FINDING SUPPORT FOR A CHANGED PROPERTY DISCOURSE FOR AOTEAROA NEW ZEALAND IN THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

by
Jacinta Ruru[*]

In the South Pacific Ocean lie the lands my peoples come from—Aotearoa New Zealand. These mountains, rivers, valleys, and coastlines hold our stories and laws. These lands give us our life, identity, and knowledge. For the past two centuries, we have shared these lands with other peoples. As these peoples became more dominant in our lands, we have fought to retain all that is special to us. As their laws began to overlay our laws, we have not always won. But change is in the air. Their laws are becoming more respectful of us and our connections to our lands. A significant example of this occurred in 2010 when Aotearoa New Zealand finally endorsed the United Nations Declaration on the Rights of Indigenous Peoples. But why was this country slow to commit to this Declaration? This Article posits that the Crown's staunch position on assumed or asserted Crown ownership of lands and resources is evidence of a continuing Doctrine of Discovery mindset and explains this country's reluctance to initially vote for this Declaration—a Declaration that seeks to recalibrate the foundations of colonial society in recognizing continuing Indigenous ownership of lands and resources.

[*] (Ngati Raukawa, Ngai te Rangi, Pakeha) Senior Lecturer, Faculty of Law, University of Otago, New Zealand. Note that parts of this Article draw on work presented by Robert J. Miller and Jacinta Ruru in Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849 (2009) and ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010). I thank Sarah van Ballekom for her excellent research assistance in preparing this Article.

I. INTRODUCTION

On April 20, 2010, the Aotearoa New Zealand Minister of Maori Affairs, Hon. Dr. Pita Sharples, finally announced this country's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, albeit with attached caveats.[1] The endorsement came more than two and one-half years after the United Nations General Assembly had adopted the Declaration following a 143:4 vote.[2] Aotearoa New Zealand was one of those four countries that voted against the Declaration back on September 13, 2007.[3] This Article posits that a reason for Aotearoa New Zealand's resistance to the Declaration was our continuing historical and legal commitment to the property notions deriving from the common law Doctrine of Discovery ideology that supports unqualified Crown ownership. While false notions of European first discovery of these lands are no longer legally endorsed,[4] the ramifications have yet to be realized, particularly in the context of ownership and management of land and natural resources. The slow commitment to the Declaration brings to the fore this gap between seeking and actually establishing reconciled Crown and Indigenous relations.

In Aotearoa New Zealand, the first persons to discover and settle the lands were Maori tribes sometime on or after AD 800.[5] In the late 1700s, European whalers and sealers began to visit these islands, and by the mid-1830s, the British, in particular, were seeking to make the country a colony.[6] The country's first international treaty—the Treaty of Waitangi—was signed in 1840 by a representative of the British Crown

[1] Media Release, Hon. Dr. Pita Sharples, Minister of Maori Affairs, Supporting UN Declaration Restores NZ's Mana (Apr. 20, 2010), *available at* http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana.

[2] Sarah M. Stevenson, Comment, *Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand*, 32 FORDHAM INT'L L.J. 298, 298 n.1 (2008).

[3] *Id.* at 298.

[4] *See* P.G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION 289 (2004).

[5] RANGINUI WALKER, KA WHAWHAI TONU MATOU: STRUGGLE WITHOUT END 24 (2004). Others put it at about AD 1200. MICHAEL KING, THE PENGUIN HISTORY OF NEW ZEALAND 46–47 (2003).

[6] Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849, 879 (2009).

and more than 500 Maori chiefs.[7] It is a short document, consisting of three articles expressed in English and Maori.[8] The controversy today lies in the translation of the first two articles.[9] According to the English version, Maori ceded to the Crown "absolutely and without reservation all the rights and powers of sovereignty" (article 1), but retained "full exclusive and undisturbed possession" of their lands, estates, forests, fisheries, and other properties (article 2).[10] In contrast, in the Maori version, Maori ceded to the Crown governance only (article 1), and retained *tino rangatiratanga* (sovereignty) over their *taonga* (treasures).[11] Article 2 granted the Crown a pre-emptive right to purchase property from Maori, and article 3 granted Maori the same rights and privileges as British citizens living in Aotearoa New Zealand.[12]

Since the signing of the Treaty of Waitangi, a legal and political debate has brewed concerning whether Maori have retained some form of sovereignty and property rights to all lands and resources that they have wished to retain. The Crown and the courts to date have supported Crown sovereignty (the English version).[13] The property question is more vexing. Legally, the issue for the most part remains untested for various reasons including the simple fact that judicial precedent holds that the Treaty is not part of the country's domestic law.[14] Therefore, for the judiciary or those acting under the law, the Treaty itself usually only becomes relevant if it has been expressly incorporated into statute. Even so, statutory incorporation of the Treaty has been a relatively recent phenomenon.[15] It was once endorsed in the courts "as a simple nullity,"[16] as this Article will explore. Politically though, the property issue is hot.

---

[7] Stevenson, *supra* note 2, at 302; *see also* Treaty of Waitangi Act 1975, sched. 1 (N.Z.) (text of Treaty in English); *Treaty of Waitangi – Te Tiriti o Waitangi*, ARCHIVES NEW ZEALAND, http://archives.govt.nz/treaty-waitangi-te-tiriti-o-waitangi (images of the original Treaty). To better understand the role of the Crown in New Zealand, see generally Noel Cox, *The Treaty of Waitangi and the Relationship Between the Crown and Maori in New Zealand*, 28 BROOK. J. INT'L L. 123 (2002).

[8] Stevenson, *supra* note 2, at 303; *see also* Treaty of Waitangi Act 1975, sched. 1.

[9] For an analysis of the textual problems with the Treaty, see generally Bruce Biggs, *Humpty-Dumpty and the Treaty of Waitangi*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 300 (I.H. Kawharu ed., 1989), and R.M. Ross, *Te Tiriti o Waitangi: Texts and Translations*, *in* THE SHAPING OF HISTORY: ESSAYS FROM THE NEW ZEALAND JOURNAL OF HISTORY 91 (Judith Binney ed., 2001).

[10] Treaty of Waitangi Act 1975, sched. 1 (English text).

[11] Treaty of Waitangi Amendment Act 1985, sched. (N.Z.) (Maori text).

[12] *Id.*; Miller & Ruru, *supra* note 6, at 882.

[13] *See* Miller & Ruru, *supra* note 6, at 882–97 (reviewing caselaw implementing the Doctrine of Discovery based on a reading of the English version of the Treaty).

[14] Since the 1980s, the Treaty is commonly said to form part of its informal constitution along with the New Zealand Bill of Rights Act 1990 and the Constitution Act 1986. Miller & Ruru, *supra* note 6, at 878.

[15] *Id.*

[16] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78 (SC).

While the Crown is committed to reconciling with Maori for historical breaches of the Treaty of Waitangi, and has settled, or is in the process of settling, many grievances with specific *iwi* (tribes) throughout the country, most settlements contain monetary, cultural, and commercial redress that equates to a tiny fraction of what was taken from them through colonization.[17] Some Crown land and natural resources are being returned to Maori tribes, but not much.[18] In particular, the Crown will not contemplate Maori ownership of large tracts of the conservation estate, oil, or gas.[19] The Crown will only contemplate limited property rights to the foreshore or seabed, and is highly unlikely to recognize Maori ownership of freshwater.[20]

This Article posits that the Crown's staunch position on assumed or asserted Crown ownership of lands and resources is evidence of a continuing Discovery mindset. The Article explains the country's reluctance to vote for an international document—the Declaration on the Rights of Indigenous Peoples—that sought to recalibrate the foundations of colonial society in recognizing continuing Indigenous ownership of lands and resources.[21] As Part II of this Article discusses, Aotearoa New Zealand had issues with the majority of the commitments contained within the Declaration, and in particular those that went to the heart of property-ownership issues and associated power roles. Part III of this Article provides context for this position, explaining that the three asserted sources of recognizing Maori property rights do not go as far as the Declaration. The sources discussed here are (1) Maori freehold land tenure, (2) Doctrine of Native Title, and (3) Treaty of Waitangi claim-settlement statutes. Part IV, in conclusion, argues that a new era for understanding Indigenous property rights ought to emerge because there is judicial support in obiter dicta for the possibility and international commitments, namely in the Declaration on the Rights of Indigenous Peoples, to do so.

II. AOTEAROA NEW ZEALAND'S POSITION ON THE DECLARATION

The Declaration on the Rights of Indigenous Peoples has been described as the "most comprehensive statement to date of indigenous

[17] *See* WALKER, *supra* note 5, at 299–311 (documenting settlement policy and settlements).

[18] *See id.*

[19] *Id.* at 302–03.

[20] *See infra* Part III.

[21] For further discussion on the Declaration and its other possible implications for New Zealand, see Stevenson, *supra* note 2; Kiri Rangi Toki, *What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples*, 16 AUCKLAND U. L. REV. 243 (2010); and *What Will Be the Implications of New Zealand Support for the U.N. Declaration on the Rights of Indigenous People?*, POSTTREATYSETTLEMENTS.ORG.NZ, http://posttreatysettlements.org.nz/indigenous-rights/ (last visited Nov. 23, 2011).

peoples' rights."[22] The international instrument affirms the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world,"[23] and has been celebrated globally as a symbol of triumph and hope.[24] It will be utilized as a means to assist Indigenous peoples "in combating discrimination and marginalization."[25] The Declaration "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations."[26]

The Declaration contains a preamble, containing 24 paragraphs and 46 articles.[27] Article 1 articulates the basic principle that Indigenous peoples hold the same "human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[28] The Declaration encapsulates many protective rights for Indigenous peoples including the right to be free from discrimination (article 2), the right to self-determination (article 3), and the right to a nationality (article 6).[29] The Declaration states that Indigenous peoples "shall not be forcibly removed from their lands or territories," (article 10) and that they have the right to "practice and revitalize their cultural traditions and customs" (article 11).[30] Pursuant to article 14, Indigenous peoples have the right to create and control their educational systems employing their own language. They have the right to enjoy all rights which are protected under relevant international and domestic labor law (article 17).[31] States shall "consult and co-operate in good faith with the indigenous peoples"

[22] Press Release, U.N. Office of the High Comm'r for Human Rights in Nepal, High Commissioner for Human Rights Hails Adoption of Declaration on Indigenous Rights (Sept. 13, 2007), *available at* http://www.un.org.np/sites/default/files/press_releases/tid_74/2007-09-13-OHCHR-PR-UN-Declaration-on-Indigenous-Peoples.pdf. For an excellent discussion of the Declaration, see generally MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Claire Charters & Rodolfo Stavenhagen eds., 2009).

[23] United Nations Declaration on the Rights of Indigenous Peoples art. 43, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[24] For example, see the work of the International Work Group for Indigenous Affairs. *IWGIA's Activities*, INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, http://www.iwgia.org/iwgia/what-we-do (last visited Nov. 25, 2011).

[25] U.N. PERM. FORUM ON INDIGENOUS ISSUES, FREQUENTLY ASKED QUESTIONS: DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (n.d.), *available at* http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf; *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 278 (5th ed. 2003).

[26] U.N. PERM. FORUM ON INDIGENOUS ISSUES, *supra* note 25.

[27] *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 23.

[28] *Id.* art. 1.

[29] *Id.* arts. 2, 3, 6.

[30] *Id.* arts. 10, 11.

[31] *Id.* art. 17.

and obtain their consent before implementing legislation that may affect them (article 19).[32] The use of traditional health practices and employment of traditional medicines is protected under article 24.[33] The Declaration protects Indigenous peoples' right to redress, which includes restitution or compensation (article 28).[34] States in consultation with Indigenous peoples should take measures to achieve the ends of this instrument (article 38).[35] Nothing in the Declaration may be interpreted as extinguishing any rights of Indigenous peoples (article 45).[36]

Aotearoa New Zealand often presented its apprehension for the draft Declaration. In May 2006, the government expressed widespread disagreement regarding the text's crucial provisions,[37] and signaled uncertainty toward the Declaration's influence and compatibility with Aotearoa New Zealand's legal framework. It was argued that the draft Declaration granted a right of self-determination which could lead to secession, threatening territorial and political integrity of the United Nations Member States (article 3); conferred a power of veto upon Indigenous peoples over laws passed by Parliament (article 20);[38] and ignored "contemporary realities in many countries" by recognizing land lawfully owned by other citizens as being subject to Indigenous land rights (article 26).[39] Replicated in full here are the four articles concerning property rights that Aotearoa New Zealand's government contested the most:

> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> . . .
>
> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

[32] *Id.* art. 19.

[33] *Id.* art. 24.

[34] *Id.* art. 28.

[35] *Id.* art. 38.

[36] *Id.* art. 45.

[37] *See* Clive Pearson, Rep. of N.Z., Statement on behalf of Australia, New Zealand and the United States of America on the Declaration on the Rights of Indigenous Peoples (May 17, 2006), http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-17-May-2006.php.

[38] *Id.* The substance of this article now appears as articles 19 and 32(2) in the final text of the Declaration. *See*, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 23, arts. 19, 32.

[39] Pearson, *supra* note 37.

> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> . . .
>
> Article 28
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
>
> . . .
>
> Article 32
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[40]

Despite Aotearoa New Zealand's evident disapproval and concern, the draft Declaration was forwarded to the United Nations General Assembly by the Human Rights Council for adoption.[41] Observed as "undermining, rather than strengthening, the partnership between the

[40] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 23, arts. 19, 26, 28, 32.

[41] For a chronology of events see *Declaration on the Rights of Indigenous Peoples: Chronology of Events Since 2006*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, http://mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-Rights/Indigenous-Peoples/draftdec-jun07.php (last updated May 31, 2010).

State and the indigenous population,"[42] Aotearoa New Zealand's statement to the Human Rights Council in June 2006 reiterated that: "New Zealand cannot associate itself with this text which, despite our most strenuous efforts and genuine intentions, remains fundamentally flawed. We want a consensus decision and a text that is capable of practical implementation."[43] In the same year, a statement on behalf of Aotearoa New Zealand, Australia, and the United States was brought before the General Assembly, opining that the text was "confusing, unworkable, contradictory and deeply flawed."[44] New Zealand's Permanent Representative to the United Nations, Rosemary Banks, provided an explanation of this country's original negative vote at the General Assembly meeting in September 2007.[45] She initially stated that Aotearoa New Zealand was one of the few countries that initially supported an international declaration for Indigenous peoples.[46] She contextualized the Declaration in terms of Maori, stating that "indigenous rights are of profound importance" in Aotearoa New Zealand, and informed the General Assembly that we have "one of the largest and most dynamic indigenous minorities in the world [and] . . . the place of Maori in society . . . [is a] central and enduring feature[] of domestic debate and of government action."[47] The Declaration's foundational essence, purpose, and ambitions were fully supported, but the actual text of four provisions (articles 19, 26, 28, and 32) was described as being "fundamentally incompatible with New Zealand's constitutional and legal arrangements."[48]

Banks explained that articles 19 and 32(2) caused concern due to the predicted negative consequences that a veto right for the Indigenous population might place on Aotearoa New Zealand.[49] The importance of the "full and active engagement of indigenous peoples in democratic decision-making processes,"[50] was acknowledged, but the risk of unintentionally creating a separate class of citizenship (where Indigenous

[42] Stevenson, *supra* note 2, at 317.

[43] Don MacKay, Perm. Rep. of N.Z., Statement to Human Rights Council First Session (June 21, 2006), http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-21-June-2006.php.

[44] Rosemary Banks, N.Z. Ambassador to the U.N., Statement to the General Assembly on The Declaration on the Rights of Indigenous Peoples (Oct. 16, 2006), http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2006/0-16-October-2006b.php.

[45] *See* Rosemary Banks, N.Z. Perm. Rep. to the U.N., Explanation of Vote on the Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

citizens have a right of veto) was too great.[51] Banks emphasized that pursuant to article 26, Indigenous peoples have the right to traditionally occupied land and resources, the right to use, control, and develop these lands and resources, with a mandatory proviso for states to give legal recognition.[52] It was felt that this article could be problematic as its scope could potentially catch Aotearoa New Zealand's entire landmass within it.[53] Land that is lawfully owned by Indigenous and non-Indigenous citizens would be subject to recognition, without taking into account current Indigenous land tenure systems. There was also an argument that this article afforded a special Indigenous right separate from non-Indigenous peoples.[54] Article 28 pertaining to redress for lands and resources owned or used was described as unworkable, and again could potentially capture the entire country within its scope. Again, legitimately owned or occupied land could be subject to numerous Indigenous claims. Banks argued that these common situations were neither addressed nor accounted for within the article.[55]

Nonetheless, three years later, Aotearoa New Zealand endorsed the Declaration—but with caveats.[56] The Minister of Maori Affairs, Hon. Dr. Pita Sharples, announcing the endorsement in April 2010 in New York, stated: "In keeping with our strong commitment to human rights, and indigenous rights in particular, New Zealand now adds its support to the Declaration both as an affirmation of fundamental rights and in its expression of new and widely supported aspirations."[57] In his statement of support of the Declaration to the United Nations, Hon. Dr. Pita Sharples noted that Aotearoa New Zealand's existing framework continued to "define the bounds of New Zealand's engagement with the aspirational elements of the Declaration."[58] Specifically, he stated that for rights and restitution of land and resources, this country had established its own "distinct" approach through its Treaty of Waitangi claim-settlement process (which will be discussed later in this Article).[59] This "existing legal regime[] for the ownership and management of land and natural resources" would be maintained.[60] Hon. Dr. Pita Sharples also made a caveat toward the right of redress by acknowledging the success of

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] [2010] 662 NZPD 10239 (N.Z) (statement by the Prime Minister supporting the Declaration "where it is consistent with the Treaty of Waitangi").

[57] Pita Sharples, Minister of Maori Affairs, Statement to United Nations Permanent Forum on Indigenous Issues (Apr. 19, 2010), http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php; *see also* Media Release, Hon. Dr. Pita Sharples, *supra* note 1.

[58] Sharples, *supra* note 57.

[59] *Id.*

[60] *Id.*

negotiated Treaty of Waitangi settlements, and stating that there was a "need to be fair to everyone and [consider] what the country as a whole can afford to pay."[61] The issue of Maori decision-making was also addressed, and it was explained that Aotearoa New Zealand would maintain reliance upon its current institutions and processes that provide for Maori involvement.[62] Further, the Treaty of Waitangi was recognized as being pertinent in these institutions and processes, perhaps silencing the Declaration in this area.[63] Nevertheless, Hon. Dr. Pita Sharples concluded near the end of his announcement with the assertion that Aotearoa New Zealand "will continue to work in international fora to promote the human rights of indigenous peoples."[64]

Turning thus to the core issue of this Article: Will a commitment to the Declaration banish the Discovery discourse from Aotearoa New Zealand's legal framework and enable this country to realize and establish Crown–Indigenous reconciliation? The next part of this Article explains the potential sources for Maori property rights. This is important because it provides context for the Crown's hesitant position on the Declaration.

III. EVOLUTION OF JUDICIAL PRECEDENT ON, AND LEGISLATIVE PROVISION FOR, RECOGNIZING MAORI PROPERTY

In Aotearoa New Zealand, there are three sources for recognizing Maori property rights. The first is via a statutory base that recognizes Maori customary land and its potential to acquire a freehold title. The second is via the Doctrine of Native Title. The third is via the Treaty of Waitangi claim-settlement process.

A. Converting Maori Customary Land into Maori Freehold Title

In less than 20 years after the Treaty of Waitangi was signed in 1840, the British Crown had acquired most of the land in the South Island and the lower part of the North Island (constituting about 60% of New Zealand's land mass and where about 10% of Maori lived).[65] In most instances the tribes had been duped: on the one hand there was controversy about the actual land included in the purchase agreements, and on the other hand there was disquiet in that the Crown had not set aside land for reserves for them as per the agreements.[66] Deeply disturbed by the correlation between selling land and loss of independence, the North Island tribes still with land began turning

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Miller & Ruru, *supra* note 6, at 886.
[66] *See, e.g.*, Tipene O'Regan, *The Ngai Tahu Claim*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES, *supra* note 9, at 234, 242–46.

against land sales.[67] Importantly, the pan-tribal sentiment saw the emergence of the Maori King Movement.[68] Perturbed that land-selling would come to an end, and thus the amalgamation of Maori would come to a halt, the British concluded that the "law of nature" required help. A new colonial tool was endorsed in the form of warfare. The British underestimated tribal resistance, and the New Zealand wars that began in March 1860 did not abate until a decade later.[69] A tougher new evangelism emerged during this time with law becoming the central tool used in destroying the Maori way of life.

Large tracts of Maori land in the North Island were confiscated pursuant to legislation;[70] legislation stipulated that native schools could only receive funding if the curriculum was taught in the English language[71] (a policy which led to the near extinction of Maori language and culture, and marginalized Maori "by a deliberate policy of training for manual labour rather than for the professions"[72]); and legislation ensured that any person practicing traditional Maori healing could became liable for conviction,[73] a policy which led to the loss of much traditional knowledge.[74]

At the heart of the new cultural genocide[75] crusade was the establishment of the Native Land Court. The Crown now waived its right of pre-emption (as endorsed in the Treaty of Waitangi and common-law Doctrine of Native Title) in favour of Maori being able to freely alienate their land.[76] The catch being, they first had to obtain a certificate of title.[77] The system sought to transform land communally held by *whanau* and *hapu* (Maori customary land) into individualized titles derived from the Crown (Maori freehold title). The preamble to the Native Lands Act 1862 explained:

---

[67] Miller & Ruru, *supra* note 6, at 886.

[68] For a discussion of Maori resistance movements, including the Maori King Movement, see LINDSAY COX, KOTAHITANGA: THE SEARCH FOR MAORI POLITICAL UNITY (1993).

[69] *See generally* JAMES BELICH, THE NEW ZEALAND WARS AND THE VICTORIAN INTERPRETATION OF RACIAL CONFLICT (1986).

[70] *See, e.g.*, New Zealand Settlements Act 1863 (N.Z.); Suppression of Rebellion Act 1863 (N.Z.).

[71] *See* Native Schools Act Amendment Act 1871 (N.Z.); Native Schools Act 1867 (N.Z.); Native Schools Act 1858 (N.Z.).

[72] Stephanie Milroy & Leah Whiu, *Waikato Law School: An Experiment in Bicultural Legal Education*, 8 Y.B. N.Z. JURISPRUDENCE (SPECIAL ISSUE) 173, 175 (2005).

[73] *See* Tohunga Suppression Act 1908 (N.Z.).

[74] *See* Maui Solomon, *The Wai 262 Claim: A Claim by Maori to Indigenous Flora and Fauna:* Me o Ratou Taonga Katoa, *in* WAITANGI REVISITED: PERSPECTIVES ON THE TREATY OF WAITANGI 213, 222 (Michael Belgrave et al. eds., 2005).

[75] For a discussion of this term, see David Williams, *Myths, National Origins, Common Law and the Waitangi Tribunal*, E LAW J. (December 2004), http://www.murdoch.edu.au/elaw/issues/v11n4/williams114_text.html.

[76] Miller & Ruru, *supra* note 6, at 887.

[77] *Id.*

> [Whereas] it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands . . . were assimilated as nearly as possible to the ownership of land according to British law[.][78]

The legislation ensured "Maori could participate in the new British prosperity only by selling or leasing their land."[79] Or, as Hon. Sewell, a Member of the House of Representatives in 1870, reflected, the Act had two objects. One was "to bring the great bulk of the lands of the Northern Island which belonged to the Natives . . . within the reach of colonization."[80] The other was:

> [T]he detribalization of the Natives, – to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system.[81]

The Land Court was extraordinarily effective. By the 1930s very little tribal land remained in Maori ownership (today it amounts to 5.5% of Aotearoa New Zealand's total land-mass).[82] The Court's early work has been described as a "veritable engine of destruction for any tribe's tenure of land,"[83] "a scandal,"[84] and the conquering of a people by pen, not sword.[85] Today, a strict retention principle governs Maori freehold land whereby the now-named Maori Land Court is directed by legislation to strive to keep ownership of Maori freehold land with those that have a genealogical blood link to the land.[86] This new legislative commitment provides a strong standing for recognizing Maori property rights in their traditional lands that have been converted to Maori freehold title, and aligns somewhat with the aspirations of the Declaration. But owners of Maori freehold land are not necessarily free to do as they wish with their land because the Maori Land Court and the law continue to provide strict checks and balances on, for example, land succession and land management.

---

[78] Native Lands Act 1862 (N.Z.); *see also* Native Lands Act 1865 (N.Z.).

[79] 1 WAITANGI TRIBUNAL, TURANGA TANGATA TURANGA WHENUA: THE REPORT ON THE TURANGANUI A KIWA CLAIMS 444 (2004), *available at* http://www.waitangitribunal.govt.nz/reports (search for Wai No. 814).

[80] DAVID V. WILLIAMS, 'TE KOOTI TANGO WHENUA': THE NATIVE LAND COURT 1864-1909, at 87–88 (1999).

[81] *Id.* at 88.

[82] Miller & Ruru, *supra* note 6, at 888.

[83] I.H. KAWHARU, MAORI LAND TENURE: STUDIES OF A CHANGING INSTITUTION 15 (1977); *see also* Bryan D. Gilling, *Engine of Destruction? An Introduction to the History of the Maori Land Court*, 24 VICTORIA U. WELLINGTON L. REV. 115 (1994).

[84] WILLIAMS, *supra* note 80, at 19.

[85] WAITANGI TRIBUNAL, THE TARANAKI REPORT: KAUPAPA TUATAHI § 1.5 (1996), *available at* http://www.waitangi-tribunal.govt.nz/reports/ (search for Wai No. 0143).

[86] Te Ture Whenua Maori Act (Maori Land Act) 1993 (N.Z.).

B. The Doctrine of Native Title Journey

The *R v Symonds* case, decided in 1847, was this country's first substantial case to explore inherent property rights of Maori and found in favor of reinforcing the sovereign rights of Britain in Aotearoa New Zealand.[87] The facts of the case are similar to *Johnson v. M'Intosh*, where the United States Supreme Court refused to recognize the validity in law of title to land purchased by individuals directly from the Indian owners.[88] In *Symonds* essentially a British individual purchased land directly from Maori in accordance with a certificate issued by Governor Fitz Roy allowing him to do so.[89] The question that occupied the court was whether the individual, Mr. C. Hunter McIntosh, had acquired legal title to the property.[90] Both judges sitting on the case said no, and both did so by drawing on United States jurisprudence.[91] This case is said to represent the foundational principles of the common law relating to Maori.[92] It was the first case to explicitly rely on the Doctrine of Discovery ideology in Aotearoa New Zealand law.[93] The most famous quote in the case is that stated by Justice Chapman, which explains the Doctrine of Native Title and its application to this country:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, *it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers*. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the *Queen's exclusive right to extinguish it*.[94]

The case held that the Queen had the *exclusive* right of pre-emption to purchase land from Maori as articulated in the Treaty, and that the Treaty did not assert either in doctrine, or in practice, anything new or unsettled.[95] Justice Chapman observed that the "intercourse of civilized nations" (namely, Great Britain) with Indigenous communities

[87] *Id.* at 883–84; *R v Symonds* (1847) NZPCC 387 (SC).

[88] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[89] *Symonds*, NZPCC at 387–88.

[90] *Id.* at 388.

[91] *See* MCHUGH, *supra* note 4, at 42.

[92] *See, e.g.*, Mark Hickford, "*Settling Some Very Important Principles of Colonial Law": Three "Forgotten" Cases of the 1840s*, 35 VICTORIA U. WELLINGTON L. REV. 1, 1–2 (2004).

[93] Miller & Ruru, *supra* note 6, at 884.

[94] *Symonds*, NZPCC at 390 (emphasis added).

[95] *Id.* Note that this observation could be disputed, especially on reading the Maori version. *See* E.T.J. Durie, *The Treaty in Maori History*, *in* SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS 156, 156–59 (William Renwick ed., 1991).

(especially in North America) had led to established principles of law.[96] This law, founded in the Doctrine of Discovery and encapsulated in the common law Doctrine of Native Title, stipulates that the Queen's pre-emptive right is exclusive.[97] Thus, the Crown is the sole source of title for settlers. This was the exact same outcome as in *Johnson*.[98] Both judges in *Symonds* relied heavily on the U.S. Chief Justice John Marshall's judgments.[99] It was to take another 150 years before a court was to hold that Maori have proprietary interests in land despite a change in sovereignty.[100]

Thirty years later, amidst the new evangelism of converting Maori customary land into Maori freehold land, the most historically significant case was decided: *Wi Parata v Bishop of Wellington*.[101] This case rewrote history. The Court here denied that Maori had sovereignty prior to 1840 and thus rejected the Treaty of Waitangi as a valid treaty.[102] In doing so, the Doctrine of Discovery came to the forefront of judicial reasoning. The facts of the case start in 1848 when the chief of the Ngati Toa tribe sought to give tribal land at Witireia as an endowment for a school to be established there to educate the tribal children.[103] The chief accordingly entered into a verbal arrangement with the then Lord Bishop of New Zealand.[104] In 1850 a Crown grant was made, without the knowledge or consent of the tribe, to the Lord Bishop.[105] The grant stated that the land had been ceded from Ngati Toa for the school.[106] However, no school of any kind was ever established.[107] The tribe sued seeking return of the land.[108] Chief Judge Prendergast ruled in favor of the Crown grant and relied on a new version of historical events. Prendergast stated:

> On the foundation of this colony the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the

[96] *Symonds*, NZPCC at 388.

[97] *Id.* at 390.

[98] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584–86 (1823).

[99] *See* MCHUGH, *supra* note 4, at 42 ("There is a strong congruence between the styles of reasoning in *R v Symonds* and the Marshall cases . . . .").

[100] *See Att'y-Gen. v Ngati Apa* [2003] 3 NZLR 643, 651–60 (CA); Miller & Ruru, *supra* note 6, at 885.

[101] (1877) 3 NZ Jur (NS) 72 (SC).

[102] *Id.* at 78.

[103] *Id.* at 72.

[104] *Id.*

[105] *Id.* at 73.

[106] *Id.*

[107] *Id.*

[108] *Id.*

> duties, and therefore of assuming the rights, of a civilised community.[109]

Prendergast explained:

> On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. . . . But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.[110]

Prendergast concluded that "the title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages."[111]

At the turn of the century, the Privy Council deemed such reasoning as going "too far."[112] However, Aotearoa New Zealand's judiciary ignored the Privy Council, "the only recorded instance of a New Zealand court's publicly avowing it[s] disapproval of a superior tribunal."[113] Later, in 1941, the Privy Council reinterpreted the Treaty as enforceable in the courts if recognized in legislation.[114] This did not occur until 1975,[115] and in regard to the status of the Doctrine of Native Title, it was not fully reinstated into Aotearoa New Zealand's common law until 2003.[116]

From the 1980s forward, the High Court began to rectify the *Wi Parata* precedent and reintroduce a more apt application of the Doctrine of Native Title into Aotearoa New Zealand's common law. In 1986, the Aotearoa New Zealand High Court held that a Maori person had a right to take undersized shellfish, *paua* (abalone), even though it was in contravention of legislation, because no statute had plainly and clearly extinguished the customary right.[117] Subsequent case law in the 1990s reinforced the existence of the common law Doctrine of Native Title in Aotearoa New Zealand, but did not accept the arguments posed under

---

[109] *Id.* at 77.

[110] *Id.* at 78.

[111] *Id.*

[112] Nireaha Tamaki v. Baker, [1901] A.C. 561 (P.C.) 577 (appeal taken from N.Z.).

[113] Robin Cooke, *The Nineteenth Century Chief Justices*, *in* PORTRAIT OF A PROFESSION: THE CENTENNIAL BOOK OF THE NEW ZEALAND LAW SOCIETY 36, 46 (Robin Cooke ed., 1969). One of the more well-known cases to assert the *Wi Parata* precedent was *In re Ninety Mile Beach* [1963] NZLR 461 (CA). *See* Richard Boast, In re Ninety Mile Beach *Revisited: The Native Land Court and the Foreshore in New Zealand Legal History*, 23 VICTORIA U. WELLINGTON L. REV. 145 (1993).

[114] Hoani Te Heuheu Tukino v. Aotea Dist. Maori Land Bd., [1941] A.C. 308 (P.C.) 324–25 (appeal taken from N.Z.); *see also* Alex Frame, *Hoani Te Heuheu's Case in London 1940-1941: An Explosive Story*, 22 N.Z. U. L. REV. 148, 164 (2006).

[115] *See* Treaty of Waitangi Act 1975 (N.Z.).

[116] *See Att'y-Gen. v Ngati Apa* [2003] 3 NZLR 643, 659 (CA).

[117] *Te Weehi v Reg'l Fisheries Officer* [1986] 1 NZLR 680 (HC).

it.[118] The courts pronounced in obiter dicta that Native Title rights: are usually communal; "cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers;" can only be transferred to the Crown and only then "in strict compliance with the provisions of any relevant statutes;" are transferred in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and, if extinguishment is deemed necessary, may have to yield to compulsory acquisition for recognized specific public purposes, but upon such extinguishment, proper compensation must be paid.[119] One court decision then explained the scope of Native Title in terms of a spectrum:

> The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. . . . At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.[120]

In 2003, the Court of Appeal in *Attorney-General v Ngati Apa*,[121] reintroduced the full spectrum of the Native Title doctrine, accepting the possibility that Native Title could encompass land either permanently, or temporarily, under saltwater.[122] The unanimous decision contributed significantly to the removal of the full force of the Doctrine of Discovery. All five judges overruled *Wi Parata*.[123]

Significantly, the *Ngati Apa* decision explicitly foresaw the possibility of the Doctrine of Native Title recognizing Indigenous peoples' exclusive ownership of the foreshore and seabed following a change in sovereignty. For example, Chief Justice Elias stated: "Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature,"[124] and "[t]he content of such customary interest is a question of fact discoverable, if necessary, by evidence."[125] Chief Justice Elias explained, "[a]s a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom,"[126] or, and she quotes from

---

[118] *E.g.*, *Te Runanganui o Te Ika Whenua Inc Soc'y v Att'y-Gen.* [1994] 2 NZLR 20 (CA), (holding Maori have no right to generate electricity by the use of water power); *McRitchie v Taranaki Fish & Game Council* [1999] 2 NZLR 139 (CA) (holding no customary right to fish for introduced species). *See also Te Runanga o Muriwhenua Inc. v Att'y-Gen.* [1990] 2 NZLR 641 (CA).

[119] *Te Runanganui o Te Ika Whenua Inc Soc'y* [1994] 2 NZLR at 24.

[120] *Id.* (internal citations omitted).

[121] [2003] 3 NZLR 643 (CA).

[122] *Id.* at 660–61.

[123] *Id.* at 650–51.

[124] *Id.* at 655–56.

[125] *Id.* at 656.

[126] *Id.*

a Privy Council decision, *Amodu Tijani v Secretary, Southern Nigeria*,[127] they might "be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference."[128] Chief Justice Elias substantiated this possibility with reference to Canada:

> The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to *exclusive ownership* with incidents equivalent to those recognised by fee simple title.[129]

The reasoning in *Ngati Apa* may be the best yet to be made by a judiciary, at least in the Commonwealth. It poignantly recognizes the possibility of the law to preserve and protect the interests of Indigenous peoples. But, it was merely obiter dicta. The issue before the Court was whether the Maori Land Court had jurisdiction to determine whether the foreshore and seabed are capable of being declared Maori customary land.[130] The Court answered yes,[131] but the Maori Land Court did not have the opportunity to do so because the Government passed legislation declaring the foreshore and seabed to be Crown land[132] (and has since passed subsequent law declaring that no one owns the foreshore and seabed).[133] The Government can do this in Aotearoa New Zealand because Parliament is supreme and unhindered in its lawmaking abilities.[134] Thus, to date, while the Doctrine of Native Title provides theoretical scope for supporting Maori property rights to land, no court has yet done so. The Declaration obviously provides some impetus to the courts to actually apply the Doctrine of Native Title, especially at the far end of the spectrum that seeks recognition of exclusive use and possession of lands and resources. Has there been more hope for Maori via the Treaty of Waitangi claim-settlement process? This is now discussed.

C. The Treaty of Waitangi—Negotiated Possibilities

In 1975, the Labour government established the Waitangi Tribunal as a permanent commission of inquiry empowered to receive, report, and

---

[127] [1921] 2 A.C. 399 (P.C.) 410 (appeal taken from Nigeria).

[128] *Ngati Apa* [2003] 3 NZLR at 656.

[129] *Id.* (emphasis added). The Canadian case cited was Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 (Can.).

[130] *Ngati Apa* [2003] 3 NZLR at 648.

[131] *Id.* at 662.

[132] *See* Foreshore and Seabed Act 2004, § 13 (N.Z.).

[133] *See* Marine and Coastal Area (Takutai Moana) Act 2011, § 11(2) (N.Z.).

[134] Claire Charters, *An Imbalance of Powers: Maori Land Claims and an Unchecked Parliament*, 30 CULTURAL SURVIVAL Q., no. 1, Spring 2006, http://www.culturalsurvival.org/print/3077.

make recommendations regarding alleged Crown breaches of the principles of the Treaty of Waitangi post-1975.[135] Since 1985 it has had the specific jurisdiction to consider claims by Maori that they have been prejudicially affected by legislation, Crown policy, Crown practice, Crown action, or Crown omission on or after February 6, 1840.[136] The Tribunal generally can only make non-binding rather than binding recommendations to the Crown on redress for what it considers to be valid claims.[137] These recommendations are made to assist the Crown in reaching a political settlement with Maori tribes. The Crown is committed to engaging with Maori in a "fair and final" Treaty of Waitangi settlement process. The Office of Treaty Settlements is a separate unit within the Ministry of Justice and has the mandate to resolve historical Treaty claims. "Claims" are defined as claims arising from actions or omissions by or on behalf of the Crown or by or under legislation on or before September 21, 1992.[138] The settlements aim to provide the foundation for a new and continuing relationship between the Crown and the claimant group based on the Treaty of Waitangi principles.[139] Settlements thus contain Crown apologies for wrongs done, financial and commercial redress, and redress recognizing the claimant group's spiritual, cultural, historical, or traditional associations with the natural environment.[140] Do these settlements recognize Maori property rights?

While significant advancement has occurred in reconciliation between the Crown and Maori, it is argued here that the underlying tenet of Discovery remains evident. There has, in fact, been some return of Crown land to Maori tribes, and major settlements that provide Maori with property rights to commercially fish for saltwater species,[141] interests

[135] Treaty of Waitangi Act 1975, §§ 5–6 (N.Z.).

[136] Treaty of Waitangi Amendment Act 1985, § 3 (N.Z.). For commentary, see THE WAITANGI TRIBUNAL: TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI (Janine Hayward & Nicola R. Wheen eds., 2004).

[137] Treaty of Waitangi Act 1975, § 6.

[138] *What is a Treaty Settlement?*, N.Z. OFFICE OF TREATY SETTLEMENTS, http://www.ots.govt.nz/ (follow "What is a settlement?" hyperlink). For an excellent overview, see Catherine J. Iorns Magallanes, *Reparations for Maori Grievances in Aotearoa New Zealand*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 523 (Federico Lenzerini ed., 2008). *See also* Jessica Andrew, Comment, *Administrative Review of the Treaty of Waitangi Settlement Process*, 39 VICTORIA U. WELLINGTON L. REV. 225 (2008).

[139] *See* Meredith Gibbs, *What Structures Are Appropriate to Receive Treaty of Waitangi Settlement Assets?*, 21 N.Z. U. L. REV. 197, 205 (2004).

[140] *Id.* at 201–02, 207. For an insight into tribal governance entities, see LAW COMMISSION, REPORT 92, WAKA UMANGA: A PROPOSED LAW FOR MAORI GOVERNANCE ENTITIES (2006), *available at* http://www.lawcom.govt.nz/sites/default/files/publications/2006/06/Publication_115_328_R92.pdf; Waka Umanga (Maori Corporations) Bill 2007 175-2 (N.Z.); and Robert Joseph, *Contemporary Maori Governance: New Era or New Error?*, 22 N.Z. U. L. REV. 682 (2007).

[141] *See* Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (N.Z.).

in aquaculture,[142] and interests in forestry.[143] But, for instance, the foreshore and seabed issue alluded to above is an example of how the Crown has been resistant to recognizing Maori property rights. The two significant pan-tribal settlements concern commercial salt-water fisheries and Central North Island forests.[144] The commercial fisheries settlement was negotiated in 1992 and dubbed the "Sealord deal."[145] It included cash compensation, 50% shareholding in Sealord Products Limited, 10% of fish stocks introduced into the quota management system in 1986, and 20% of all new stock brought into the system thereafter (now valued at around NZ$750 million).[146] The Central North Island forests settlement was negotiated in 2008 and dubbed the "Treelord deal."[147] It included return of ownership to iwi of 176,000 hectares of forest valued at NZ$196 million and about NZ$223 million paid to the claimant tribes.[148] It is also thought that the tradeable carbon credits could be valued at between NZ$50 and NZ$70 million.[149]

In regard to legislated tribal settlements, more than 18 groups have received redress, amounting to a total value of more than NZ$921 million (with the largest cash compensation paid to single tribes being NZ$170 million).[150] Nonetheless, several parameters determine the scope of the negotiations: the Crown "strongly prefers to negotiate claims with large natural groupings rather than individual whanau and hapu,"[151] and

---

[142] *See* Maori Commercial Aquaculture Claims Settlement Act 2004 (N.Z.).

[143] *See* Central North Island Forests Land Collective Settlement Act 2008 (N.Z.).

[144] *See id.*; Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

[145] *See* Paul Moon, *The Creation of the "Sealord Deal"*, 107 J. POLYNESIAN SOC'Y 145 (1998), *available at* http://www.jps.auckland.ac.nz/document/?wid=5006.

[146] *See* Maori Fisheries Act 2004, pmbl. (N.Z.); *Te hi ika – Maori Fishing: Fisheries Management and Practice*, TE ARA, http://www.teara.govt.nz/en/te-hi-ika-maori-fishing/6 (last updated Mar. 2, 2009). For commentary on the settlement and legislation, see *Legislation & Policy*, TE OHU KAIMOANA, http://teohu.maori.nz/legislation_policy/index.htm (last visited Nov. 25, 2011).

[147] *See* Yvonne Tahana, *Iwi Look at Treelords Deal Top-Ups*, NZHERALD.CO.NZ (June 26, 2008, 5:00 AM), http://www.nzherald.co.nz/news/print.cfm?objectid=10518432.

[148] N.Z. Office of Treaty Settlements, *Deed of Settlement*, TERABYTE.CO.NZ, http://nz01.terabyte.co.nz/ots/DocumentLibrary/CNIsummary.pdf (last visited Nov. 25, 2011).

[149] *Treelord Treaty Deal 'Could Be Done in June'*, STUFF.CO.NZ (Jan. 5, 2008, 8:55 AM), http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/396301.

[150] *See Claims Progress*, N.Z. OFFICE OF TREATY SETTLEMENTS, http://www.ots.govt.nz/ (follow "Settlement Progress" hyperlink; then follow "Progress of Claims" hyperlink) (last updated July 21, 2011).

[151] OFFICE OF TREATY SETTLEMENTS, HEALING THE PAST, BUILDING A FUTURE 15 (Summary ed., 2006), *available at* http://nz01.terabyte.co.nz/ots/DocumentLibrary/HealingSummaryreprint.pdf. Note that cross-claim boundary disputes are often at issue. For example, see cases such as *N.Z. Maori Council v Att'y-Gen.* [1987] 1 NZLR 641 (CA); and *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87 (HC); and also WAITANGI TRIBUNAL, THE REPORT ON THE IMPACT OF THE CROWN'S TREATY SETTLEMENT POLICY ON TE ARAWA WAKA (2007), *available at* http://www.waitangi-tribunal.govt.nz/reports (search Wai No. 1353); and WAITANGI TRIBUNAL, TAMAKI

is attempting to settle all grievances within a tight budget and timeframe. Another explicit policy is that no large tracts of conservation land can be returned to Maori as part of Treaty of Waitangi settlements. While this policy is being fiercely debated by tribes in the North Island, the tribe that has the largest amount of its traditional lands encased in the conservation estate—Ngai Tahu on the South Island—settled with the Crown in 1998. On the ownership front, Ngai Tahu were only able to secure a seven-day vestment of Aoraki/Mount Cook, the mountain that stands as the centerpiece of the Aoraki/Mount Cook National Park and is the country's tallest mountain.[152] At the expiry of the seven days, Ngai Tahu must gift the mountain back to the nation.[153] The tribes in the North Island are all at various stages of seeking ownership of the four national parks that lie in the North Island: Tongariro, Taranaki, Urewera, and Wanganui.[154]

Similarly, the Government has refused to negotiate iwi ownership of oil and gas despite a Waitangi Tribunal report recommendation to do so.[155] Likewise, the Government was not prepared to countenance Maori arguments in the courts that they owned the foreshore and seabed as Maori customary land, and enacted a law to stop the possibility. The Foreshore and Seabed Act 2004 (now repealed) stated: "the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property."[156] The replacement statute, the Marine and Coastal Area (Takutai Moana) Act 2011 does something slightly different. It states: "Neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area, as in existence from time to time after the commencement of this Act."[157] This new 2011 Act, however, does contain an exciting possibility for Maori: the ability to seek "customary marine title" to specific stretches of the foreshore and seabed.[158] This new statutorily created property title will enable Maori to have an inalienable title to this land, but it is expected that very few stretches of land under salt water, either permanently or temporarily, will

MAKAURAU SETTLEMENT PROCESS REPORT (2007), *available at* http://www.waitangi-tribunal.govt.nz/reports (search Wai no. 1362).

[152] ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 236 (2010).

[153] Ngai Tahu Claims Settlement Act 1998, §§ 13–18 (N.Z.).

[154] MILLER ET AL., *supra* note 152, at 236.

[155] *See* WAITANGI TRIBUNAL, THE PETROLEUM REPORT 79 (2003), *available at* http://www.waitangitribunal.govt.nz/reports (search for Wai No. 796). For discussion of this as a continuing live issue see Kelly Loney, *Iwi Begins Submission on Oil Issue*, TARANAKI DAILY NEWS (Apr. 27, 2010, 5:00 AM), http://www.stuff.co.nz/taranaki-daily-news/news/3625114/Iwi-begins-submission-on-oil-issue.

[156] Foreshore and Seabed Act 2004, § 13(1) (N.Z.). Note that the "public foreshore and seabed" is defined as meaning the foreshore and seabed but "does not include any land that is, for the time being, subject to a specified freehold interest." *Id.* § 5.

[157] Marine and Coastal Area (Takutai Moana) Act 2011, § 11(2) (N.Z.).

[158] For a definition of this term, see *id.* § 9(1).

be classified under this title.[159] This is because the statutory test that Maori will need to prove in the courts is exceedingly tough. For instance, a Maori group would have to prove that it holds the relevant land under salt water in accordance with Maori customs and values to a level that accords with exclusive use and occupation since 1840 without substantial interruption.[160] In conclusion, while the Treaty of Waitangi settlement process does provide some recognition of Maori property rights, it is limited to what the government feels appropriate. Discovery ideology is still obviously present here and provides an explanation for why the government endorsed the Declaration with caveats. Nonetheless, is there future legal scope for the Declaration to influence a more inclusive Maori notion of rights to own, govern, and manage property?

IV. CONCLUSION: A NEW DISCOURSE OF "RECONCILED PARTNERSHIP" FLOWING FROM ENDORSING THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES?

In 2010, when Aotearoa New Zealand signalled its support for the Declaration, Prime Minister John Key stressed: "While the declaration is non-binding, it both affirms accepted rights and establishes future aspirations. My objective is to build better relationships between Maori and the Crown, and I believe that supporting the declaration is a small but significant step in that direction."[161] But, in the House of Representatives, during question time, Key assured members of parliament: "It is not a treaty, it is not a covenant, and one does not actually sign up to it. It is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework."[162] And in regard to a direct question concerning the scope of article 26 of the Declaration that asserts that Indigenous peoples have the right to the lands they have traditionally owned, occupied, used, or acquired,[163] Key blandly answered:

> We support that only where it is consistent with the Treaty of Waitangi. I might add that last year Australia affirmed the United

[159] Yvonne Tahana, *Harawira: Few Maori Will Pass Foreshore Ownership Threshold*, NZHERALD.CO.NZ (Sep. 17, 2010, 12:07 PM), http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10674156.

[160] Marine and Coastal Area Act 2011, §§ 58–59.

[161] Press Release, John Key, Prime Minister, National Govt to Support UN Rights Declaration (Apr. 20, 2010), http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration.

[162] [2010] 662 NZPD 10238 (N.Z).

[163] *Id.* at 10239 (Hon. Rodney Hide: "Does his Government support article 26 of the declaration, which states: '. . . Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired.'; if so, can he tell the House which parts of New Zealand or which natural resource were not traditionally owned, occupied, or otherwise used or acquired by Maori before European settlement?").

> Nations Declaration on the Rights of Indigenous Peoples, as has the vast majority of the world. The last time that I looked, the indigenous people of Australia were not taking control of the entire country, nor were other indigenous peoples around the world. It is a non-binding, aspirational goal. Where it is consistent with the Treaty of Waitangi, Maori will have their lands.[164]

This last sentiment concerning consistency with the Treaty deserves attention. As discussed above, the Treaty of Waitangi does not provide redress for Maori in the courts, because to date it has not been incorporated into legislation in a manner that would allow the courts to do this.[165] Moreover, while the Treaty of Waitangi claim-settlement legislation does return some land to Maori, it is only land that the Crown has permitted (and of concern to Maori, does not include large tracts of land within the conservation estate). On this point, the Declaration purports to go much further in recognizing the rights of Indigenous peoples to all of their traditional lands. Still, there is some consistency between the two international documents.

Importantly, the Treaty of Waitangi jurisprudence commits to a relationship of partnership, as does the Declaration. The Declaration's preamble reads: "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States."[166] The landmark case to interpret the statutory phrase "the principles of the Treaty of Waitangi," is aligned with this notion that treaties provide a basis for partnership. The 1987 Court of Appeal decision, *New Zealand Maori Council v Attorney-General*[167] had to determine the significance of section 9 of the State-Owned Enterprises Act 1986: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."[168] This wording was unique—no other statute had ever confined those with statutory power to have some level of regard to the Treaty of Waitangi.[169] At that time, the judicial mindset was still mostly steeped in the *Wi Parata* idea that the Treaty was "a simple nullity."[170] Maori took the opportunity afforded by this section to argue in the courts that the Crown had to act consistently with the Treaty in transferring its assets to state-owned business-focused enterprises.[171] They were successful.[172]

---

[164] *Id.*

[165] *See supra* Part III.B.

[166] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 23, pmbl., para. 15.

[167] [1987] 1 NZLR 641 (CA). To appreciate the importance of this case, see generally "IN GOOD FAITH" SYMPOSIUM PROCEEDINGS MARKING THE 20TH ANNIVERSARY OF THE LANDS CASE (Jacinta Ruru ed., 2008).

[168] State-Owned Enterprises Act 1986, § 9 (N.Z.).

[169] MILLER ET AL., *supra* note 152, at 230.

[170] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78 (SC).

[171] *See N.Z. Maori Council* [1987] 1 NZLR at 642.

All five justices (Cooke, Richardson, Somers, Casey, and Bisson) concurred to state that partnership, reasonableness, and good faith are the hallmarks of the expression "the principles of the Treaty of Waitangi."[173] Justice Cooke specifically stated that the Treaty can no longer be treated as a "dead letter"[174] and to do so "would be unhappily and unacceptably reminiscent of an attitude, now past."[175] Justice Cooke concluded: "[Treaty] principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality."[176] He stressed the importance of not freezing Treaty principles in time: "What matters is the spirit. . . . The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."[177] Justice Richardson observed that: "[t]he obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi,"[178] and Justice Somers likewise stated: "Each party in my view owed to the other a duty of good faith."[179] Justice Casey emphasized the importance of an "on-going partnership,"[180] and Justice Bisson described the Treaty principles as "the foundation for the future relationship between the Crown and the Maori race."[181] And, in a final paragraph inserted at the conclusion to the published unanimous judgment, Justice Cooke offered a reflection on how the Treaty partners were trying to work out the details of how Maori land claims could be safeguarded when land is transferred to a state enterprise. He stated, in what are the final lines to a 69-page Court of Appeal judgment, that "[t]he Court hopes that this momentous agreement will be a good augury for the future of the partnership. Ka pai."[182]

On May 31, 2011, James Anaya, the current United Nations Special Rapporteur on the Rights of Indigenous Peoples, released his report on Maori in Aotearoa New Zealand that recognizes the aligned commitment to partnership.[183] This report applauds some of the commitments made to Maori, including the Treaty of Waitangi settlement process as "one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples," but states that

[172] *Id.*
[173] *Id.*
[174] *Id.* at 661.
[175] *Id.*
[176] *Id.* at 667.
[177] *Id.* at 663.
[178] *Id.* at 682.
[179] *Id.* at 693.
[180] *Id.* at 703.
[181] *Id.* at 714.
[182] *Id.* at 719.
[183] Special Rapporteur on the Rights of Indigenous Peoples, *Addendum to Report: The Situation of the Maori People in New Zealand*, ¶ 11, Human Rights Council, U.N. Doc. A/HRC/18/35/Add.4, Annex (May 31, 2011) (by James Anaya).

it does have "evident shortcomings."[184] For example, an "overarching concern" is that the Treaty-settlement negotiation process "is flawed from the outset because the party responsible for the breaches of the Treaty of Waitangi—the Government—is wholly responsible for determining the framework policies and procedures for redress for those breaches, resulting in a situation that is inherently imbalanced and unfair to Maori."[185]

Partnership is a cornerstone commitment for Crown–Maori relationships and is endorsed in both the Treaty and the Declaration. This bodes well for developing a continuing relationship. But it also means that there ought to be a fundamental shift in understanding Maori rights to property, including land and natural resources. In the first 12 or so months since endorsing the Declaration, there does not appear to have been a dramatic change. For instance, the most recent statute that has been enacted that goes to the heart of claimed Maori property rights—the Marine and Coastal Area (Takutai Moana) Act 2011—still adheres to a Discovery mindset. This statute repealed the controversial Foreshore and Seabed Act 2004.[186] The 2011 Act is comparatively a little better on the property question, but not much. The Foreshore and Seabed Act 2004 had asserted that the Crown owns the foreshore and seabed.[187] The new 2011 Act states that no one owns it.[188] The new 2011 Act makes it more tempting for Maori to seek through the courts territorial and use rights to the foreshore and seabed and makes it slightly easier for them to establish these rights.

One of the most highly regarded Maori judges, now-retired High Court Justice Eddie Durie (and past Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal), was reported in the media as labeling New Zealand's commitment to the Declaration as "the most significant day advancing Maori rights since the Treaty of Waitangi."[189] Durie is reported as accepting that the Declaration, like the Treaty, only has moral force in law, but that "[i]mportant statements of principle established through international negotiation and acclamation filter into the law in time, through both governments and the courts, which look constantly for universal statements of principle in developing policy of deciding cases."[190] The Declaration, like the Treaty of Waitangi, will hopefully have some impact on our domestic journey towards reconciliation.

---

[184] *Id.* ¶ 67.

[185] *Id.* ¶ 35.

[186] *See* Marine and Coastal Area (Takutai Moana) Act 2011, § 5 (N.Z.).

[187] Foreshore and Seabed Act 2004, § 13 (N.Z.).

[188] Marine and Coastal Area (Takutai Moana) Act 2011, § 11(2).

[189] Tracy Watkins, *Judge Hails Big Advance for Maori*, STUFF.CO.NZ (Apr. 22, 2010, 5:00 AM), http://www.stuff.co.nz/national/politics/3608428/Judge-hails-big-advance-for-Maori.

[190] *Id.*