberty.)

Colonisation then began apace. English-style institutions were created – a legislature, an executive and a judiciary – delivering essentially English-style outcomes through English-style processes. For their part, Maori were regarded as susceptible to the entirety of English law, ameliorated in the early period so far as enforcement of criminal law was concerned. Chiefly authority remained in a de facto sense, but was progressively undermined by the universality of English law, by land sales and by the new economy. There was some recognition of Maori customary law, by means of the common law's "custom-recognising" window. But that recognition withered and largely disappeared in the early 20th century – both because many Maori were integrated into European life, but also because of the onslaught of legal positivism which held that legally-cognisable rights could be produced only by legislation.[4] By such means Maori fishing rights, for example, disappeared as a legal concept for nearly a century – despite the Treaty's apparent affirmation of them. Customary fishing rights were rediscovered in a 1985 court case (part of the Australian and Canadian renaissance of indigenous rights happening at much the same time).[5]

As things stand, the English dimension of New Zealand's constitution is well understood. For most of New Zealand's history the Treaty has been understood as a foundational document – deserving pride of place in the national archive, but not a document to which constant recourse is required. It was not thought to need specific implementation in law. After all, the promises of respect for Maori property rights and equality in articles 2 and 3 could be delivered by the ordinary operation of English common law (albeit that, in fact, they often were not). Successive New Zealand governments down to about the mid-1980s did not regard the Treaty as any significant political fetter on their power, nor as speaking with any particularity to contemporary situations.

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4 Notably *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (NZSC) and *Waipapakura v Hempton* (1914) 33 NZLR 1065 (NZSC).

5 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZR 680 (NZHC). In Australia momentum was building for the celebrated *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, and in Canada there had been *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

But, as we shall see, a Maori dimension of New Zealand life and law is evolving steadily and powerfully. The progressive resolution of historic land grievances over the last 20 years has seen substantial inflows of money for many Maori tribes and subtribes. Maori have a significant economic base, and increasingly seek a measure of influence and autonomy over matters affecting them. And in this renaissance the Maori version of the Treaty has been, if not literally influential, then at least emblematic of the progress made. It is evidence that the deal struck in 1840 view aligns closely with contemporary aspirations of Maori.

The Maori Treaty, Te Tiriti o Waitangi

Virtually all signatories signed the Maori version at Waitangi and elsewhere. In that sense its text carries more weight.

In Maori, article 1 of the Treaty is no simple cession of Maori sovereignty. It is a grant by Maori to the Queen of "governorship",[6] implying a continuing role for Maori in the new order as overseer of the Governor. On that basis Maori sovereignty may be said to remain with Maori, with the Crown empowered to govern. Or, perhaps more realistically, the Maori version may be said to speak to some sort of power-sharing association. At any rate, the idea that the English Crown would completely monopolise law-making power and control was not self-evidently envisaged by the Maori version. Meanwhile, and consistently with the Maori version of article 1, article 2's promise of continuing Maori ownership reads in Maori as a promise of continuing *chieftainship*[7] over their possessions. That implies more than just ownership; it could be understood as political control. Further, amongst the concepts signified by the Maori word *taonga*, chosen to translate the English word "properties" in article 2, are intangibles such as language and culture. So the Crown's promises in the Maori version include a promise to recognise Maoridom's chiefly authority over tangible and intangible properties including language and culture – indeed, Maori institutions and way of life.

The Maori version, te Tiriti o Waitangi, is, as a result, very close to the set of aspirations that modern indigenous people have in the once-colonised nations. It can be read as envisaging continuing self-determination and some sort of equal place, or at the very least *a* place, in the constitutional order. It is no surprise, then, that the Treaty has been central to Maori concern about the structure of the New Zealand state and they way their interests ought to be regarded.

An overview of the place of the Treaty in New Zealand law and practice

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6 The word used is *kawanatanga*, a transliteration of the English word "governor", in use by 1840 to denote the office of Pontius Pilate in the New Testament and of Governor Gipps in New South Wales, each of whom answered to a higher authority.

7 The word is *rangatiratanga*, derived from *rangatira* or chief, denoting chieftainship. The treaty term is actually *tino rangatiratanga*, the former word being an intensifier denoting absolute chieftainship.

The fact is, however, that New Zealand's legal history – or much of it – has proceeded on the basis of the English version of the Treaty. It remains the position that the Treaty can give no legally enforceable rights, unless and to the extent it is embodied in legislation.[8] And no legislation has ever incorporated the Treaty into the law of New Zealand in any global sense.[9] The real problem is that, as with human rights treaties, the Treaty of Waitangi is vague and general, potentially applying across the whole field of governmental endeavour, from immigration, health and education to leisure and welfare. The crucial questions become: what does it really *mean* to protect and treat Maori equally in health, education, in licensing intellectual property, in applying the rules for protecting the environment and entering free trade agreements with other states? Such questions demand practical answers, and often the allocation of significant resources. Answers given will also depend on the times in which they are given. They are the stuff of politics. It is, of course, conceivable that such questions could be consigned to the courts. But without a statute that so consigns them, the courts have had only a limited role to play.

In this state of affairs, the real work is done at the political level – persuading politicians and Parliaments that the Treaty requires or precludes a certain type of law in this or that field. After that, the law then operates according to its terms. It is only in recent times that such arguments have fared well in political debate. For example, in education, there is provision for state funded Maori immersion schools at all levels, a requirement that all schools must emphasise Maori culture and make Maori language available for those that wish, and for all tertiary institutions to recognise a commitment to the Treaty of Waitangi. In the important fields of conservation, natural resources and the environment, the relevant legislation is explicit in requiring consultation with Māori *iwi* (tribes) in the development of planning controls, and also in requiring that regard be had to Māori cultural and spiritual concerns.

Māori electoral success, especially since the advent of the MMP electoral system in 1993, has contributed to this sea change. Māori members have been elected to Parliament in significant numbers; the current National

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[8] The authority for this proposition, as applied to the Treaty of Waitangi, is *Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] NZLR 590; [1941] AC 301 (PC). Intriguingly, in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 Cooke P commented that this was orthodoxy, "at any rate from a 1942 standpoint", thereby hinting at potential judicial revision. In a modest sense, that revision has come: for example, in oral argument in *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZR 301 (CA) Cooke P observed that, even in the absence of a statutory reference to the Treaty, the Crown could not argue that its actions in seeking to settle Māori grievances over fisheries were somehow free of Treaty of Waitangi considerations. The applicants lost that case for unrelated reasons; see below at text accompanying note 32.

[9] The New Zealand Supreme Court Act 2003 provides in s 13 that, for the purposes of gaining leave to appeal to the Supreme Court, a significant issue relating to the Treaty of Waitangi is a matter of general or public importance. But this is far from a general provision that the Treaty may be called by a Court as a source of rights when addressing any legal question.

Administration has a "Confidence and Supply Agreement" with the Māori Party.

But not all political struggles are won. There is not the space here for any detailed account, but in general terms the pattern of New Zealand law has been this: a search by Māori and their lawyers for a legal basis upon which to make claims to courts in order to assert their customary rights to fisheries, forests, land, culture and language. Māori have also sought influence in domestic politics and in the development of national, regional and local policies. Finally, there has been continuing pressure to redress the injustice of the loss of Māori land, some of which was lost by sharp practices but much more of it by "reforms" and legal structures that made its transfer out of traditional Māori ownership easy and hence inevitable.[10]

For much of the 20th century, then, there was little meaningful regard to the implications of the Treaty. But by the mid-1970s political traction for change had occurred to the point that the Treaty of Waitangi Act 1975 was enacted. This Act allowed Māori to make claims, to the newly-constituted Waitangi Tribunal, that the Crown had acted (or was proposing to act) inconsistently with the "principles of the Treaty of Waitangi". The Tribunal was empowered to make findings and recommendations, but not binding judgments. Initially the Tribunal could inquire only into post-1975 issues. But in 1984 the jurisdiction of the Tribunal was extended so as to enable it make findings, and recommendations, about governmental actions dating right back to 1840. Any Māori person may complain about a past or planned action of the Crown.

The Tribunal's jurisdiction therefore has the Treaty as its centrepiece. Because its statutory function is to report on inconsistencies with "the principles of the Treaty of Waitangi" the Tribunal has been able to blend the English and Māori texts to provide an explanation of our modern situation that is not radical and revolutionary, but realistic and transformative. It has held that the Treaty principles require a process by which the Crown (by which is meant, of course, successive governments) and Māori must relate – that there should be consultation, good faith, co-operation and so on. The Tribunal accepts, as realistically it must, that the Crown is sovereign, but says that this sovereignty rests on the basis that Māori interests must be accorded an appropriate priority in matters that relate to and affect them. In this way "Māori" (that is to say, Māoridom as a whole) and each Māori tribe are bestowed a sort of quasi-constitutional status. This comes about because, through the medium of Treaty principles, New Zealand's founding document is taken to require consultation and solicitation for Māori interests in a way that is somehow different from the general political duty owed by governments to their citizenry. Such obligations of consultation imply the existence of entities with which to consult, and that implies the continuing vitality of these entities' own mechanisms for generating internal leadership and authority. In short it implies an indigenous culture within the broader national culture.

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[10] See the excellent book by Stuart Banner *Possessing the Pacific* Harvard UP, 2007, especially the evocative chapter titles relating to New Zealand, chapters 2 "Conquest by Contract" and 3 "Conquest by Land Tenure Reform".

A related development was that from around 1986 onwards it became common for Parliament to impose, in legislation, these same "principles of the Treaty" as a mandatory consideration in the making of statutory decisions, or as a limit on executive power in certain discrete fields (eg, in environmental or conservation decisions). By this means, the substance of the Treaty of Waitangi was made justiciable in those fields. It thus became a part of the domain of administrative law and judges, and not just the Waitangi Tribunal.

The first and most far-reaching example was the State-owned Enterprises Act 1986, which contained in s 9 a general proviso that "nothing in the Act" permitted the Crown "to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". This produced landmark litigation: *New Zealand Māori Council v Attorney-General.*[11] For the first time the Court of Appeal of New Zealand was called upon to articulate the Treaty principles and decide whether the Crown had acted consistently with them. With the Waitangi Tribunal, the Court held that those principles included the need for good faith between the Treaty partners and fiduciary-like obligations for the Crown to consult and to consider Māori interests when policies and actions affecting Māori are determined. On the facts of the case the Court held that the Crown would breach the Treaty principle of "redress" for past breaches were it to proceed (as it proposed) to transfer a huge proportion of state-owned land to the new "corporatized" state trading enterprises. (This was because transferring the land would make it impossible for the Crown to return any land that the Waitangi Tribunal might subsequently recommend for return to Māori on the ground it had been wrongly taken in the past.)

The chronology of events so far brings us to 1987. By this time, New Zealand was reckoning with the idea of a Bill of Rights. We need to go back to 1985 for the beginning of the Bill of Rights idea, just before the Treaty was being kick-started back into life by the policies of the 1984-90 Labour Government and the series of judicial decisions of which the *Māori Council* case just mentioned was the first. The timing was significant.

2. The White Paper proposal for a New Zealand Bill of Rights

On Waitangi Day in 1984, Geoffrey Palmer announced that a future Labour government would include the Treaty in a Bill of Rights. Following the change of government in 1984, the *White Paper: A New Zealand Bill of Rights* was tabled in April 1985. Article 4 would have included the Treaty (along with other civil and political rights provisions) as supreme law.

As with much of the proposed Bill of Rights, Article 4 drew inspiration from the Canadian Charter of Rights and Freedoms. As to the Treaty it would have said:

> 4. (1) The rights of the Māori people under the Treaty of Waitangi are hereby recognised and affirmed.

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11 [1987] 1 NZLR 641 (CA).

(2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.

(3) The Treaty of Waitangi means the Treaty as set out in English and Māori in the Schedule to this Bill of Rights.

The terminology of "recognised and affirmed" was a Canadian Charter borrowing.[12] In Canada it had been neatly designed to avoid the difficulty that there was no consensus on the rights that Canada's aboriginal peoples enjoyed. The Charter lobbed the issue into the courts. That would have been the outcome in New Zealand too.

But, as it happened, the White Paper proposal for a Bill of Rights in New Zealand proved unpopular with the citizenry and did not proceed.[13] The article 4 Treaty proposal was particularly unpopular with Māori. This seems counter-intuitive now, given that a Treaty clause in a supreme law would have been, one might think, a vast improvement over a non-justiciable Treaty.

The dominant Māori view, however, was that a justiciable Treaty would be susceptible to restrictive interpretation. Further, because of the way the Bill of Rights had been drafted, article 4 was subject to article 3, meaning that Treaty rights, like all rights, would be potentially subject to such "reasonable limits" as were "demonstrably justified in a free and democratic society". Māori opinion leaders judged it better to keep the Treaty outside the legal system, where it could be invoked to critique that system – if not formally through litigation, then at least through political debate and activism. Handing the Treaty over to (then as now) non-Māori judges within the system did not seem wise, given the way Māori cases had generally turned out to that point.

Māori distrust was understandable. In 1985 Māori had not had the measure of litigation success that came from 1987 onwards when the then-Labour Government began to insert Treaty references into legislation. The *New Zealand Māori Council* case mentioned above was the first, but more followed. They all had much the same pattern: when the Government of the day was privatising or restructuring a new sector of state enterprise, the applicable legislation generally contained some sort of "Treaty clause" that restrained executive power and made it an administrative law question whether the principles of the Treaty had been observed in the decision-making process. This occurred in the power generation sector,[14] television[15] and radio broadcasting,[16] mining,[17] forests[18] and fisheries.[19]

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12 Constitution Act 1982, s 25.

13 An overview of the Bill of Rights proposal and how it eventually resulted in the New Zealand Bill of Rights Act 1990 is to be found in Rishworth, "The Birth and Rebirth of the Bill of Rights", ch 1 in Huscroft and Rishworth (eds), *Rights and Freedoms,* Brookers, 1995.

14 *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 (CA).

15 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

16 *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 (CA).

17 *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA).

18 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

19 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA).

These cases were not all successful, but they signalled the applicability of Treaty principles, and Māori aspirations for involvement, across the whole spectrum of public activities. They showed the role the courts might play, and they showed how the Treaty actually spoke to most areas of activity. But back in 1985 all this lay in the future. In the result, the White Paper proposal did not proceed. Instead, 5 years later, a statutory bill of rights was enacted, the New Zealand Bill of Rights Act 1990.

3. The New Zealand Bill of Rights Act 1990 and minority rights

In the Bill of Rights as enacted there is no mention of Treaty rights, only "minority rights" in s 20. These were not included with any eye to the Māori situation. Indeed, it was understood that Māori did not want the Treaty of Waitangi included in a bill of rights.

The Bill of Rights had generally adopted the rights in the ICCPR, article 27 of which deals with minority rights. Section 20 implements article 27:

> **20 Rights of minorities–**A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

This is not the place for a commentary on s 20, but some quick features should be pointed out before proceeding:[20]

- Section 20 is unusual in that it does not confer rights on all persons, only all persons who are in a minority (of one of the types mentioned). The assumption is that majorities will look after themselves through the ordinary political process, aided when necessary by the full panoply of individual rights such as freedom of expression.

- Section 20 taken literally confers an individual right, not a right for a group. But in practice one or more individuals can, through s 20, invoke it to preserve their rights and indirectly those of a group.

- The right to practice a minority religion seems on its face to overlap with the general right to freedom of religion that applies for the benefit of all, and which is affirmed elsewhere in the Bill of Rights (ss 13 and 15). Section 20 does not add anything, realistically, to the separate religion clauses.

- Article 27 cases fall into two basic categories. Those where a litigant invokes her right to gain access to a minority group which is seeking, under colour of law, to exclude her (*Lovelace v Canada*[21] and *Kitok v*

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[20] A commentary on s 20 is found in ch 15 of Rishworth et al, *The New Zealand Bill of Rights*, OUP, Melbourne, 2003.

[21] Comm 24/1977, 30 July 1981.

Sweden[22]), and those where a litigant invokes what is essentially the right of every group member so as to resist something that the state is seeking to impose that affects the group as a whole (*Länsman v Finland*;[23] *Länsman v Finland*[24]).

Plainly s 20 inures for the benefit of all minorities, not just Māori. But because Māori make up less than 50% of the population they are undeniably a minority and entitled to whatever protection it offers. The question arose, therefore, whether s 20 would serve to render justiciable, as minority rights, the sorts of controversies that might otherwise have been framed as Treaty claims (and as such not cognisable in a court). This seemed a possibility, especially in relation to the right to enjoy the "culture" of the minority. That denoted customs and control over historic resources, including lucrative and important resources such as fisheries, rivers and forests.

There was indeed some early support for the idea, at least in academic articles.[25] The argument was that s 20 effectively incorporated the Treaty in the Bill of Rights: it was as if there were a right to have the Treaty observed. This seemed a big claim to make, and the argument suffered a little from the weakness that it read s 20 as requiring that things had to be done *for* Māori rather than – as was usual for bills of rights – a restraint on the power of the state (that, so far as s 20 was concerned, it not *deny* the right to culture). But in human rights law it is indeed the case that rights have some measure of positive reading.[26] That is to say, there may be occasions when the state's doing nothing would constitute a denial of a right to culture, language or religion, and positive measures would be required.

The argument suffered also when one considered that s 20 would be an amazingly subtle way of incorporating the Treaty of Waitangi into the Bill of Rights. Even so, one could not rule out the possibility that s 20 went some of the way in producing what a Treaty clause might have produced.

Another difficulty in regarding s 20 as a Trojan Horse containing the Treaty of Waitangi was the likely unwillingness of Māori to embrace the idea that a section aimed at minorities – at *all* minorities – had any special significance for them. The strongly expressed, and understandable, Māori view is that they are no mere minority in Aotearoa/New Zealand. Rather, together with the

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22 Comm 197/1985, 27 July 1988.

23 Comm 511/1992, 8 November 1994.

24 Comm 671/1995, 30 October 1996.

25 A Blades "Article 27 of the ICCPR: A Case Study on Implementation in New Zealand" [1994] 1 Canadian Native Law Reporter 1 and E Durie, "Constitutionalising Māori" in Huscroft G, and Rishworth P (eds) *Litigating Rights; Perspectives form Domestic and International Law*, Hart Publishing Ltd, Oxford, 2002, 241, 251-2.

26 See, for example, *Platform "Artze Fur Das Leben" v Austria* (1991) 13 EHRR 204. The key point is that protecting freedoms may require positive action where governments have knowledge that a citizen's rights are endangered by other citizens and the means to protect them.

Crown, they are a founding partner.[27] All this said, such sentiments have not, as we shall see, totally precluded invocation of s 20 by Māori individuals and groups.

In the end whether observing s 20 equates to observing the Treaty of Waitangi depends upon what we regard as observing the Treaty and whether that properly satisfied the standards implied by s 20. By the 1990s, as we have seen, the Treaty was increasingly seen as requiring a certain type of "process" – good faith, consultation and so on – in relation to Māori. This, as we shall see next, resonated with the impact of article 27 (section 20's ICCPR counterpart) on matters affecting indigenous peoples in other parts of the world.[28]

4. The Bill of Rights and advancement of Māori claims

In the main, Māori litigation in the Bill of Rights-era has not been based on the Bill of Rights. Even when assistance could be gained from s 20 – say in cases aimed at the protection of the Māori language[29] – that section has not been mentioned. The reason is not hard to discern: there was no disagreement in these cases with the basic premise that government was under a statutory duty, imposed by ordinary legislation, to have regard to Treaty principles. The cases turned only on whether there was a breach of these principles. Putting these arguments in terms of s 20 of the Bill of Rights would, at best, have been simply another way of addressing the same issue.

But there are cases in which Māori have invoked s 20 of the Bill of Rights, there being no other statutory "peg" on which to hang their claim. It is to these cases I now turn, for they exemplify the manner in which the imperatives that underpin s 20 are operating in other dimensions of New Zealand law – in the common law and in politics – and producing outcomes that are consistent with s 20.

Māori values in environmental law

An early Bill of Rights case indicated the potential use of s 20. In *New Zealand Underwater Association Inc v Auckland Regional Council*[30] a Māori tribe objected when the Auckland Port company was granted permission to dump harbour dredgings onto the sea floor at an outlying part of Auckland's Hauraki Gulf. The dredgings were accumulated sediment that had been washed into the dock area through the city's stormwater drains, blocking the

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27 As put recently in a debate about immigration law by Māori Party MP Hone Harawira, but paraphrasing Māori academic Dr Ranginui Walker, "[the Treaty] was the guarantee of a developing social contract. It was a partnership of the two cultures, with, at its very core, the expectation that Māori, as a Treaty partner, would be consulted on every aspect concerning people who want to come here." *Hansard* Vol 658 (2009) NZPD page 7648.

28 (2001) 8 IHRR 372.

29 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513; [1994] 1 AC 466.

30 Planning Tribunal, 16 December 1991.

berthing of large ships. The Māori objectors said this dumping was deeply offensive to their culture and religion, which regarded the waters of the Hauraki Gulf as sacred. It was said that extraneous material ought not to be placed (and replaced) in it.

The permission to dump the dredgings had been given under a statutory power. The argument was that statutory discretions ought not to be exercised so as to infringe a right in the Bill of Rights. Formally, that argument was valid, though it was rejected by the Tribunal based on plainly wrong reasoning. The Tribunal said that the Bill of Rights could not prevail over a clear provision in law that conferred power to grant consent. It is now clear, of course, that statutory discretions are always read subject to the implicit requirement that no right be unreasonably infringed.[31] Even so, the argument would have failed on the merits. The idea that mere offence to religious and cultural sensibilities constituted a denial of the right to enjoy Māori culture was problematic. (It might be different if the claim were restricted to a particular area of the sea at which religious or cultural practices were carried out and which the dumping would impede.) In comparable US jurisprudence, conceived as First Amendment claims, such general rights not to be offended do not prevail. So on the merits the argument faced difficulties.

But what is most significant for current purposes is that there have been no more such cases. This was a case in the dying days of the old legislation about water rights. The incoming Resource Management Act 1991 specifically incorporated Māori spiritual and other concerns into the environmental planning regime. No recourse was thereafter required to the more general provisions of the New Zealand Bill of Rights Act 1990. Māori concerns were mainstreamed into the ordinary operation of the law, and not made a Bill of Rights matter. This is not to say that they will always prevail, but they are now seen as proper and routine considerations and there are indeed cases where they have prevailed.

The Sealords litigation

The next, and most significant, s 20 case was the 1992 fisheries litigation and its aftermath – a complaint by some Māori tribes to the Human Rights Committee under the Optional Protocol to the ICCPR that New Zealand had breached article 27.

The background was this. Māori had by 1985 succeeded in a series of fishing rights cases in the High Court, establishing that it was possible for Māori to assert customary (pre-1840) Māori fishing rights as a defence to fisheries prosecutions, and that these rights could be exercised with modern fishing equipment and in relation to commercial fishing. The implication of these victories was considerable, and by 1992 not yet fully explored.

On one view, the wording of the (then) Fisheries Act affirmed that Māori had a legal claim to customary fishing rights – including, perhaps, even

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31 See *Drew v Attorney-General* [2002] 2 NZLR 58 (CA).

rangatiratanga or “chiefly authority and control” – over the lucrative offshore fisheries resource of New Zealand worth millions of dollars. Litigation with these implications was pending. It had prospects of success, because the applicable legislation contained the sentence: “Nothing in this Act shall affect any Māori fishing rights.” Since it had been accepted, in 1985 as a result of *Te Weehi v Regional Fisheries Officer*, that customary Māori fishing rights actually existed, this phrase now had real bite – Government had been allocating fishing quota under the Fisheries Act without proper regard to Māori rights and potential claims.

The dispute was resolved by way of a major settlement in which the Government paid $150 million to a newly created Māori entity (the Treaty of Waitangi Fisheries Commission). The settlement became known as the “Sealords Deal” because the settlement sum was used to purchase for Māori a 50% share in a major fishing company, Sealord Products Ltd. That shareholding, together with further fishing quota issued to the Commission, would place a considerable share of the New Zealand fishing industry in Māori control. In exchange, Māori for their part were to surrender their right to make customary (or, much the same thing, Treaty of Waitangi-based) fishing claims to the fisheries resource. In effect, Māori were mainstreamed into the fishing industry, and given a substantial share of it, on the basis that their customary rights were surrendered.

Some tribes dissented from this settlement and challenged it in the courts. Seeking a cause of action, they based their claim on s 20 of the New Zealand Bill of Rights Act 1990 – the right of a minority to enjoy its culture. Māori, said these tribes, were a fishing people with a fishing culture. The proposed settlement, said the tribes, would force them to abandon these cultural rights with only the promise of sharing in a pan-Māori settlement as compensation. The Crown was, they argued, acting unlawfully in seeking to implement a deal that contravened s 20 of the Bill of Rights.

The dissentients lost their challenge.[32] The Court of Appeal ruled that because the settlement could only be implemented by legislation, the Courts could not rule such promised legislation unlawful nor preclude any bill from going to Parliament. For this reason the merits of the Māori tribes’ argument were not explored. But the Court hinted that, in fact, the Sealords Deal was a very good one for Māori.

Meanwhile, the Waitangi Tribunal had been asked to advise whether the proposed settlement was consistent with the principles of the Treaty of Waitangi. The Tribunal, too, gave the Sealords Deal its approval as a positive step for Māori. It pointed to the considerable consultation between Crown and Māori negotiators that had preceded it, and benefits that would flow from it. And so the settlement proceeded. Now, 17 years later, it does indeed appear to have been successful in delivering prosperity for Māori.

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[32] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

But the present interest lies in what the dissenting tribes did next. Those that felt they would lose more than they gained from the Sealords Deal took their case to the Human Rights Committee under the Optional Protocol. There the argument centred on article 27. The Committee would have to deal with the merits of the settlement, whereas the New Zealand courts had not done so because of the orthodoxy about separation of powers.

In fact, however, the Human Rights Committee also dismissed the challenge to the Sealords Deal (*Mahuika v New Zealand*).[33] The Committee readily accepted that the claimant tribes enjoyed a fishing culture and that the effect of the Sealords settlement was to bring an end to their traditional rights, replacing them with an entitlement to share in the Sealords settlement and to fish under New Zealand law. But the Committee ruled that this was *not* a denial of their right to culture. The Committee emphasised the extensive consultation that had taken place between Government negotiators and representatives of Māori tribes. That there was some dissent could not obscure the fact of widespread consultation leading to agreement, with the wisdom and fairness of the deal appreciated by the majority. Citing its decision in *Kitok v Sweden*[34] the Committee said "it may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected."

This was essentially to apply, as principles of article 27 of the ICCPR, the same principles of good faith and consultation as the New Zealand institutions (the courts and the Waitangi Tribunal) had held to be required by the principles of the Treaty of Waitangi.

This is a significant finding for Treaty law and practice in New Zealand. It means that the requirements of international human rights law largely replicate the position that had evolved by way of developing "Treaty principles" – the requirements of good faith, consultation and so on. In a variety of fields including health, conservation, education, resources hazardous substances control, and law reform, New Zealand law does contain provisions that direct the attention of decision-makers to Māori interests. If properly executed, that law ought to result in outcomes that are consistent with article 27 as it has been interpreted by the HRC in cases such as *Mahuika* and *Länsman v Finland*.[35]

So in these two cases, s 20 has not in fact added anything to that which is produced by Treaty principles. The Bill of Rights has not advanced Māori interests beyond the point they are brought to when advanced as Treaty rights. What has really counted, then, is the readiness of successive governments to give meaning to Treaty rights, a readiness assisted by judicial decisions in those cases where the substance of the Treaty has been made justiciable in a particular field.

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33 (2001) 8 IHRR 372 (HRC).

34 Comm No 197/1985, 27 July 1988.

35 Comm No 511/1992, 8 November 1994.

Dogs that didn't bark: cases in which s 20 is conspicuous by its absence

In several cases, the salient point about s 20 is that it is not mentioned at all, even though it was, on its own terms, relevant. This suggests that the interests which s 20 promotes are being effectively served by the operation of ordinary law.

One such case was the landmark one of *Ngati Apa v Attorney-General*[36] in which the Court of Appeal, overruling a 1963 decision of its own,[37] held that it was possible for Māori to advance claims to customary ownership of the seabed and foreshore around New Zealand. Previously, that was thought impossible as the seabed and foreshore was vested by various statutes in the Crown. But customary title, said the Court of Appeal, was not inconsistent with the Crown's own title.

Section 20 played no part in the reasoning. It was essentially a common law case. Still, the outcome – that Māori could advance customary claims to specific pieces of foreshore and seabed – was consistent with their right to enjoy their culture.

There was a dramatic sequel, however. In a climate fuelled by speculation that Māori tribes might gain exclusive title to beaches and then exclude New Zealanders from access to them, the Government introduced legislation to prevent Māori claims to the foreshore and seabed going to the Māori Land Court. Instead a different process was to be instituted to compensate Māori for their claims, to make various other provisions for their cultural practices, and to exclude the possibility of any claim for exclusive customary title. This was duly enacted as the Foreshore and Seabed Act 2004.

The central thrust of that legislation was to deny Māori recourse to the courts to press their property rights. That made the legislation unattractive, in human rights terms, from the outset. But there is no right to property in the New Zealand Bill of Rights and the new legislation could not be criticised on that account. There is, however, the right to culture and a right against discrimination. Both were implicated here.

Section 7 of the Bill of Rights required that the Attorney General signify to the House of Representatives, on introduction of the Foreshore and Seabed Bill, whether any provision was inconsistent with a protected right. But she did not. She issued a legal opinion giving her view that the Bill did not deny the right to culture in s 20, saying she was unaware of any Māori cultural practice that required *exclusive* possession of seabed and foreshore. She went on to say that the bill was *not* discriminatory, reasoning that the national interest in attaining certainty over ownership of seabed and foreshore was a compelling objective, and that discrimination against Māori (in precluding only Māori from

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36 [2003] 3 NZLR 643 (CA).

37 *Re the Ninety Mile Beach* [1963] NZLR 461 (CA).

asserting claims to foreshore and seabed[38]) was rationally and proportionately related to that end. The fact that the AG signed this "no breach" opinion personally – in contrast to the practice, in every other case known to me, of lawyers in the Crown Law Office or Ministry of Justice signing them – perhaps carries an inference that the Attorney-General's view was not shared by her own advisers.

But a further sequel is significant. The Labour Government's promotion of the Seabed and Foreshore Act was deeply unpopular with Māoridom and with most of its Māori members. It led to the defection of several Māori members of Parliament, and formation of the Māori Party. In 2008 the Government changed. The incoming National government formed a relationship with the Māori Party. It quickly established a task force to review the Foreshore and Seabed Act, and that Taskforce has recommended its repeal.[39] This is an instance, then, of the ordinary political process ultimately delivering rights-consistent outcomes to Māori, even in circumstances where the Bill of Rights was powerless (both because it could not accomplish a repeal or annulment of legislation and because the Attorney-General had not seen the 2004 Act as discriminatory or as inimical to minority rights).

Looking at the Foreshore and Seabed saga more broadly, its genesis was largely bound up with Māori aspirations for marine farms, and so the saga takes its place in the series of cases that involved Māori claims for recognition of their rights when public assets are being allocated for private benefit. Subsequently a political settlement of Māori claims to aquaculture has been reached, not unlike that reached for sea fisheries in the Sealords Deal, whereby 20% of new aquaculture space is allocated for the benefit of Māori tribes.[40]

Māori custom and custody of a body for burial

A recent High Court judgment, *Clarke v Takamore*,[41] has also illustrated the extent to which the common law (independent of any statutory bill of rights) is able to reckon with the customs of indigenous peoples. The case concerned the funeral arrangements for the body of James Takamore, a Māori man who lived most of his life in the South Island but whose tribal affiliations were with two North Island tribes. He had spent his adult life living away from his tribal grouping. His will expressed a wish to be buried, but did not specify where. His wife (and executor) duly made arrangements for the funeral service to be held on a *marae* (Māori meeting house) and for the body to be buried at a Christchurch cemetery. But the night after Mr Takamore's death, his extended family arrived from the North Island, seeking to retrieve his body and return it to the heart of the Tuhoe tribal area in line with claimed Māori custom. The

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38 For historical reasons it appeared that some New Zealanders, who could have been of any race, did in fact hold title to areas of seabed and foreshore and the bill was not aimed at them, but only at Māori claiming customary title.

39 *Ministerial Review of the Foreshore and Seabed Act 2004, Report of the Ministerial Review Panel,* 30 June 2009, paragraph 7.62.

40 See Māori Commercial Aquaculture Claims Settlement Act 2004.

41 High Court, Christchurch, CIV 2007-409-001971, 29 July 2009, Fogarty J.

following day, after heated discussions, the Takamore family removed Mr Takamore's body and took it north against his wife's wishes.

The matter duly came to the High Court where Fogarty J traversed three issues: first, the extent of an executor's common law powers to determine where a body is to be buried; secondly, whether the *tikanga* (customary law) of Tuhoe Māori should be recognised as part of that common law; and thirdly, how any clash between the executor's rights and Māori customary law should be resolved in the specific case. On the second issue Fogarty J adopted much of the evidence of customary practice provided by counsel for the defendant tribe. That evidence did indeed show that relevant Māori custom involved the possibility that tribal wishes might prevail over those of a surviving spouse. Fogarty J then canvassed case law indicating that the common law was open to adaptation in light of indigenous customary law.[42] He suggested, without deciding, that common law recognition extended beyond specific common law rights to broader interests such as adoption and spiritual practices. Finally, he noted the flexibility of indigenous custom, and pointed out that "this approach by the common law of recognising customary internal self-government for resolving disputes, as this tikanga does, is not undermined by any statute."

When looking at the particularities of the case in front of him, however, Fogarty J was reluctant to allow the Tuhoe custom in this case to prevail. Mr Takamore had effectively ceased to identify with his tribe. Applying a three-part test from an early case about Māori custom[43] – which required Courts to examine the existence of a custom, the consistency of a custom with statute law, and whether a custom is reasonable – Fogarty J found the first two ingredients of the test were satisfied, but held that the Māori custom was unreasonable to the extent that it claimed to apply to a person who had chosen to live apart from his tribe.

Fogarty J drew on Article 3 of the Treaty of Waitangi, which accords Māori rights as British subjects, to hold that some middle ground needed to be found between customary law and the common law. Recognising the collective right of Tuhoe funeral practices would in this case impose too great a restriction on individual freedom for the custom to be applied. Consequently, Fogarty J found the actions of Mr Takamore's North Island family to be unlawful.

This is significant for our discussion of statutory bills of rights and their role in advancing indigenous interests. If it is clear that, where there is a will to make it so, the common law is moving organically to recognise customary rights as well as broader interests (as *Takamore* implies), a straitjacketed "right to culture" might be not just unhelpful, but counter-productive in the way in which it could narrow the number of indigenous interests capable of recognition by the Courts. The common law itself contains sufficient resources, without needing the help of a statutory bill of rights, to advance the causes of

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42 Citing cases such as *Nireaha Tamaki v Baker* [1901] AC 561 and *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 as support for this proposition.

43 *Public Trustee v Loasby* (1908) 27 NZLR 801.

indigenous rights and interests – at least this is what the New Zealand experience would suggest. But the right of a minority to enjoy its culture is the principle that lies behind such decisions.

In that sense s 20 gives voice to a principle that is intrinsic to common law as it reckons with indigenous peoples. Perhaps it serves as an impetus to advance recognition of minority rights to culture. But it is surely significant that there is not one mention of s 20 in the Fogarty J judgment. When the applicable principles are seen as embedded in the law, recourse to the Bill of Rights is not necessary.

5. Has the Bill of Rights impaired Māori interests?

The issue to consider here is whether legislation or policies designed to advance Māori interests might be conceived as discriminatory in relation to other racial groups whose interests are not similarly advanced. This requires a consideration of s 19 of the Bill of Rights, which gives rights against discrimination on various grounds, and the Human Rights Act 1993 (which does the same but in relation to private sector discrimination).

Significantly, the Human Rights Act 1993, which established an anti-discrimination code along with a Human Rights Commission to educate, advise and report on human rights generally, did not initially contain any reference to Māori and the Treaty of Waitangi. The interaction of Treaty-observing and anti-discrimination law began to attract attention in the late 1990s and early 2000s, when a small backlash began to develop about so-called “special measures” for Māori (affirmative action in state employment and universities, for example, and provision for Māori seats in local government). The question was asked: might Treaty-honouring provisions in legislation and policy be precluded by anti-discrimination law? It was true that the New Zealand Bill of Rights Act and the Human Rights Act each contained special clauses designed to facilitate affirmative action schemes. But this came at the cost of making it look like Treaty-honouring was some sort of dishonourable exception to a general principle of equality. There was particular controversy about a proposal to put a Treaty clause into the Public Health Bill in 2000: some took the point that a Bill about public health should surely focus on the health needs of individuals, and not send signals that the race or ethnicity of a sick person was somehow relevant. To the argument that taking race into account might in fact be necessary for effective delivery of health care to minority groups, the rejoinder was that if this were so then it applied for all races and not just Māori. The result was a backdown for the Treaty clause in that case. At the policy level, Māori health organisations would continue to be funded and consulted about delivery of health services to their people, but similar such arrangements might be made for Pacific people and Somalis, for example.

A Human Rights Amendment Act of 2001 mentioned the Treaty of Waitangi for the first time. By this Act the Human Rights Commission was given a new statutory function:

> (d) to promote by research, education and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law.

As I wrote at the time:[44]

> That addition appears to have been prompted by a combination of factors. In various ways, the time to hitch Treaty rights to the wagon of human rights seemed to have come. As s 5(2)(d) makes clear, the aim was for a "better understanding" of what all this might mean. That may be a reference to a growing public concern in 2001 over whether, in fields like public health, Treaty rights should mean special or even different arrangements for Māori. Sorting out the interaction of human rights and Treaty rights needed some work. So, while "Treaty clauses" had become common in other statutes, often requiring decision-makers to have regard to the "principles of the Treaty of Waitangi", the clause chosen for the Human Rights Act was somewhat more tentative. This time it is not Treaty principles, but Treaty "dimensions". No one is bound by them, but there is to be a research, education and discussion about them.

So what has been the record in relation to Māori and the provisions of the Bill of Rights and the Human Rights Act? In fact there has been remarkably little litigation, but the following cases and events will give the flavour.

Affirmative action schemes

It is not uncommon for New Zealand universities that offer limited-entry tertiary level courses (such as Law and Medicine) to set aside a quota of places for groups perceived as educationally disadvantaged and under-represented. In the main these schemes have not been tested against the criteria set out for them in the Human Rights Act 1993. On their face they necessarily discriminate against potential students who are not included in the scheme, and who must therefore compete for a lesser number of places. Depending on the type of scheme, it is likely there will be non-admitted persons with a higher grade point average than targeted students who qualify for preferential admission.

The ability to offer such schemes is assured by s 73 of the Human Rights Act and s 19(2) of the Bill of Rights. These are broadly equivalent to s 15(2) of the Canadian Charter – a statement that special measures that take race into account to ensure equality will not violate the prohibition on discrimination.

There has only been one decided case, an undefended first instance tribunal decision with little precedential value. Responding to government incentives, a regional polytechnic institute had set aside for Māori all available places in a fishing industry training course. A local fishing company complained that it could not enrol its own non-Māori cadet in the course. The polytechnic had no interest in defending its action. The complaint was upheld, on the ground that no evidence had been led to satisfy the statutory test for such schemes: that

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44 Rishworth, "The Treaty and Human Rights" [2003] NZ Law Rev 381 at 382.

Māori "may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community".

There has been no other case, and targeted assistance schemes involving quotas are not uncommon in universities. This state of affairs, and the likelihood that they will be upheld if able to be demonstrated as rational and proportionate, suggests that the anti-discrimination principle is not a hindrance to Treaty-driven or needs-driven favourable treatment for Māori. Note, of course, that the reasons why Māori might be favoured under special admissions schemes – a history of educational disadvantage – could be applicable to other minorities: it is not necessarily a Treaty-inspired policy.

Discrimination in favour of Māori to accommodate Māori representational interests

The issue of Bill of Rights consistency comes up in relation to the passage of "Treaty-implementing" bills that potentially discriminate on the grounds of race. This will be when Māori institutions are created, or Māori representation is desired on national or regional institutions.

At the level of the national Parliament, New Zealand has a long history of Māori representation. This goes back to 1867 when four dedicated Māori seats in the House of Representatives were created. These are seats representing Māori electorates – whose voters, having some degree of Māori ancestry, have opted to be on the Māori electoral roll. More recently, when proportional representation was introduced in 1993, the number was increased and is now dictated by a formula driven by the number of Māori electors on the Māori electoral roll – presently there are seven seats.[45] The continuation of Māori seats is criticised in some quarters, including on the ground that it is discriminatory.[46]

Māori representation (by way of dedicated seats elected by voters on the Māori roll) has been made possible at the level of municipal government,[47] but, controversially at the time of writing, has been ruled out of contention for the proposed "super-city" that will be created when all the Auckland-area municipalities are merged into one as from late 2010. A noteworthy feature of political debate about this current proposal is that no-one presses the argument for Māori representation on the basis of rights in the Bill of Rights, although some who oppose it do so on the basis that there should be no racial qualifications (and hence no racial discrimination) in electoral law.

That raises the question of what the courts might say if they were empowered to rule on whether the creation of Māori seats in municipal government infringe the rights of others to be free of discrimination.

Some hint at the Crown Law Office's views is to be found in legal advice given on a related issue. In the Historic Places Amendment Bill 2004 provision was

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45 See the Electoral Act 1993, s 78.

46 Joseph, *The Māori Seats in Parliament*, New Zealand Business Roundtable, 2008.

47 See Bay of Plenty Regional Council (Māori Constituency Empowerment) Act 2001, ss 5 and 6.

made for four persons to be appointed to the Māori Heritage Council on the basis of, amongst other things, their being Māori. If the Bill was discriminatory, then s 7 of the Bill of Rights required the Attorney-General to report that fact to Parliament on introduction of the Bill.

Advice provided to the Attorney-General concluded that the racial qualification was not unlawful discrimination because it was (in terms of s 5 of the Bill of Rights) a "justified" limitation (on the right of potential candidates of other races to be considered).[48] That advice stressed that making appointments to the Council solely on the basis of a person's qualification and experience *without* reference to Māori ethnicity would affect the credibility and *mana* of the Trust. This would in turn undermine the ability of the Trust and the Board to understand the concerns of and speak with Māori constituents about the protection of Māori culture. This legislation therefore did not result in a section 7 report. Note that this was an instance of the actual appointees needing to be Māori, and not simply a case of a dedicated seat to which Māori electors would appoint (where, as with the Māori Parliamentary seats, the candidate need not necessarily be Māori – although in practice will be).

Looking at it more broadly, a likely judicial resolution of Māori representation issues seems to be this. Representational advantages bestowed on Māori through creating a Māori electoral roll and special seats are a form of political discrimination representing the current interpretation of the deal struck by the Treaty of Waitangi. It is not racial or ethic discrimination, since it implements a deal made with Māori *political* entities in 1840. This is the approach of the United States Supreme Court in rejecting a discrimination challenge in the case of *Morton v Mancari*,[49] which concerned hiring preferences for indigenous North Americans in the Bureau of Indian Affairs. The essential point is that obligations assumed in a founding Treaty between two political entities should not too readily be taken as impossible of performance due to a general anti-discrimination code.

6. Reflections on New Zealand experience and implications for Australia

My essential point has been that recourse to s 20 is not frequent in New Zealand because ordinary law is serving those same values. This may not always be so, and so mine is not an argument against putting in place something like s 20. It is just an argument that it need not be seen to have revolutionary consequences. The real revolution has been happening quietly elsewhere in the executive and legislative branches. A degree of race consciousness sufficient to deliver political outcomes based on the Treaty of Waitangi has not been ruled out as unlawful discrimination, although each case needs to be considered on its merits.

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45 Advice provided to the Attorney General, at http://www.justice.govt.nz/bill-of-rights/bill-list-2004/h-bill/historic-places-amend.html.

49 417 US 535 (1974).

What might this mean for Australia? If the New Zealand experience is anything to go by, indigenous rights will not be subverted through judicial reasoning, but at the same time will not be aggressively advanced through the courts. The site of advancement has been the political realm. However, we should ask: is the New Zealand experience anything to go by? Are there factors that might take Australia in a quite different direction? There are indeed some possible factors. These must be sketched briefly: a proper treatment would require considerable historical detail.

Differences in political culture

Australia has a rather different history in relation to indigenous rights. First and foremost it was not founded on a treaty, still less a treaty whose text serendipitously expresses contemporary aspirations and cannot easily be disregarded as out of date. Much might have changed in 170 years, but the principles the Treaty of Waitangi affirms are capable of application in a new age. Australia lacks a treaty as a focal point.

Second, the degree of interaction between the indigenous and settler communities seems to have been much greater in New Zealand than Australia, no doubt a consequence of New Zealand's more compact geography and probably also a reflection of greater Māori entrepreneurialism and economic participation. While Māori have achieved considerable successes outside of the Courts though their political presence and the moral suasion of the Treaty, aboriginal Australians have remained, mostly, outside the mainstream of Australian politics. They might therefore take up the opportunity of litigating their claims in the Courts with greater enthusiasm. Courts, too, may feel the need to fill a gap to a greater extent than in New Zealand. And this will have a bearing on the design of a bill of rights, as well as on the possible use of a minority rights provision if that is all that ends up being included.

Changing relationship between indigenous groups and concepts of rights

Indigenous groups' attitudes towards rights are also changing very quickly. While Māori were wary of including the Treaty of Waitangi in the Bill of Rights in 1990, in recent times Māori have appropriated more frequently the language of rights to couch their claims for political redress. The Foreshore and Seabed Act saga involved considerable recourse to international human rights mechanisms, including an approach by Māori to the UN Committee on the Elimination of Racial Discrimination, which made a critical report, and a subsequent visit to New Zealand by a Special Rapporteur. Additionally, New Zealand's refusal to endorse the UN Declaration on the Rights of Indigenous Peoples last year has led to a mobilisation of support by Māori for concepts of indigenous rights.

The use by indigenous peoples of the off-shore accountability mechanisms reflects the desire for a forum of accountability that measures their state against international standards. Battles lost domestically can be relitigated internationally, though an international victory can always be discounted

locally. The demands to internalise these standards, so that they might be applied by a domestic tribunal, may well be stronger in Australia in 2010 than they were in New Zealand in 1985.

7. Conclusion

A Bill of Rights may be affirmatory of a desired status quo, or designed to be transformatory, taking realisation of rights to a new level. Perhaps most contain something of each. In the case of New Zealand, the Bill of Rights signified no particular aims in relation to the Māori dimension of New Zealand life. The Treaty of Waitangi remained as the centrepiece for Māori aspirations. In a country with different circumstances, reference to indigenous rights in a bill of rights may have more symbolic value. It may serve as a high level set of principles to which recourse is constantly made both by the executive Government as it chooses how to act, and by the courts when they are called upon to rule on actions and omissions. And it may express the aspirations of Australia as a nation in this important dimension of indigenous peoples.

Alternatively, that may be too difficult to accomplish within a bill of rights. Perhaps a charter about indigenous peoples should stand apart from a bill of rights.

Either way, bill of rights or separate charter, they will never be a panacea for indigenous issues. The real work will lie with governments and aboriginal leaders. They are the ones that initiate actions and decide upon policies. A bill of rights itself should aspire only to settle the high level principles. The New Zealand experience suggests that this is not revolutionary, and (albeit in a nation with no written constitution) the Treaty principles have become part of our “constitutional” landscape. The current understanding of Treaty principles as speaking to matters of good faith and consultation have served us well, and – in times which are very different from those envisaged in the 19th century – they have served us well. Maybe something similar is possible in Australia.