THE UN DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES - THE INTERNATIONAL AND CONSTITUTIONAL LAW CONTEXTS

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I INTRODUCTION

The Minister of Justice in his presentation to the ILA/ICJ Seminar in 1997 described the New Zealand Government's policy towards the Draft Declaration on the Rights of Indigenous Peoples[1] in its present form. His presentation and the subsequent discussion made the point that many of the same issues also arise in settling historical claims for breaches of the Treaty of Waitangi and securing its future observance. I wish to look at the context in which policy in both these areas should be evaluated and developed.

I shall identify first key issues of international law, then look at the relationship between the Draft Declaration and the Treaty, and finally look at some implications of both for the New Zealand legal system and our national society. In doing so, I will concentrate on the political rights of indigenous peoples. The Draft Declaration

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1 U N Doc E/CN4/Sub2/1994/2/Add1.

recognises that, as well as having the right to participate fully in the political life of the nation along with all other citizens[2], indigenous peoples have the right of self-determination.[3] The exercise of that right includes the right to autonomy or self-government in matters that relate to their internal and local affairs, as well as ways and means for financing those functions.[4] It also includes the right of indigenous peoples to participate, through procedures determined by them, in decision-making about matters that may affect their rights, lives and destinies. States are to obtain the free and informed consent of the peoples concerned before implementing legislative measures dealing with such matters.[5]

These political rights, especially the over-arching right of self-determination, provide a basis for the other substantive provisions of the Draft Declaration. These recognise the rights of indigenous peoples to human rights and freedom from discrimination,[6] to their lands and natural resources,[7] to social welfare and development[8] and to their physical and cultural integrity,[9] as well as to measures for the implementation of their substantive rights.[10]

Here, I want to focus on the *principles* underlying the key political rights, not the way they are expressed in the text. Once the substance of these principles is agreed upon, it should be possible to resolve fairly easily the ambiguities and uncertainties which lawyerly eyes discern in some parts of the text.

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2 Article 4. See also art 5 under which every indigenous individual has the right to a nationality.

3 Article 3.

4 Article 31.

5 Articles 19 and 20. The language used in these articles contains significant variations. Article 19 refers to "matters which may affect their rights, lives and destinies". Article 20 refers to "legislative or administrative measures that may affect them". Presumably, the potential effect of such measures on an indigenous people must be different from their potential effect on citizens generally. The relationship between the two articles needs to be clarified.

6 Articles 1, 2 and 18.

7 Articles 25 - 30.

8 Articles 21 - 24.

9 Articles 6 - 17 and 32 - 35.

10 Articles 36 - 45.

A Evolving international human rights norms

My starting point is that the Draft Declaration codifies and develops an aspect of the international law of human rights.[11] This body of law sets standards about the way in which states may treat their own citizens.

Obvious questions are: Why is international human rights law concerned with the rights of the world's indigenous peoples?[12] Generally speaking, they form only *part* of the populations of states. If indigenous peoples have the right of self-determination, how is this to be squared with the principle of international law requiring respect for states' territorial integrity? Are the political rights of indigenous peoples consistent with the elimination of racial discrimination? And even if they are, what are their implications for the powers of governance of states under their own constitutions? Can special rights for one sector of the community be reconciled with the democratic right of all citizens to

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11 The Draft Declaration is being formulated under the auspices of the United Nations Human Rights Commission and its Sub-Commission on Prevention of Discrimination and the Protection of Minorities. Up till now, most of the work has been done by a panel of experts with the extensive participation of non-governmental organisations, including those representing indigenous peoples themselves. Now the Draft is being considered by Governments, but with the ongoing participation of organisations representing indigenous peoples. Its adoption by the United Nations General Assembly is a major objective of the International Decade of the World's Indigenous Peoples: UN General Assembly Resolution 50/157, adopted without a vote on 21 December 1995.

In substance, the Draft Declaration builds on established international human rights doctrines including the protection of the rights of minorities and also on International Labour Organisation Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 1989. This Convention revised the Indigenous and Tribal Populations Convention (No 107) 1957. Both were adopted without much participation of indigenous peoples. Neither included a right of self-determination. Convention No 169 expressly denied that any international law implications flowed from the use of the term "peoples": Art 1(3).

12 The Draft Declaration contains no definition of "indigenous peoples". They are to have the collective and individual right to identify themselves as indigenous and to be recognised as such: see art 8. However, a working definition recognises that they have the following characteristics:

> first, they have a historical continuity with the societies that developed in particular territories before they were conquered or colonised;
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> secondly, they consider themselves to be a distinct and non-dominant sector of the present society of the territory;
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> thirdly, they are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

See Jose R Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, paras 379-381, UN ESCOR, UN Sub-Commission on Prevention of Discrimination and the Protection of Minorities, E/CN4/Sub2/1986/7/Add4.

participate in the political process and the principle of equality before the law? What are the implications for the social cohesion of the community as a whole?

B What indigenous peoples are seeking to achieve

In trying to answer these questions we must first of all understand that, through the Draft Declaration, indigenous peoples are seeking room for their unique value systems to operate, within the legal systems of the states in which they live. These legal systems are usually based on the dominant culture in the national society.

One leading international law scholar considers that recognition and implementation of the rights of indigenous peoples will depend on the extent to which the members of dominant cultures can identify, and then suspend, the operation of their own cultural conditioning. Often, this conditioning leads dominant groups to assume that indigenous values should yield to the universal validity and superiority of their own cultural assumptions. He points out that it is not easy to open ourselves to the realities of each other's inner worlds:[13]

> ... the ideas and emotions we must identify in ourselves are often held at levels of consciousness so deep that we are unaware of them. At the same time they exercise profound influence over what we see, how we see, and how we react.

The need to try to understand one another's inner worlds is the key to evaluating the Draft Declaration in the three contexts already mentioned - international law, the Treaty of Waitangi, and the New Zealand legal system.

II INTERNATIONAL LAW

A The landmark developments

The content of present-day international law has been greatly influenced by two seminal concepts explicitly recognised in the United Nations Charter: respect for the principle of equal rights and self-determination of peoples[14] and for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.[15] These have been the mainspring of the decolonisation process and the growing number

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13 W Michael Reisman, *International Law and the Inner Worlds of Others*, (1996) 9 St Thomas Law Review 25, 31.

14 Article 1(2).

15 Article 1(3).

of international instruments, comprising both treaties and declarations, that have come to be known as the United Nations Bill of Human Rights.[16]

In practice, indigenous peoples had access to the decolonisation process only if they inhabited non-self-governing territories separated by "blue water" from the metropolitan territory of the administering power. To provide a basis in international law for trying to ameliorate the plight of colonised peoples within States that were already independent, specially the indigenous, Indian and coloured peoples of southern Africa, the United Nations General Assembly and other UN organs took new initiatives. These were rooted in international human rights doctrines but appealed also to the commitment to eradicate colonialism in all its forms. They included the adoption by the United Nations General Assembly, in December 1965, of the International Convention on the Elimination of All Forms of Racial Discrimination.

A year later, in December 1966, the General Assembly adopted the two International Covenants on Human Rights - one on Civil and Political Rights and the other on Economic, Social and Cultural Rights. These instruments proclaimed an indispensable link between the right of self-determination of peoples and the observance of individual human rights and fundamental freedoms. Each contained, as the first paragraph of its first article, the following provision:[17]

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

My late husband, involved at the time as a member of New Zealand delegations to sessions of the UN General Assembly, has described the controversy which preceded the inclusion of common article 1:[18]

> From the point of view of Western countries it seemed the height of artificiality to talk about an individual right of self-determination, which could be exercised at any time by any person to determine the state or nation to which he would belong. ... To be sure, there was a principle of self-determination, which was of vital importance, but which had to be applied in accordance

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16 The treaties impose contractual obligations on the states that become parties to them. The declarations record existing and developing standard-setting norms. This body of law is a main source of the customary international law of human rights, binding on all states whether or not they have signified their express agreement.

17 The provision reproduced the substance of para 2 of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514(XV), 14 December 1960.

18 R Q Quentin-Baxter "International Protection of Human Rights" in Keith ed, *Essays on Human Rights* (Sweet & Maxwell (NZ) Ltd, Wellington, 1968) 134.

> with political decisions. In effect, the reply of the vast majority was that they did not wish to place upon this right as strict an interpretation as we were suggesting; ... for them the right of self-determination symbolised the end of colonialism, the right of every people to be free. As far as they were concerned, therefore, this was the right upon which all other rights depended. After many a rearguard battle had been fought, the majority ... insisted upon the inclusion of the right of self-determination in ... both Covenants ....

Despite the emphasis at the time on the exercise of the right of self-determination by the peoples of non-self-governing territories, there is ample evidence that article 1 of the Covenants does not apply only to such peoples.[19] The reference to "all peoples" means what it says. The Government of New Zealand has become a contracting party to the Covenants, along with more than 135 other states.[20]

B The right of self-determination of indigenous peoples

The Draft Declaration on the Rights of Indigenous Peoples is firmly rooted in the landmark international law developments just described.[21] It expresses their right of self-determination in the same terms as in article 1(1) of the Covenants, with the substitution of a reference to "indigenous peoples" instead of "all peoples". The inclusion of this right of self-determination - at least in an unqualified form - is almost as controversial, and for the same reason. Once again, the debate is being conducted on different planes.

Governments are concerned about the international law implications. A supposition that the right of self-determination necessarily connotes a right of secession raises the question of how its exercise by a people within a state is to be reconciled with the maintenance of the state's territorial integrity. Some argue that only the entire population of an existing state constitutes a "people" with a right of self-determination. Hence the view that distinct sectors of the population are not "peoples", or if they are, that such

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19 On ratifying the Covenants, the Government of India entered a reservation to the effect that the right of self-determination pertains only to "peoples under foreign domination". It has no application to "sovereign independent States or to a section of a people or nation - which is the essence of national integrity": UN, *Human Rights, Status of International Instruments*, UN Doc. ST/HR/5, 1987, 9. The Governments of France, the Federal Republic of Germany and the Netherlands objected to the reservation on the ground that the right of self-determination set out in the Covenants applies to all peoples: *Ibid*, 18ff. See generally, Cassese *Self-determination of Peoples* (Cambridge University Press, 1995).

20 As at 31 December 1996.

21 See especially the fourth, fifth, fourteenth, fifteenth and sixteenth preambular paragraphs.

peoples have only the right of "internal", as distinct from "external", self-determination. That would exclude any right to secede.[22]

Professor James Anaya of the University of Iowa argues convincingly that it is a mistake to equate self-determination with the decolonisation regime which led in most cases to the emergence of new independent states.[23] He sees the right as setting qualitative standards rather than prescribing particular outcomes:[24]

> First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order ... be one under which people may live and develop freely on a continuous basis .

On this analysis, a right of self-determination for indigenous peoples would mean that they and their members are entitled to be full and equal participants in the creation of the institutions of government under which they live, and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.

These norms would not require a state for every 'people'.[25]

Whether or not the precise terms of Anaya's analysis are accepted, it seems clear that, if the right of self-determination is a generalised right of all "peoples", capable of being exercised in a variety of contexts, the outcomes of its exercise must also vary. International law prescribes the legitimate outcomes when the right is exercised by the peoples of non-self-governing territories. The approved range[26] emerged from a

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22 See especially Cassese, above n 19. In trying to pinpoint the present state of international law on the scope and meaning of the right of self-determination, some commentators seem at times to place undue weight on the statements of the representatives of states made in the course of contentious debate in the negotiating forums from which particular texts emerged. These are not necessarily evidence of the actual practice of states or of the extent to which that practice has normative value.

23 S James Anaya *Indigenous Peoples in International Law* (Oxford University Press, New York & Oxford, 1996) 80.

24 Above n 23, 81. Anaya's analysis is supported by the wording common to the Covenants and the Draft Declaration: "By virtue of that right [self-determination] they ["all peoples" or "indigenous peoples"] freely determine their political status" - the constitutive aspect - "and freely pursue their economic, social and cultural development" - the ongoing aspect of self-determination.

25 Above n 23, 87.

26 Independence, integration with an independent state or self-government in free association with an independent state. Arguably, "the emergence into any other political status freely determined

succession of UN General Assembly resolutions. In other circumstances international law recognises the tension

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by a people" is also an option: see Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625(25)1971.

between the application of the principle or right of self-determination and the maintenance of the territorial integrity of states.[27]

To that extent, international law already circumscribes the exercise of the right of self-determination by indigenous peoples. The Draft Declaration prescribes the main outcomes of its exercise. They do not include secession. The whole thrust of the Draft is that the indigenous peoples concerned will remain full members of their national societies.

Why then have the representatives of indigenous peoples taking part in meetings in Geneva set their faces against an express provision precluding any right to secede? Anaya supplies one answer. While in most cases involving indigenous or other peoples, secession would be a cure worse than the disease, it may be an appropriate remedial option in limited contexts where substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the welfare of all concerned.[28] I believe there is also another and more compelling answer.

The unqualified right of self-determination of indigenous peoples, in common with all other "peoples", has a powerful symbolism. It affirms that, despite the incorporation of the territories they traditionally occupied within the borders of present-day states, indigenous peoples have retained their distinct cultural identity and the right to control their own lives. As was the case when the Covenants were being negotiated, the right of self-determination is perceived as the right on which all other rights depend.

The fact that the International Covenants recognise the unqualified right of self-determination of *all* peoples has not deterred states from becoming parties. In my view they should be able to accept such a right for *indigenous* peoples now, in the expectation that international law will continue to set parameters for its exercise.

C Autonomy and participation in decision-making

I would now like to turn to the outcomes of the exercise of the right of self-determination by indigenous peoples contemplated by the Draft Declaration: the rights of

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27 See, for example Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625(25)1971; Final Act of the Conference on Security and Cooperation in Europe (Helsinki), 197514 ILM, 1292. See also United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514(XV), 14 December 1960, though in the context the reference to the "national unity and territorial integrity of a country" primarily reflects the insistence of some states, particularly in Africa, that the exercise of the right of self-determination by a people of a non-self-governing territory should respect the existing colonial boundaries.

28 Above n 23, 84-85 and the authorities cited in Anaya's footnote 71.

indigenous peoples to internal autonomy or self-government and to participate in the decision-making process on other matters that closely affect them, through procedures determined by them, reinforced by a power of veto if agreement cannot be reached.

The immediate reaction of some may be that such arrangements would be discriminatory and would even amount to apartheid - the very kind of separate institutions that were universally condemned as long as they were in force in southern Africa. The answer is that the international instruments forbidding racial discrimination look at the consequences of the different treatment of particular groups, not the mere fact of different treatment in itself. The international community did not adopt the approach of the International Court of Justice in the *Southwest Africa* case which had held that there was no need to investigate or determine the questions of intent behind the policy of apartheid or its effect upon the welfare of the inhabitants.[29]

Both the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Suppression and Punishment of the Crime of Apartheid forbid measures which deny fundamental human rights and freedoms, including political rights, to sections of a national community.[30] Because the practice of apartheid had that kind of exclusionary effect, it involved racial discrimination. In contrast, the Draft Declaration prescribes different treatment for indigenous peoples with the object of enhancing, rather than impairing their political and other rights. In doing so, it does not nullify or impair the "enjoyment or exercise on an equal footing of human rights and fundamental freedoms" [31] by members of non-indigenous cultures.[32]

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29 1971 ICJ Reports 6, 57.

30 Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination defined "racial discrimination" as meaning any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of *nullifying or impairing* the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of human life. (Emphasis added.)

Similarly, art 2(c) of the International Convention on the Suppression and Punishment of the Crime of Apartheid prohibits any legislative and other measures calculated to *prevent* a racial group or groups from participation in the political, social, economic and cultural life of the country ... (Emphasis added.)

31 Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination as quoted above n 29.

32 Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination allows special but temporary measures to secure the "adequate advancement of certain racial or ethnic groups or individuals" in order to ensure their equal enjoyment of human rights and fundamental freedoms. This provision originated from a desire to ensure that such

This proposition is borne out by the established jurisprudence of the European Commission on Human Rights and the European Court of Human Rights on the differential treatment of particular groups. Such treatment constitutes discrimination in the enjoyment of human rights and freedoms, including political rights, under the European Convention on Human Rights, only if it has no objective and reasonable justification, and lacks a legitimate end, or lacks proportionality between the means employed and the end sought.[33] In international forums there have been few, if any, echoes of the constitutional challenges alleging "reverse discrimination" made by some members of dominant cultures in the United States, particularly in respect of measures to overcome the consequences of past discrimination against African Americans. There is ample warrant in state practice for the legitimacy of arrangements recognising the autonomy of indigenous and other distinct communities, and in some cases the need to obtain their agreement to measures closely affecting them.

In the United States, native American (Indian) tribes, although not other indigenous peoples like native Hawaiians, have always been recognised as distinct political entities outside the ambit of the Constitution. Measures affecting them, including those for their self-government, have been accepted by the majority culture without constitutional challenge. Canada, too, accepts, and in some cases has already implemented, a right of self-determination for its indigenous peoples which respects the political, constitutional and territorial integrity of the State.[34]

The recent Fiji Constitution Review Commission found that the international human rights standards did not preclude the recognition of group political rights. Although the Commission was mainly concerned with the treatment of groups in Fiji's national political institutions, it also had to evaluate the long-existing separate systems for the governance of the indigenous Fijian and Rotuman peoples. It recommended the continuance of constitutional protection for these systems, as long as the laws made

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special measures were not to be regarded as, or to become, discrimination against the disadvantaged groups or individuals concerned. See McKean *Equality and Discrimination under International Law* (Oxford, Clarendon Press, 1983) 153, 158-9. Its purpose was not to reassure the groups or individuals who do not benefit from the special measures that these will be discontinued as soon as possible.

33 Case *De Geillestreerde Pers N V v The Netherlands*, 6 July 1976, 1976 D R, para 94; *Marckz* Case, Judgment of 13 June 1979, Series A, Vol 31, para 33; Case of *Abdulaziz Calabes and Palkandali*, Judgment of 28 May 1985, Series A, Vol 94, para 72; *Inze* Case, Judgment of 28 October 1987, Series A, Vol 126, para 41; *Darby* Case, Judgment of 23 October 1990, Series A, Vol 187, para 131.

34 Canadian statement to the UN Working Group on art 3 of the Draft Declaration on the Rights of Indigenous Peoples, November 1996.

under them did not discriminate among members of the group to which they applied or deny them any other human right or fundamental freedom.[35]

D Majority rule under a democratic constitution not sufficient

Some people might think that the right of self-determination is satisfied, once all the citizens of a country are entitled to take part in democratic government on a basis of equality. This approach overlooks the fact that, in societies that are not homogeneous, majority rule by itself is often an inadequate way of protecting the interests of minority and other non-dominant groups.

Many countries have recognised group political rights as a legitimate way of meeting the concerns of particular groups which fear that they would be neglected or swallowed up if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium, described by Professor Arend Lijphart as "consociational" democracies. Whenever possible, the group has been given autonomy in matters that concern it. When autonomy is not possible because the interests of other groups or the State as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power.

What are the implications of such arrangements for racial harmony and national unity? In the consociational democracies of Western Europe, the fact that individuals, as well as being members of distinct linguistic, religious or regional communities, also have strong, cross-cutting identities has prevented fragmentation. The consociational arrangements have proved a valuable safety valve, reducing tensions among different communities.

In Spain, ETA, the militant Basque separatist organisation, has steadily lost support as the autonomy granted by post-Franco Governments has led to the creation of regional governments and a special status for Basques and Catalans. Nearer to home, in the Fiji Islands, the fact that the indigenous Fijians continue to be guaranteed the maintenance of their land rights and chiefly system as well as their own system of law-making and administration has been a major factor in persuading them to restore democracy at the national level.

I shall come back to the question of special rights for a section of the population in the third main section of this paper when I look at how the New Zealand legal system can

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35 *The Fiji Islands: Towards a United Future*, Report of the Fiji Constitution Review Commission, Parliament of Fiji Parliamentary Paper No 34 of 1996, paras 3.100 and 17.90 and Recommendation 641.

accommodate political rights for indigenous peoples as contemplated by the Draft Declaration.

E Negotiations required to give effect to political and other rights

My last point in speaking about the international law context is that the political and other rights of an indigenous people will often need to be implemented by arrangements agreed to through negotiation with the state authorities.[36] That does not mean that the rights are empty ones. In both international and domestic law, the duty to negotiate in good faith in an endeavour to reach agreement is accepted as the best, and indeed the only, way of reconciling the competing rights and resolving the conflicting interests that are characteristic of our complex modern society. Negotiations to give effect to the rights set out in the Draft Declaration would not be at large. Both parties would have the protection of negotiating within the framework of mutually accepted, overarching principles.

III THE TREATY OF WAITANGI

A The interaction of international and national law

My first point under this heading is that international law and domestic law and practice are mutually supportive. In developing and applying international law, policy advisers, negotiators and international and national tribunals look to state practice for evidence of established or emerging norms. In developing and applying domestic law and policy, decision-makers in all branches of government seek to achieve consistency with the international standards. Not surprisingly, this capacity for cross-fertilisation is particularly strong in the human rights area.

The experts and non-governmental organisations that have taken part in the work on the Draft Declaration, have been influenced by the experiences of particular indigenous peoples, including Maori. I do not suggest that there is an exact correspondence between the provisions of the Treaty of Waitangi and those of the Draft Declaration, but the main concepts run in parallel. Under the Treaty the Queen is to have *kawanatanga*, rendered as "sovereignty" in the English text; Maori are to have the full rights of citizens, but they are also guaranteed *tino rangatiratanga*, rendered as "full exclusive and

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36 That is demonstrably true for the peoples of non-self-governing territories exercising their right of self-determination through self-government in free association with an independent state - an option chosen by the Cook Islands and by Niue - or integration with an independent state. The availability of these options depends on successful negotiations with the independent state concerned. For an analysis of the role of negotiation in implementing the exercise of the right of self-determination and other political rights of indigenous peoples, see Anaya, above n 23, 129-132.

undisturbed possession" of their lands and estates and their other *taonga*, rendered as "forests, fisheries and other properties".

The Treaty stands in its own right as a source of rights and obligations as between Maori and the Crown. Its authority does not depend on anything in the Draft Declaration or other international law source.[37] I will not attempt to go into the long story of how the Treaty has been seen at different times since 1840 by Maori on the one hand and the settler community and their descendants on the other.

In the light of the changes in thinking within the non-Maori community that have occurred in my lifetime, and the growing Maori involvement in national life, I think it is now inconceivable that any New Zealand Government would call in question the sanctity of the rights and obligations created by the Treaty. However, there is not yet a shared and generally accepted view within the two communities about how these rights and obligations are to regulate their ongoing relationships. In trying to develop an understanding which accommodates their different world views, the ongoing work on the Draft Declaration on the Rights of Indigenous Peoples is helpful in two ways.

B The Treaty does not stand alone

First, it demonstrates that there is nothing unusual or anachronistic in regarding the Treaty of Waitangi as a continuing source of fundamental principles governing the relationship between Maori and other New Zealanders. The Treaty is the main vehicle through which Maori have expressed and seek to fulfil their yearning to survive as a distinct people. Other indigenous peoples have the same yearning. The dominant and indigenous cultures in New Zealand are not alone in their search for ways of accommodating their different perspectives in the nation's laws and policies.

C A Declaration on the Rights of Indigenous Peoples as a source of principles for implementing the Treaty

Secondly, a Declaration on the Rights of Indigenous Peoples could, I believe, be helpful in pointing us towards ways of giving effect to the Treaty, not only in settling claims for historical breaches, but also in the future life of our nation. Specifically, it might help us reconcile the consequences of the cession by Maori of *kawanatanga* and their retention of *tino rangatiratanga*.

In 1993, the Waitangi Tribunal launched its *Rangahaua Whanui* research programme to identify, on a district and national theme basis, patterns of historical grievances and injuries as evidenced by individual claims for breaches of the Treaty. The object was to

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37 Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) 102-3; Anaya, above n 23, 132.

assist the Tribunal and the country as a whole in understanding where the Treaty claims process was heading. Only then would it be possible to alleviate a problem of national proportions, set the ground for independently negotiated settlements and help to generate widely agreed guidelines for the resolution of historical Maori grievances.[38]

The author of Volume 1 of the *Rangahaua Whanui* Series, *National Overview*, Professor Alan Ward, refers to the agreement among modern scholars that "*tino rangatiratanga*" would have implied much more to Maori than the English term "possession". Its meaning would have tended more towards "self-determination" and "autonomy".[39] He points out that the *kawanatanga* responsibilities of the Crown in shaping a nation state inevitably rubbed up against the *rangatiratanga* of *whanau* and *hapu*.[40]

After carefully formulating criteria for judging the seriousness of Treaty breaches and the prejudicial effects that it is most necessary to remove, and evaluating the historical evidence in their light, Ward reaches the following conclusion-[41]

> On the basis of the Crown's actions being most deliberate, and hurtful of most people, the most important issue is the loss of *rangatiratanga*, or legitimate scope for autonomous Maori action. This has two major aspects:
>
> (i) the loss of resources which underpin autonomy and self-determination at the individual and tribal level; and
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> (ii) the exclusion of Maori from the decision-making institutions that affect their lives and resources.
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> The establishment or re-establishment of mechanisms of consultation and empowerment will be as important as the restoration of a resource base.

A Declaration which recognises the right of indigenous peoples to autonomy or self-government in their internal or local affairs and the need to obtain their agreement to national measures closely affecting them, would appear to provide a principled framework for reconciling the exercise of *kawanatanga* by the executive Government and Parliament on the one hand and, on the other, the exercise of *rangatiratanga* by Maori, at both the local and the national level. The rights to internal autonomy and participation in other decision-making that closely affects them give assurances to Maori, in keeping with

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38 Chairperson's Foreword, Volume 1, Waitangi Tribunal *Rangahaua Whanui* Series, *National Overview* (GP Publications, 1997) xiii-xiv.

39 *National Overview,* above n 38, 3.

40 *National Overview,* above n 38, 5.

41 *National Overview,* above n 38, 34.

their widely expressed aspirations. They also give the government and members of the dominant culture a clearer sense of the direction in which the country is travelling.[42] That brings me to my final theme.

IV THE DRAFT DECLARATION AND THE NEW ZEALAND LEGAL SYSTEM

A The negotiating positions of governments

Governments negotiating international law instruments often try to ensure that they will be able to give effect to them without going beyond their existing domestic law and policy. But inconsistency with domestic law can never be a principled ground for objection. If new international norms become recognised, States are required to bring their domestic law, including their constitutions, into conformity.

In the intergovernmental working group some governments, including that of New Zealand, have argued that, in democratic states, indigenous peoples should have the right to develop their political, economic and social systems within the existing constitutional, economic, social and legal framework. In part this stance may be a response to anxieties about the implications of recognising that indigenous peoples have the right of self-determination. I have suggested earlier that the outside limits of such a right can safely be left to international law without requiring them to be spelt out in the Declaration itself. In part the position of governments may reflect anxiety about the constitutional and policy implications of acknowledging the political and other rights of indigenous peoples.

However, in formulating a Declaration, care must be taken to avoid any suggestion that the international law rights of indigenous peoples are to be subordinated to the existing constitutions and legal systems of the tates of which they happen to be citizens. Such a qualification would be flawed in principle. In practice it would yield uneven results,

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42 There is widespread recognition that the need for such a reconciliation involves "constitutional" issues. In its section on the Treaty of Waitangi, the post-election Ministry of Justice Briefing Paper to the incoming Minister made the following point:

> The challenge for government domestically and internationally is to advance the debate about the constitutional status of the Treaty in a direction that will promote movement towards mutual understanding. The significance of the issue and its relevance to all New Zealanders suggest that the Crown should not act prematurely by adopting fixed positions or closing off options. The Crown might approach the issue by becoming better informed and encouraging all New Zealanders generally to do the same. (Ministry of Justice, *Briefing Paper for the Minister of Justice*, October 1996, 40.)

depending on the nature of the constitution and other law of the state concerned.[43] At worst it could suggest that nothing is required to change.

B Compatibility with New Zealand constitutional norms

I will now explore briefly the question whether New Zealand constitutional norms are consistent with special rights for Maori, as an indigenous people, especially the political rights stemming from the exercise of the right of self-determination. To what extent does our constitution impose constraints or provide guarantees for both the dominant and the non-dominant cultures?

New Zealand's constitution is not supreme law. As an act of state, the Treaty of Waitangi, like other treaties, is not directly enforceable in the courts, except to the extent provided by statute[44]. Our sense of what is "constitutional" in the broad sense is likely to take us back to the writings of Professor A V Dicey. In 1885, Dicey published a series of lectures in which he attempted to explain the working of the British constitution by reference to what he saw as its distinguishing principles. Although aspects of his analysis have been much criticised, his vivid concepts of the *sovereignty of Parliament*, the *rule of law*, which includes *equality before the law*, and *constitutional conventions* are still influential today.

V EQUALITY BEFORE THE LAW

Dicey saw the rule of law as requiring, among other things, equality before the law. By this he meant that, in England[45]

> no man is above the law, but ... every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

He had in mind especially the fact that officials were answerable before the ordinary courts for acts done in excess of their authority. However, Dicey acknowledged that "officials" - the examples he gave were soldiers or clergyman of the Established Church - were subject to laws which did not affect the rest of the nation, and were in some

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43 For example, in the case of Canada, the constitution, which is supreme law, recognises and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada" - s 35 of the Constitution Act 1982. Although the Supreme Court of Canada has not so far held that aboriginal rights include an inherent right to self-government, it has held that government action which interferes with aboriginal rights must conform to constitutional standards of justification: *R v Sparrow* (1990) 1 SCR 1075 (SCC).

44 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, 324-5; [1941] NZLR 590, 596-7.

45 A V Dicey *Introduction to the Law of the Constitution*, 9 ed by E C S Wade, 193. Apart from the Introduction by Professor Wade, the text of the ninth edition is in the form in which Dicey finally settled it in the seventh edition in 1908.

instances amenable to the jurisdiction of special tribunals, while still in most cases also being subject to the duties of an ordinary citizen.[46]

Today, a multitude of activities are regulated by legislation, enforced sometimes by the ordinary courts and sometimes by special tribunals. We can see more clearly that equality before the law does not mean that the same law applies to all. Rather it means that "all are equally subject to the law, though the law to which some are subject may be different from the law to which others are subject",[47] as one commentator has put it. The law that applies to each of us may sometimes vary, depending on who we are, what we do, and where we reside.

So we are suffering from an illusion if we think that we have always lived under a system in which the same law applies to everyone, in all circumstances. It is more accurate to say that the same law applies, or should apply, to everyone whose material circumstances are the same. Our law reflects the international standards. The essence of unfair discrimination against a person on the ground of race, ethnic origin or other personal characteristic is not different treatment in itself, but different treatment which cannot be demonstrably justified in a free and democratic society.[48] If people who share a common characteristic are affected by a difference in their circumstances, then there may be both a justification and a need for the law to take account of the difference.

In the words of a distinguished Canadian[49]

> To be the same is not to be equal. To be equal is to be treated as equal based on relevant differences.

I should like to test this proposition by looking at the way the law has applied to Maori.

A The doctrine of aboriginal rights

From the moment New Zealand became a British colony, the imported English law recognised some rights which, in the nature of things, were enjoyed only by Maori. There is a presumption that, on colonisation, the Crown will respect existing rights of property.

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46 Dicey, above n 45, 193-4.

47 Lord Wright in "Liberty and the Common Law" [1945] *Cambridge Law Journal*, 2, 4, quoted by Heuston in *Essays on Constitutional Law* (2 ed, 1964) 47.

48 See New Zealand Bill of Rights Act 1990, ss 5 and 19.

49 Rosalie Abella "From Civil Liberties to Human Rights: Acknowledging the Differences" in *Human Rights in the Twenty-first Century: A Global Challenge* (K & P Mahoney eds, Dordrecht/Boston/ London, Martinus Nijhoff Publishers, 1993) 66.

This means that, although the Crown acquires both the right to govern the country and the radical or ultimate title to land, [50]

> private ownership is unimpaired and the tribal or other rights of the inhabitants (not amounting to private ownership) can be extinguished only by the consent of the occupiers or in accordance with statute, and they continue to exist unless the contrary is established.

The principle that the tribal or other rights of the indigenous peoples in colonised territories are preserved is known as the doctrine of aboriginal rights. It was applied by the courts in New Zealand's early years as a colony,[51] then largely ignored for over a century, but has now been resurrected.[52] It exists independently of the Treaty of Waitangi but appears to be broadly consistent with it.[53] However, the extent to which the doctrine can help protect the Treaty rights of Maori, and their developing international human rights as an indigenous people, depends on whether, and, if so how far, the statute law has left room for it to operate.[54] I mention it here not to identify its present-day effect but to make the point that Maori rights were recognised in New Zealand law from the very beginning, quite independently of legislation.

B Statutory provision for Maori

Again, throughout our history as a nation, there have been and still are numerous statutes prescribing or affecting the property and other rights of Maori. It is well beyond the scope of this paper to assess their overall effect, but I should like to emphasise a few salient points.

1 Land rights

The rights of Maori in respect of their land have continuously been recognised by statute since 1841.[55] Subsequently, however, Parliament authorised the *raupatu* or confiscation of lands from tribes regarded as having been in rebellion during the land wars. It also enacted legislation grossly interfering with the form of native tenure and limiting the extent to which the extinguishment of native title could be tested in the

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50 Roberts-Wray, above n 37, 636.

51 *R v Symonds* [1840-1932] NZPCC 387 (SC).

52 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

53 See dictum of Cooke P in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655.

54 *Te Runanga o Ikawhenua Soc v Attorney-General* [1994] 2 NZLR 20.

55 Roberts-Wray, above n 37, 630. Subsequent suggestions that some parts of New Zealand had never belonged to Maori and were therefore available for sale without the need for purchase from the Maori owners met strong resistance and were not pursued.

courts. These and other statutory interventions contributed to the alienation of the bulk of Maori land, often without the consent in any real sense of the original communal owners.

2 *Waterways, lakes, the foreshore and fisheries*

The history of the recognition of Maori rights to waterways, lakes, the foreshore and fisheries is even more chequered. There was substantial interference by Acts of general application that failed to preserve Maori rights. The statutes declaring that nothing in them applied to "any Maori fishery"[56] were a notable exception, though even they were at first held to be ineffective on the ground that no Maori fisheries had been recognised by statute.[57]

3 *Other forms of statutory intervention before 1975*

Statutory regulation of the lives of Maori extended to many other aspects of their individual and collective lives, including marriage, adoption, traditional cultural and religious practices, education, and forms of economic and social organisation. The overall approach was to promote the "amalgamation" of Maori into the same framework of law and administration as the settlers. To the extent that the arrangements recognised and maintained existing Maori institutions or created new ones permitting Maori participation, the arrangements were largely tailored to meet the preconceptions and priorities of the majority culture. Institutions proposed or supported by Maori were not recognised, or, if they were, they were dismantled or modified as soon as they were seen as threatening existing power structures. Alan Ward sums up the situation as follows:[58]

> The history of Maori relations with the State is that the hopes and promises of 1840 were not fulfilled. The Maori people's institutions were not recognised in any lasting way, but neither were Maori admitted to more than subordinate roles in the new order.

4 *Statutory initiatives after 1975*

In 1975, after more than a decade of increasingly vigorous Maori protest about the lack of commitment to the Treaty, specially in preserving the remnant of Maori land, Parliament established the Waitangi Tribunal. Its task is to hear and determine claims that actions of the Crown contravened the principles of the Treaty. Although, formally, the Tribunal could at first investigate only the Crown's actions since 1975, it often had regard to the historical origins and effects of current legislation and policies. In 1985,

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56 Section 88(2) of the Fisheries Act 1983 and its predecessors.

57 *Waipapakura v Hempton* (1914) 33 NZLR 1065; *Keepa v Inspector of Fisheries* [1965] NZLR 322.

58 *National Overview*, above n 38, 117.

Parliament extended the Tribunal's jurisdiction to things done or omitted by the Crown at any time since 1840.

Decisions of the Waitangi Tribunal have identified breaches of the principles of the Treaty in respect of Maori lands, fisheries, forests and other *taonga* such as the Maori language. However, the Government's restructuring policies of the 1980s threatened to make it less able to redress those breaches by restoring at least some of the affected resources to the Maori claimants. Through political action[59] and litigation,[60] resulting in agreed statutory schemes,[61] and in some cases Treaty settlements,[62] Maori have been able to ensure that resources not already in private hands would remain available for the settlement of claims.

C The sovereignty of Parliament

Apart from the doctrine of aboriginal rights, all the law relating to Maori was made by Parliament. We are familiar enough with Dicey's concept of "Parliamentary sovereignty". In his words[63]

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59 At the request of Maori, the Government agreed to include in legislation authorising state-sector restructuring a provision that the Crown is not permitted to act in a manner inconsistent with the principles of the Treaty of Waitangi: State-Owned Enterprises Act 1986, s 9.

60 Maori challenged proposals for the disposition of particular assets in the courts, on the ground that relevant statutory provisions had been ignored or breached. The courts have ordered dispositions appearing likely to prejudice Treaty rights to be put on hold, until arrangements for protecting the rights could be put in place. See the decisions of the Court of Appeal in the land case, *New Zealand Maori Council v Attorney-General* [1987] 1NZLR 641; the forests case, *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; the coal case, *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.

Similarly, Maori successfully challenged the legality of the quota management scheme for sea fisheries on the basis of the long-standing statutory provision protecting "any Maori fishery" from statutory interference. They showed that the recognition of individual rights to fish commercially on the basis of previous substantial fishing activity would effectively exclude most Maori. See *Ngai Tahu Maori Trust Board v Attorney-General* (Unrep HC Wn CP 559/87 2.11.87, CA 42/90 27.2.90), and *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641.

61 The Treaty of Waitangi (State Enterprises) Act 1988; the Crown Forests Assets Act 1989; the New Zealand Railways Corporation Restructuring Act 1990; the Crown Minerals Act 1991; the Crown Research Institutes Act 1992.

62 The Maori Fisheries Act 1989; the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and the Waikato Raupatu Claims Settlement Act 1995.

63 Dicey, above n 45, 39-40. From a philosophical viewpoint, Dicey saw the liberties of the subject as better protected under this system than in countries where the courts had the power to overturn legislation that was inconsistent with the constitution.

> Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and further ... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

However, Dicey himself acknowledged the "difficulty" that .[64]

> Every one ... knows as a matter of common sense that, whatever lawyers may say, the sovereign power of Parliament is not unlimited... . There are many enactments, and these not in themselves enactments obviously unwise or tyrannical, which Parliament never would and (to speak plainly) never could pass ...

Dicey saw parliamentary sovereignty as co-existing with the fact of actual limitations on the power of Parliament, both external and internal. The external limitation was the possibility or certainty that the people or a large number of them will disobey or resist the laws. Moreover, there were things that Parliament had done in other times which a modern Parliament would not repeat. The internal limitations arose from the nature of the sovereign power whose character was moulded by the society of the day. The function of representative government was to bring about a coincidence between the external and internal limitations. Parliament was the legal sovereign, but the electors were the political sovereign.

Does this mean that Parliament may pass any legislation which has the support of a majority for the time being? Subsequent commentators have pointed out that the legal sovereignty of Parliament as Dicey described it is not supreme power, but merely an expression of the common law rule that the courts will recognise as law the rules which Parliament makes by legislation. Whether there are limits to this rule is speculative and outside the realm of this paper. The main limits on Parliament's powers are likely to remain those which Parliament does or can impose on itself, in ways going beyond political expediency.

First, constitutional conventions, which Dicey saw mainly as constraints on the exercise of the Crown's executive powers,[65] are now seen as extending to the legislature. There are certain types of legislation which Parliament ought not to pass. One important category is legislation which will result in a breach of international law.[66] Laws made in

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64 Dicey, above n 45, 71.

65 Dicey did not adequately resolve the potential conflict between the two notions of the rule of law and the sovereignty of Parliament: Wade & Phillips *Constitutional and Administrative Law* (9 ed by A W Bradley, London, Longman Group Limited, 1977) 89.

66 See especially, Jennings *The Law and the Constitution* (5 ed, University of London Press Ltd, London, 1959) 137-192.

breach of constitutional conventions would still be law, but their political cost could be high. It has been well said that[67]

> conventions describe the way in which certain legal powers must be exercised if they are to be tolerated by those affected. ... a crucial question must always be whether or not a particular class of action is likely to destroy respect for the established distribution of authority.

Secondly, Parliament may give the courts directions about how to interpret and apply legislation, generally as in the case of the Acts Interpretation Act 1924 and the New Zealand Bill of Rights Act 1990, or in the case of particular Acts. Examples include the Acts which are required to be interpreted and applied consistently with the principles of the Treaty of Waitangi.[68]

Thirdly, Parliament may require a special "manner and form" for legislation inconsistent with certain earlier legislation. If it does so, there is every indication that the courts will not regard inconsistent legislation as "law " unless it has been made in the manner and form prescribed. So far, the New Zealand Parliament has not enacted a requirement of this kind, though it has come close to doing so in the Electoral Act.[69]

D Implications for the political rights of Maori as an indigenous people

Nothing in the concept of equality before the law or Parliamentary sovereignty is inconsistent with the recognition of the political rights of Maori as an indigenous people. The New Zealand legal system has always recognized legal pluralism in the sense that different laws apply to different people whose circumstances are recognised as being different. The law affecting Maori so far made by Parliament has operated at times for their benefit, even when Maori interests cut across Government initiatives. At other times the statute law has operated to their great detriment, when Parliament subordinated Maori interests to those of the majority community.

Special laws for Maori do not unfairly discriminate against non-Maori unless it can be shown that, in the context, there is no reasonable justification for recognising the different circumstances of Maori.[70] The reverse proposition also holds good. Parliament

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67 Marshall and Moodie *Some Problems of the Constitution* (Revised ed 1961) 31ff.

68 Above n 59, and see also the Conservation Act 1987 and the Resource Management Act 1991.

69 Section 268 of the Electoral Act 1993 requires amendments to certain sections of the Act to be passed by a majority comprising 75% of all the members of Parliament or approved by a majority of all electors voting in a referendum. However, as a matter of law if not of convention, this provision can itself be repealed by ordinary legislation.

70 This might be regarded as the underlying issue in the "trout" case, *Taranaki Fish and Game Council v M'Critchie*, Unrep, DC, Wanganui, Decision of Judge A J Becroft, 27 February 1997. The decision is under appeal.

is at present considering fair ways of terminating the statutory perpetual leases over reserved Maori land. No such restrictions apply to the use of other land.[71]

Maori groups, like any other group, have the right to freedom of association. Unless statute provides otherwise, they need no authorisation from Parliament to exercise autonomy or self-government in matters that concern them exclusively, or to participate in decision-making, through negotiations leading to agreement, on other matters that closely affect their lives.[72] This is evident from the negotiations leading to agreements on the settlement of Treaty claims with iwi and other traditional Maori groupings, and also by Maori bodies incorporated by or under statute, primarily for other purposes.

However, even in a time of deregulation, modern statute law is still wide-ranging. The common law sets limits to the extent to which the rights and freedoms of individuals, including Maori, can be affected by contracts with third parties or by administrative action. For the sake of greater certainty, it will often be wise for the Maori group concerned to agree or request that Parliament should exercise its law-making power - in other words its sovereignty - to recognise or give effect to agreed arrangements for the exercise of Maori rights to autonomy or participation in decision-making.

Treaty settlements have been implemented by legislation. Parliament may need to continue to legislate for Maori in other contexts, but "at their request and with their consent". I borrow the phrase from the Statute of Westminster, the 1931 Imperial Act which recognised the only circumstances in which the Imperial Parliament would in future make law for the former Dominions. The content of the legislation could range from general provisions requiring compliance with the Treaty principles to detailed schemes.

How can Maori be sure that Parliament, in the exercise of its sovereignty, will not exercise its powers, contrary to their wishes, perhaps to overcome difficulties in reaching agreement through consultation or negotiation, specially when the general interest is also at stake? There are several possible answers.

One is through the operation of constitutional conventions recognising that Parliament ought not to make laws that are inconsistent with the Treaty of Waitangi or with the international law norms pertaining to the rights of indigenous peoples.[73]

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71 Maori Reserved Land Amendment Bill, at present under consideration by the Justice and Law Reform Select Committee.

72 See the short-lived Runanga Iwi Act 1990, repealed by the Runanga Iwi Act Repeal Act 1991.

73 A Minister seeking Cabinet approval for legislative proposals must report on whether they have implications for, or may be affected by, the principles of the Treaty of Waitangi and international obligations, among other things - See *Cabinet Office Manual* (Cabinet Office, 1996) 57.

Decisions of the Waitangi Tribunal contain insights into how the Treaty should be seen as applying to the exercise of Parliament's legislative powers when the general interest is affected..[74]

> A ... basic principle, first set out in the *Motunui-Waitara* report, upheld the priority of the Maori interest over the general public interest, in carefully defined situations, should the two come into conflict. The report used the phrase 'exchange of gifts' - Maori gave the Crown the right to make laws in return for being given a prior claim upon the protection of the Crown when their special interests were at stake.

Another possible answer is to agree that, in limited contexts of special concern to Maori, the manner and form of law-making should require more than the approval of a majority in Parliament. It could, for example, include the need for the consent of representative Maori groups at the local or the national level, or of a majority in a referendum among those on the Maori roll.

Yet another answer is the changing composition of Parliament itself. The Maori seats are now based on the principle of equal suffrage. Reflecting the international norms, the votes of all citizens carry approximately the same weight, whether they are on the general or the Maori roll. The introduction of a proportional system of representation has led to the inclusion of Maori among members of Parliament roughly in proportion to their number in the population.

Both developments provide better assurances for the way in which Parliament will make laws affecting Maori. At the same time, the cross-cutting allegiances of Maori voters among differenct political parties, and between the general and the Maori rolls, are likely to prevent the divisiveness of a system of representation based exclusively on ethnicity. This leads to my final question: what are the likely consequences for our society of recognising the rights of Maori to autonomy and participation in decision-making?

V THE IMPLICATIONS FOR NEW ZEALAND SOCIETY

The removal of the Maori people's deeply-felt sense of disempowerment is in the interests of us all. Only then will it be possible to build on the guarantee in article 3 of the Treaty. Our shared rights and privileges as New Zealand citizens give all of us a shared responsibility for the well-being of our nation.

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74 W H Oliver, *Claims to the Waitangi Tribunal* (Wellington, The Department of Justice (Waitangi Tribunal Division) and Daphne Brasell Associates Press, 1991) 76. Article 20 of the Draft Declaration reflects the substance of this principle. Article 36 expresses the right of indigenous peoples to the observance of their treaties with states or their successors, "according to their original spirit and intent".

Recognition of the distinct rights and interests of Maori is likely to lead to greater appreciation of the things we have in common. These include participation in the church, war, sport, the arts, and increasingly in all sectors of the economy. There is much on which to build our national unity, while respecting the diversity of our bicultural society.

That does not minimise the significance of the disproportionately adverse statistics concerning Maori housing, health, education, unemployment and criminal offending. Those must be seen as a national concern. Public funding will continue to be needed, but many of the remedial steps may be better taken by or in cooperation with Maori institutions at the national or local level. Some arrangements for this purpose are already in place or being strengthened.

VI CONCLUSION

The Treaty of Waitangi faces us with the challenge of reconciling the exercise of *kawanatanga* and *tino rangatiratanga*. The political rights of indigenous peoples included in the Draft Declaration seem likely to help us with that task. Their purpose is to return to indigenous peoples the control of their lives, within their national societies. Most if not all the significant changes in our times, in the international community and in the lives of nations, have been brought about by similar acts of faith. There is good reason for the New Zealand Government, in consultation with Maori, to play a positive and constructive part in the formulation and adoption of a Declaration on the Rights of Indigenous Peoples. The end-product is likely to be the strengthening of the national societies to which the indigenous peoples of the world belong, including our own.

Discussion

Q You referred to the fact that, in the early stages of colonisation, the British Crown recognised the aboriginal title of Maori. New Zealand was initially administered as part of New South Wales. The colonisers there did not recognise the land rights of Aborigines, so my question is, why was the Australian situation quite different?

A I am no authority on how Australian settlers came to believe in the legal fiction that there were no people there, and that the land was *terra nullius*. I do not think the application in New Zealand of the doctrine of aboriginal title was in any way affected, except possibly very indirectly, as a reflection of the fact that, in both countries, settler communities became fully self-governing, with the power to make the laws of the land free of any control from Westminster. It has always been recognised that aboriginal title may be modified or taken away by statute. In accordance with the perceptions of the time, the New Zealand Parliament passed legislation about the way Maori should

henceforth hold their land and be free to dispose of it, or rather should be encouraged to do so.

Q Kia ora. Thank you very much for your presentation. I noted your comment that states have lived with the notion that "all peoples" have the right of self-determination, without qualification, and your suggestion that the same approach should be taken in formulating the right of self-determination of indigenous peoples. In this connection you mentioned the writings of Professor James Anaya. I wonder if you could comment on how widespread that view would be among international lawyers?

A Many books and articles have been written on the scope of the right of self-determination. I think it is fair to say that some scholars have tended to look principally at the positions taken by states in various negotiating forums about whether the right of self-determination should or should not be recognised in a particular context, and with or without qualifications. I would argue that the statements by representatives of states should not be given undue weight. They should be balanced by some examination of what states actually do.

Personally, I think it is a profitless exercise to try to pin down the content of the right of self-determination too exactly. It exists at a different level from individual human rights. It has to be given content in a whole range of different situations. For indigenous peoples, I think the main content of the right is likely to become crystallised through the exercise of the particular political and other rights that are included in a Declaration on the Rights of Indigenous Peoples in its final form.

Q Kia ora Alison, I really liked your paper. You state that there is a constitutional convention that Parliament ought not to make laws that are inconsistent with New Zealand's international obligations, whether they arise from treaties or general international law. Do you think that we should have a constitutional convention that Parliament will not legislate inconsistently with the Treaty of Waitangi? That would be one way of giving ourselves a constitution.

A Conventions have to grow or develop in the hearts and minds of all concerned, although sometimes you can create a more or less instant convention by something that is agreed and recorded. Already we have in the Cabinet Office Manual a direction that a Minister proposing a Bill has to report to Cabinet on the implications of the Bill, both for the Treaty of Waitangi and for New Zealand's international obligations. So, we have a sense that those things matter; they need to be considered. Parliament needs to be told if a Bill impinges on either of those areas, or on others like the New Zealand Bill of Rights. That probably does not answer the whole question, because I did say at another point that we need to have greater agreement on what the Treaty of Waitangi means. We have not got that yet. I believe we should go on searching for that shared understanding.