

WAIKATO LAW REVIEW

TAUMAURI

VOLUME 19, ISSUE 2, 2011



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Juliet Chevalier-Watts

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Te Whare Wānanga o Waikato

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<i>An Account of the Making of the Human Rights Amendment Act 2001</i>	1
Margaret Wilson	
<i>Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy In Canada</i>	14
Paul LAH Chartrand	
<i>Indigenous Rights – Hollow Rights?</i>	29
Valmaine Toki	
<i>Rights Denied: Orang Asli and Rights to Participate in Decision-making in Peninsular Malaysia</i>	44
Yogeswaran Subramaniam	
<i>The Punitive Turn in Post-Colonial Sentencing and the Judicial Will to Civilise</i>	66
Dr Thalia Anthony	
<i>The Rangatahi Court</i>	86
Matiu Dickson	
<i>“Three Strikes” Sentencing: Another Blow for Māori</i>	108
Wayne Rumbles	
<i>Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights</i>	117
Dr Robert Joseph	
<i>What Is The Place Of Corrective Justice In Criminal Justice?</i>	134
Simon Connell	
<i>Charitable Trusts and Political Activity: Time for a Change?</i>	145
Juliet Chevalier-Watts	
<i>Reform of the Civil Justice System: The New Meaning of Justice and the Mitigation of Adversarial Litigation Culture</i>	160
Les Arthur	
<i>Legal Positivism in the Pre-Constitutional Era of Late Nineteenth-Century Iran</i>	174
Sadeq Bigdeli	
<i>Missing the Point? Law, Functionalism and Legal Education in New Zealand</i>	188
W John Hopkins	
<i>A Thorn in the Flesh that Cannot Fester: Habermas, the Duluth Model, Domestic Violence Programmes</i>	196
Philip Rossiter	

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EDITORS' INTRODUCTION

I am pleased to present the second issue of the Waikato Law Review for 2011. This special issue draws together a number of articles which were developed from papers presented at the Justice in the Round: Perspectives from Custom and Culture, Rights and Dispute Resolution Conference held at Te Piringa – Faculty of Law in April 2011.

The conference theme was derived, in part, from aspects of the three founding goals of Te Piringa – Faculty of Law. These goals are the understanding of law in its contexts; developing bi-cultural legal understandings; and fostering professionalism in our students. In reflecting the Faculty's commitment to biculturalism, the conference was intended to foster achieving this goal in its own right, as well as reflecting New Zealand's unique identity in an increasingly multi-cultural society, with a bi-cultural foundation. In affirming the Faculty's commitment to law in context, the conference gathered a group of people already "working for justice", to consider "justice" and conceptions of justice in the institutional, ideological, and cultural contexts in which they are currently situated, and to consider how both the ideas and their realisation in fact, might be improved or redesigned. Our goal was to further a dialogue about what constitutes "justice in the round".¹

While at first glance the Table of Contents may seem an eclectic mix, each paper presents its perspective on justice, reflecting on the past, present and possible futures.

The first two papers are derived from the plenary sessions of the conference. Margaret Wilson's paper "Mainstreaming Human Rights in Public Policy: An Account of the Role of Human Rights Amendment Act 2001" offers a unique insight into the recent legislative history and its relationship to policy. The second plenary paper is from Paul Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada", which argues that the political action of the Indigenous peoples of Canada are important for law and political processes out of which constitutional and legal norms emerge.

The remaining papers draw on the themes of rights, policy and reform illustrated in the plenary papers albeit through different lenses. These papers explore the rights of indigenous people in Australia, Malaysia, Canada, the United States and here in Aotearoa. Policy is explored in a number of contexts including: charitable trusts, legal education, and domestic violence. Commentary on legal reforms explores both the criminal and civil arena from nineteenth-century Iran to twenty first century Aotearoa/New Zealand. It was also pleasing that a number of the papers are from post-graduate students as well as experienced academics and practitioners. I am sure that in this special issue there will be something of interest for all readers and hope you enjoy reading it.

I would like to express my thanks to all the contributors and reviewers without which this special edition would not be possible, especially in light of some of the tight deadlines. My thanks must also go to Gay Morgan and Robert Joseph for editorial assistance and support. I would also like to thank Diane Lowther for her timely and excellent copy editing, Amanda Colmer from A2Z Design for layout support, and Janine Pickering for her administrative support, institutional knowledge and keen eye.

Wayne Rumbles
Guest Editor

1 Brenda Midson "Conference Welcome" *Justice in the Round Conference Handbook* (University of Waikato, April 2011).

AN ACCOUNT OF THE MAKING OF THE HUMAN RIGHTS AMENDMENT ACT 2001

BY MARGARET WILSON*

1. INTRODUCTION

In this paper I want to address the relationship between policy and law through a discussion of the 2001 Amendment to the New Zealand Human Rights Act 1993. Discussions of justice often focus on analysis of court decisions or legislation. Legal policy is not often analysed or the process by which legal policy is formed and incorporated into the law. This paper is an attempt to try and fill that gap through a description of the process to enact the 2001 Human Rights Amendment Act. The narrative is based on my experience so it is acknowledged at the outset that others involved in the process may hold different views.

I shall argue that the way in which human rights have been incorporated into New Zealand's legal system reflects the underlying constitutional relationship between the Parliament and the courts. This constitutional relationship is still founded on the notion of parliamentary sovereignty and while the courts are developing a role as the guardians of individual human rights, Parliament still retains the right to 'make the law'. New Zealand's lack of a written constitution and its flexible pragmatic approach to constitutional matters has meant that an iterative approach between the courts and Parliament has been evolving over the past 20 years. While both institutions have acknowledged the importance of adherence to human rights standards, their role in the application and enforcement of those standards has developed within the context of New Zealand's constitutional arrangements.

The reason I concentrate on the significance of 2001 Amendment in this lecture is because it demonstrates the role of Parliament in enacting a human rights statutory framework and also the role of the legal institutions that enforce human rights. It also clarifies the relationship between the Human Rights Act and the New Zealand Bill of Rights Act 1990 (NZBORA) in terms of the status of both Acts and the remedies available.

At the outset it is argued that New Zealand has a commitment to embedding human rights within its constitutional arrangements. New Zealand also may be described as a good international citizen because since the formation of the United Nations it has supported its various human rights initiatives. It has ratified the main human rights international treaties. It was not until the 1970s however that New Zealand started to incorporate its international commitments into domestic legislation. The role of human rights in New Zealand constitutional arrangements reflects its history and culture, including the long accepted commitment to parliamentary sovereignty as a fundamental tenet of those arrangements. This adherence to parliamentary sovereignty has been challenged recently, however, by the inclusion of human rights standards within the constitutional arrangements. This challenge has come through the enactment of a human rights statutory framework and

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the interpretation of that framework by the courts. This development has raised directly the issue of whether the courts can declare invalid or void legislation that does not conform to the human rights standards.¹

The debate as to who makes the law is an important but large topic, so this paper will focus on the significance of the 2001 Amendment's contribution to that debate.² To understand the role of the 2001 Amendment in seeking to clarify the relationship between Parliament and the courts in the enforcement of human rights, it is necessary to briefly review the statutory context within which human rights have developed in New Zealand.

The first domestic recognition of international human rights commitments in New Zealand came with the Race Relations Act 1971, the Long Title of which recited: "An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination."

This was followed by the Human Rights Commission Act 1977, the Long Title of which read: "An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general in accordance with the United Nations International Covenants on Human Rights."

The Human Rights Commission Act then was primarily the fulfilment of the government's international obligations to protect citizens from discrimination perpetrated by fellow citizens. It was written with the private sector in mind and sought to regulate the public sector only when it was acting as an ordinary person. It therefore applied to the government when acting as a private person, for example, as an employer, a landlord or supplier of goods and services that were analogous to those supplied by a private person.

The Human Rights Commission Act then was designed as anti-discrimination legislation. Originally it prohibited only discrimination on the grounds of sex, marital status, religious and ethical belief and contained grounds for the justification of discriminatory treatment in right and proper circumstances. It was not a Bill of Rights Act nor intended to be such an Act. The provisions of the Act in 1977 reflected the political pressure for the legislation. The women's movement had campaigned for legal protection and a remedy against discrimination since the 1975 Select Committee Report on the Role of Women in New Zealand Society, in their recommendation that:³

The committee recommends that legislation be introduced to prohibit discrimination against any person by reason of sex and however arising such legislation to provide the means for (a) eliminating sex discrimination and removing existing legal disability, (b) prescribing sanctions against discriminatory practices, and (c) establishing machinery for enforcement procedures, to function also as a means of informing and educating the public as to the implications of the principle of equality as embodied in the Act

The political rhetoric of the time was framed in terms of women's right to equality, and the connection between human rights and women's rights was tenuous. At the time of lobbying for legal

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- 1 See Petra Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 for an analysis of the relationship between the courts and the Parliament.
 - 2 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164; John Smillie "'Fundamental Rights', Parliamentary Supremacy and the New Zealand Court of Appeal" (1995) 111 LQR 209; Tom Campbell "Judicial Activism: Justice or Treason?" (2003) 10 Otago LR 307 at 312; Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Around" (2003) 14 PLR 148.
 - 3 Select Committee on Women's Rights *The Role of Women in New Zealand Society* (Government Printer, Wellington, June 1975) at 98. (Also AJHR I13).

recognition of the right not to be discriminated against, we did not express this claim in terms of human rights. This did not occur until the 1990s, and in particular the Beijing UN Women's Convention when in popular terms women's rights morphed into human rights.⁴ The conceptual framework for legal reform was firmly positioned within the demand for equality. A change of government in New Zealand in 1975, however, saw an end to a commitment to sex discrimination legislation and the advent of a Human Rights Commission Act.⁵

The change not only reflected the change in political ideology, but the advocacy of an influential lobby in the legal and public service community for recognition of the international human rights commitments in domestic legislation. At that time women were not influential in policy making, with few women in Parliament or senior roles in the public service. The result was a political compromise, with the title of the Act appearing to refer to human rights, while in reality it was a legal framework for recognition of a remedy for unlawful discrimination. It is a truism to state that the shape of legislation reflects the political environment of the time but it is still useful to be reminded of this fact when seeking to understand the purpose of legislation.⁶

The compromised nature of the Human Rights Commission Act meant it was unable to fulfil the expectations of all of its supporters. It was neither an aspirational statement of commitment to high principle nor an effective remedy against discrimination. It was also not designed to address the changing nature of the relationship between the individual and the state that accompanied the introduction of the neo-liberal economic policy framework in the 1980s. This led to campaigns amongst concerned citizens for a statement of principle of the rights of individuals that must be respected by the state.⁷ The result of these campaigns was the New Zealand Bill of Rights Act (NZBORA) in 1990, and more comprehensive anti-discrimination legislation in the 1993 Human Rights Act. Note the name change which signalled that the emphasis was now on human rights themselves, not the human rights institutional framework.

The campaign for a Bill of Rights gained traction when Ministers within the fourth Labour government supported the enactment of a Bill of Rights. The policy process began with a White Paper in 1985 recommending a Bill of Rights incorporating civil and political rights and the entrenchment of the legislation.⁸ In other words the Bill of Rights was to be superior legislation. The Bill provoked a discussion on the scope of the Bill and whether it should also include social and economic rights and the Treaty of Waitangi.⁹ The affects of the neo-liberal economic policies were starting to be felt at the time and citizens were seeking protection from the exercise of executive power that fundamentally changed their economic and social interests. The Bill of Rights was seen as a way to hold governments responsible for their economic and social policies as well as protecting civil and political rights of citizens. Perhaps not surprisingly there was little govern-

4 *Beijing Declaration and Platform for Action*, 4th World Conference on Women 15 September 1995 <www.un.org/womenwatch/daw/beijing>.

5 As part of the women's lobby for a specifically sex discrimination Act similar to that in Australia, the Human Rights Commission Act was seen by some of us as a compromise because it departed from the notion of specific sex discrimination legislation and incorporated the notion of sex discrimination with other forms of discrimination.

6 I was actively involved in the movement for the statutory recognition of the equality of women and in particular organising women and the law workshops at the various United Women's Forums that took place in the 1970s.

7 Sir Geoffrey Palmer provided parliamentary leadership for a New Zealand Bill of Rights.

8 *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6 57 (White Paper).

9 For discussion of the various public concerns about the Bill see *Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* [1987-1990] AJHR I 8C.

ment political support for an extension to such rights so the focus returned to civil and political rights.

On the question of inclusion of the Treaty of Waitangi in the Bill of Rights, Māori during the consultation process made it clear they did not support inclusion, so it was dropped. The arguments were many but included a loss of mana (status) for the Treaty if it was included in legislation, especially if the Act was not entrenched, and the fear that incorporation risked the Treaty being amended or even repealed by Parliament. The Treaty of Waitangi as such has no legal status but is enforced through reference to the rights and obligations under the Treaty being incorporated in numerous Acts and Regulations.¹⁰ The pragmatic flexible nature of New Zealand's constitutional arrangements has meant that in reality the Treaty is recognised as a constitutional document and while its legal status may be in doubt, its political status is not.

The arguments surrounding the Bill then centred on whether the Bill should be entrenched legislation, with the implication that the courts could declare legislation unlawful. In other words, this was an attempt at constitutional change, the nature of which was seen by some as an attack on parliamentary sovereignty. Although New Zealand has a judiciary of high competence and integrity, there was little support for the courts over-ruling a decision of the Parliament. This is a fundamental, if contested, issue in what passes for a constitutional debate in New Zealand. It was to rise again in the 2001 review of the Human Rights Act, in the establishment of the Supreme Court and continues today.

The NZBORA then reflected the New Zealand approach to constitutional matters. The Long Title of the Act reads as follows:

An Act—

- (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

2. Rights Affirmed

The rights and freedoms contained in this Bill are affirmed.

3. Application

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

Decline to apply any provision of this enactment—

By reason only that the provision is inconsistent with any provision of this Bill of Rights.

10 Margaret Wilson "The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality?" (1997) 5 Wai L Rev 17.

The Act specifically incorporates the International Covenant on Civil and Political Rights but preserves the notion of parliamentary sovereignty. Paul Rishworth notes:¹¹

... Parliament enacted the New Zealand Bill of Rights Act 1990, a non-entrenched statutory bill of rights designed to affect the interpretation of statutes but not their validity. The proponents of the Bill of Rights plainly intended its non-entrenchment to have the desired effect of keeping political power from judges but, to make sure, they added s 4 as well. That section makes it clear that legislation inconsistent with the Bill of Rights is not to be declared implicitly repealed or in any way held ineffective.

Although the Act is clear that the courts cannot declare a provision illegal or invalid, the courts, by developing the notion of declarations of inconsistency through their interpretation of the Act, may ensure human rights standards are not ignored.¹² I shall return to this issue later. The initial cases to the courts involved procedural correctness in criminal cases. Although the cases raised important issues, they did not fulfil the public's expectation that a Bill of Rights would provide a remedy for non-criminal matters. This expectation was unrealistic given the scope and nature of the NZBORA. It also highlighted the confusion between the Bill of Rights and Human Rights legal regimes. While s 19 of the NZBORA provided a right to be free from discrimination, that discrimination is limited to the grounds enumerated in the Human Rights Act 1993. The 1993 Human Rights Act extended the grounds for unlawful discrimination complaints and, importantly, led to an amendment to the NZBORA that extended the protection of freedom from discrimination to include all the prohibited grounds.¹³ While this amendment gave more substance to the NZBORA s 19 (freedom from discrimination) provision, it did not necessarily provide an effective remedy for citizens seeking a redress from unlawful discrimination.

In this paper I shall now concentrate on the policy attempts to provide an accessible effective remedy against unlawful discrimination. The extension of the prohibited grounds was important but equally important was the carrying over from the 1977 Human Rights Commission Act of s 151 that made it clear that the Human Rights Act should not limit or affect the provisions of any other Act or Regulation. This provision was similar to a provision in the NZBORA. Section 151 would have attracted little attention but for the fact that, during the submissions before the Select Committee on the 1993 Act, the Human Rights Commission argued it was not necessary to continue the provision because all legislation was to be made human rights compliant after the completion of a project to review all legislation for this purpose.¹⁴

This project was named Consistency 2000 and was to be led by the Human Rights Commission. The proposed project was an attempt to make all legislation human rights compliant through amending all legislation that was inconsistent with human rights obligations. It was a worthy, if ambitious, proposal to which the Select Committee expressed a cautious approach, as there was a concern that such a proposal was, again, constitutional change by stealth. In other words there was a concern that parliamentary sovereignty would be compromised by such an amendment to

11 Grant Huscroft and Paul Rishworth *Rights and Freedoms: The New Zealand Bill of Rights 1990 and The Human Rights Act 1993* (Brookers, Wellington, 1995).

12 *Baigent's Case* (1994) 1 HRNZ 42; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *R v Poumako* [2000] 2 NZLR 695 at 719; (2000) 5 HRNZ 652 at 683 (CA); *R v Pora* (2000) 6 HRNZ 129. See also Petra and Andrew Butler's paper "16 Years of the New Zealand Bill of Rights" <www.alla.asn.au/conference>.

13 See Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press Australia, 2003) at 368–375.

14 An account of the circumstances surrounding the s 151 issue is found in *Re-Evaluation of the Human Rights Protections*, Report for the Associate Minister of Justice and Attorney-General (Ministry of Justice, Wellington, 2000) at 25–52.

the new Human Rights Act. The Committee agreed, however, that once the project was completed s 151 should expire. The date set for expiry was 31 December 1999. The failure of the Human Rights Commission and the Government Departments to complete this task resulted in the expiry date for s 151 having to be extended to 31 December 2001.¹⁵ The amendment Bill to achieve this extension was accompanied by vigorous parliamentary debate that ignited the whole question of whether the expiry of the provision meant that the Human Rights Act was to become superior law and attain primacy over other legislation. This question was not resolved by the amendment because a Parliamentary majority for the Bill could only be achieved on the issue of extension of time. The stage was therefore set for this issue being debated again before the 31 December 2001 statutory expiry date.

The election of a Labour-led government at the end of 1999, with a manifesto commitment to review the whole human rights statutory framework, provided the stage for what turned out to be a highly acrimonious debate. It not only raised the whole question of who makes the law – the courts or parliament – but whether human rights were just another example of political correctness and social engineering, and if they were necessary at all. Although the incoming Labour Government had a commitment to review the legislation and institutions, the policy to review the Human Rights Act was driven by the need to enact new legislation before 31 December 2001. The two urgent policy issues on which the government sought advice were the completion of the review work of Consistency 2000, and the resolution of whether or not to repeal s 151. The more substantial question of a review of the whole Act was therefore influenced by this timetable.¹⁶

The two streams of policy work were commenced quickly. The first was to complete the Consistency 2000 review of all legislation to ensure it was human rights compliant. The project had been too ambitious and produced much information without a systematic method of identifying priority areas of real discrimination as opposed to potential discrimination. It was an example of a poorly designed policy project. The lack of case law also made the task of the Commission and officials very difficult. Although it may be argued that the project was ill-conceived it did produce some valuable information and identified areas for further consideration; for example, the position of same-sex couples, questions of family status, disability issues and questions of age responsibility. Useful guidelines for officials were subsequently produced by the Ministry of Justice to guide policy making to ensure it was human rights compliant, but the exercise highlighted the need to review the whole institutional human rights framework.

The second policy work stream began on 3 May 2000 with the – Government's establishment of a Ministerial Re-Evaluation of the Human Rights Protections in New Zealand. Four independent members¹⁷ were appointed to report on the best way in which the Government could fulfil its policy of implementation of human rights. The Government envisaged a more proactive active advocacy role for the human rights institutions. In essence, the objective was to mainstream human rights through creating a human rights culture in the international, public and private sectors. It

15 See Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield *Re-Evaluation of the Human Rights Protection Report*, August 2000. Report to Associate Minister of Justice, for a summary of the events during this period.

16 As the Minister responsible for the legislation, I was conscious that there was not the time nor the resources to undertake a major review within a three year term of Parliament but there was an opportunity to make some changes, because of the expiry of s 151 and the need to pass legislation to address that issue.

17 Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield were appointed as the Ministerial advisors who, with assistance from Ministry of Justice officials, wrote the *Re-Evaluation of the Human Rights Protection Report*, August 2000.

was a move away from the individual complaints focus that had dominated the work of the Commission, while also preserving the right of individuals to access the complaints process.

The reason for appointing a group of independent advisors was because a fresh, innovative perspective was required and the advice was needed urgently. In some ways it was an impossible task given the constraint of time. The tyranny of three year parliaments is a real issue when developing policy that will endure beyond the three years. The fact that the group produced a report that, in most respects, was adopted by the Government and has endured three subsequent changes of government is a tribute to the quality of the advice produced in a short time.¹⁸

The Ministerial Group report made several recommendations on institutional and administrative changes to the Human Rights Act. The most important advice included the recommendation that s 151(1) should be allowed to expire on 31 December 2001 because there was no possibility that the Human Rights Act would have primacy over other legislation. If such a situation was ever to occur in New Zealand, it argued that the NZBORA was the appropriate legislation to have primacy. In this context the report recommended that, when a person is acting under statutory authority or the prerogative, the actions should be assessed against the NZBORA standard. I shall return to the effect of this recommendation when I review the legal remedies now available for breach of the Human Rights Act.

The Ministerial Group also recommended a fundamental change in the focus of human rights institutions and an institutional redesign of those institutions. In summary, a new Human Rights Commission was recommended with a membership designed to be representative and to have a clear focus on being the advocate for human rights, so that human rights practice became mainstreamed into public and private sector decision making. The primary functions of the new Commission set out in the Amendment Act are as follows:

5 Functions and powers of Commission

(1) The primary functions of the Commission are—

- (a) to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and
- to encourage the maintenance and development of harmonious relations between individuals among the diverse groups in New Zealand society.

The first function was designed to promote a human rights culture and to engage the community in support of the concept and practice of human rights. It was intended to free the Commission from the complaints resolution focus that had dominated much of its good work in the past. The second function was recognition of the changing nature of race relations in New Zealand. Whereas the focus in the past had been on relationship between Māori and Pākehā, New Zealand society was becoming increasingly diverse and it was important to acknowledge the inclusion of other ethnicities. It was also a recognition that the focus of the relationship between Māori and Pākehā had shifted from individual rights to the Treaty of Waitangi and the question of Māori sovereignty.

The Treaty, in Article Three, guaranteed Māori equal rights and this commitment must be fulfilled, but the focus was now on collective rights with political and economic sovereignty assuming a greater prominence. The debate over the relationship between the Treaty of Waitangi and human rights is an important one, however, and will continue to be part of New Zealand con-

18 The Human Rights Amendment Act 2001 reflects the fact that the main recommendations of the Ministerial Group were accepted and implemented.

stitutional discourse.¹⁹ The recommendation to merge the Race Relations Office with the Human Rights Commission was controversial at the time. The government considered it necessary, however, to ensure that the institutional arrangements reflected a holistic approach to human rights and that there was a better balance between the twin functions of advocacy and complaint resolution.

Although the advocacy role of the Commission was given primacy, the other crucial role for the Commission had been the settlement of individual complaints. The Re-evaluation Report acknowledged the importance of both functions while recognising the tension that often exists between achieving both roles. Internationally, more attention had been given to the importance of institutional design in the effectiveness of the implementation of human rights. For example, the International Council on Human Rights had produced a report that demonstrated that social legitimacy through effective performance was a crucial factor in the success of a national human rights institution (NHRI).²⁰ It had identified the need to move from a complaints-led to a programme-led approach, which was endorsed by the Re-Evaluation Report and the accepted by the Government.

The distinctive feature of the new Human Rights Commission was a clearer statement of the functions of governance, management and compliance. This division of responsibility and activities ensures better use of resources, but also more effective delivery of the principal functions of education and advocacy, and compliance through the resolution of complaints. The objective of the new procedure for dispute resolution was to settle the matter as quickly as possible through the Commission, employing skilled mediators to deal with all complaints accepted by the Commission. If mediation was unsuccessful then the matter could be referred to the Director of Human Rights Proceedings, an independent office within the Commission.

The Director plays a critical role in the new Commission. It is the Director of Human Rights Proceedings who decides whether to represent a complaint, bring a complaint to the Human Rights Tribunal or refer the matter back to the Commission for mediation. This new role ensures the independence and professionalism of the complaints procedure. While the emphasis is on the settlement of complaints through mediators, some matters are not settled and it is appropriate that they are heard and determined by the Human Rights Tribunal established under the 2001 Amendment. Information on this procedure is clearly set out on the Commission's website and in their publications.

Whether the new procedures have been successful in providing an improved remedy may be assessed from the 2010 Annual Report that notes:

In the 12 months ending 30 June 2010, the Commission dealt with a record number of enquiries and complaints. ... In this period 8000 new human rights enquiries and complaints were recorded. Of these, 4647 requested the Commission to intervene and 1908 of the complaints featured an element of unlawful discrimination. There were 2795 requests for the Commission to engage in other ways than resolving a complaint.²¹

In terms of resolution of complaints of unlawful discrimination, the 2010 Annual Report notes:

In 2009–2010, the Commission's dispute resolution team closed 1756 complaints that raised issues of unlawful discrimination. Of these:

19 See *Te Mana i Waitangi: Human Rights & The Treaty of Waitangi* Draft Discussion Document, (Human Rights Commission, Wellington, July 2003).

20 *Performance & Legitimacy: National Human Rights Institutions* (International Council on Human Rights Policy, Versoix, Switzerland, 2000).

21 New Zealand Human Rights Commission "Annual Report" (2010) <www.hrc.co.nz>.

- 53 per cent were closed after further assessment, mediator discussion and/or exploration of issues with the complainant. After discussion with a mediator, many complainants go on to resolve the dispute themselves or to take other action more appropriate to their dispute.
- 22.5 per cent were resolved or partially resolved between the parties with mediator assistance.
- 21 per cent were discontinued by one or other party. This can be because of changes in the complainants' circumstances or their withdrawal of the complaint; parties not engaging in mediation; complainants choosing not to proceed further on receipt of an initial response from the respondent; or complainants deciding to take the matter to the Human Rights Review Tribunal.
- 3.5 per cent were found, on closer examination, to be outside discrimination jurisdiction.²²

I want to focus now on the legal remedies available to litigants as a result of the 2001 Amendment. I have already noted the complaints procedure under the Amendment Act that provides a remedy for individuals who seek redress for a breach of their human rights under the Act. In the mediation process, those remedies include damages, an apology and an undertaking not to continue the discriminatory behavior. If the matter is referred to the Tribunal the remedies available include a declaration, a restraining order, damages, and a direction to undertake training or a programme to ensure the discriminatory behavior does not continue. I have noted already that this process appears to be working reasonably well.

In a case where the Tribunal finds an enactment is in breach of the human rights provision, it may issue a declaration that the enactment is inconsistent with the right to freedom from discrimination affirmed by s 19 of the NZBORA. The Minister responsible for the offending enactment is then required to report to Parliament on the existence of the declaration and the government's response to it, within 21 days of all appeals being heard. Section 92K makes it clear that a declaration does not invalidate the enactment or discontinue the action or policy that is discriminatory. This latter remedy was the attempt to clarify the relationship between the Human Rights Act and the NZBORA. It was also an attempt to provide a remedy for a breach of the NZBORA through the Human Rights Tribunal that required the government to address the inconsistency. Just how effective a remedy may be seen through the case of *Atkinson v Ministry of Health*²³ where the Tribunal issued a declaration of inconsistency in respect of an allegation of discrimination on the grounds of family status by a group of families who are denied financial support for the care of relatives with disabilities. The Minister of Health announced the decision would be appealed and we await that decision.

The other situation where an enactment that is inconsistent with the NZBORA standard can be drawn to the attention of the government is under s 7 of the NZBORA. This provides that the Attorney General has a duty to bring to the attention of the House of Representatives any provisions of any Bill introduced that appear to be inconsistent with any rights and freedoms contained in the NZBORA. Although this provision does not prevent the government proceeding with legislation that is inconsistent with the NZBORA, it is intended to make the inconsistency transparent before enactment. An analysis of this provision and its operation is found in the text *The New Zealand Bill of Rights*.²⁴

22 Ibid.

23 *Atkinson v Ministry of Health* 8 HRNZ 902 [2010] NZHRRT 1.

24 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003).

There are several criticisms of the s 7 NZBORA process. First the provision only applies to Bills on introduction, yet under the mixed member proportional electoral system (MMP), Bills are likely to be considerably amended in the select committee, where the issue may be addressed or a new breach created that is not notified. Second, the subjects of the declarations are often only incidental to the policy of the enactment and therefore they are not seen as important and do not attract much debate in either the select committee or the House. Third, there is no obligation to follow the advice of the Attorney General. The independence of the Attorney General is constrained in terms of voting in support of a declaration because he or she is politically committed to vote with the government, although in the law officer role is not bound by collective responsibility.²⁵ Also, apart from the symbolism of voting independently, it would not change the outcome.

The role of the Attorney General is most effective when preventing provisions that are inconsistent with the Bill of Rights being introduced into legislation either by intervening during the policy stage or with colleagues in Cabinet. The 2001 Ministerial Review recommendations provided an opportunity for the Human Rights Commission to engage directly with public officials to make them aware of the provisions of both the NZBORA and Human Rights Act.²⁶ The Cabinet Manual now specifically requires that all Bills submitted to Cabinet must comply with both the NZBORA and the Human Rights Act.²⁷ Finally the seriousness with which the House takes a declaration of inconsistency depends on how seriously the members take such breaches. During the parliamentary debate on the 2001 Amendment itself the opposition political rhetoric characterised human rights with political correctness. The political environment for human rights advocacy in 2001 was not friendly. Rosslyn Noonan, the Chief Human Rights Commissioner recently described the challenge as follows:²⁸

If the only knowledge you had of the Human Rights Amendment Act 2001 had come from listening to Parliamentary debates during the second reading and Committee stages of the Bill, then you could well have believed that the new Human Rights Commission was going to be a frightening manifestation of Big Brother (or in this case Big Sister which was apparently infinitely worse), thought police, social engineering and political correctness, with a licence to establish re-education camps in the jungles (or in our case the bush). One Opposition MP suggested it should be called, among other things, the Human Rights Political Correctness Bill.

It is interesting to note that at the time of the debate in 2001 a nationwide opinion poll taken by UMR found that over 80 per cent of New Zealanders said it was extremely important (57 per cent) or important for the Human Rights Commission to deal with human rights issues.

An analysis of the effectiveness of NZBORA on the legislative process by Andrew Geddis concluded:²⁹

Finally, a large proportion of the apparently NZBORA inconsistent legislation that Parliament has enacted relates to groups possessing only marginal political influence: drug users; gang members; “boy racers”; prisoners on parole; paedophiles; etc. A government can expect to pay a minimal political cost by appearing to limit the rights of these groups.

²⁵ *Cabinet Manual 2008* (Cabinet Office, Wellington, 2008) at 4.3, 4.4, 4.5.

²⁶ *Non-Discrimination Standards for Government and the Public Sector: Guidelines on How to Apply the Standards and Who is Covered* (Ministry of Justice, Wellington, March 2002).

²⁷ *Ibid.*, at 7.60, 7.61, 7.62.

²⁸ Rosslyn Noonan “Background to the New Zealand Experience” (paper presented to the Everyday People, Everyday Rights Conference, Victorian Equal Opportunity and Human Rights Commission, Melbourne, Australia, 2009).

²⁹ Andrew Geddis “The Comparative Irrelevance of the NZBORA to Legislative Practice” (2009) NZULR 465 at 488.

I concur with this assessment. The effectiveness of s 7 reports, however, has to be seen in the context of the number of enactments that do not attract such reports, which is often due to amendments to policy proposals prior to introduction of the legislation. Geddis reports that, since 1990, 48 s 7 reports have been issued by the Attorney-General, of which twenty-two related to government Bills and twenty-six to members or local Bills.³⁰ Bromwich, in an analysis of rights-vetting under the NZBORA, noted that between January 2003 and June 2009 the Attorney General tabled 17 s 7 declarations of inconsistency and of these, seven were not enacted; eight were enacted with the offending provision remaining; one enacted with amendment lessening the breach; and one enacted with the breach removed.³¹

As Attorney General I found the process of Bill of Rights vets resource intensive and the Bills that required a declaration were a small number. As a result of the 2001 Review I sought and gained support from the Cabinet to make all vets public on the Ministry of Justice website, which happened in 2003. While the declarations of inconsistency will rarely prevent legislation being enacted, they do ensure all legislation is formally scrutinised to ensure there is conformity with the NZBORA. They also legitimise the role of the Attorney General to protect and uphold human right standards in the executive decision making process. I was also conscious that the declarations were an opinion of how the NZBORA may be interpreted. On occasions I felt a good argument could be mounted against support of the declaration but in the interest of erring on the side of an interpretation that supported the Bill of Rights position, I agreed to the declaration of inconsistency.

The other procedure for declaring an enactment inconsistent with the NZBORA is for the courts, in their interpretation of an enactment, to make a declaration. Such a declaration does not invalidate the enactment in any way, as noted previously, but it does draw public attention to the offending provision. While there was no statutory recognition of this practice, it was widely supported by the NGO community and much of the legal profession.

Andrew Geddis, in the analysis mentioned previously, noted that the courts, in the context of interpreting the NZBORA, have adopted a considered cautious approach. Although in the *Moonen Case*³² the Court of Appeal, in a dicta statement by Justice Tipping, had asserted the obligation on the Court to draw attention to legislation that was inconsistent with the NZBORA, in the following terms:³³

That section was, however, retained and should be regarded as serving some useful purpose, both in the present statutory context and in its other potential applications. That purpose necessarily involves the court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject matter arises in that forum. In the light of the presence of s.5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the courts will indicate whether a particular legislative provision is or is not justified thereunder.

30 Ibid, at 475–475.

31 Tessa Bromwich “Parliamentary Rights-vetting under the NZBORA [2009] NZLJ 189.

32 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

33 Ibid, at 17.

This obligation, however, did not go as far as declaring an enactment unlawful. This was specifically prevented as part of the political accommodation to ensure the enactment of the NZBORA in 1990. The approach of the Supreme Court to legislation inconsistent with the NZBORA is seen in *R v Hansen*³⁴ where, although four of the five judges held that a provision relating to the burden of proof was an unreasonable limit on the right of the accused right to be presumed innocent, the court did not follow the approach of the House of Lords in *R v Lambert*³⁵ where a similar reverse onus issue arose. In this case, the House of Lords used a similar interpretative provision in the United Kingdom Human Rights Act 1998 to read down the provision and give a “rights friendly” interpretation. The New Zealand Supreme Court considered and rejected the United Kingdom judicial approach with Justice Tipping stating “whether [such an approach] is appropriate in England is not for me to say, but I am satisfied that it is not appropriate in New Zealand.”³⁶

The New Zealand Supreme Court approach has been described by Claudia Geiringer in these terms:³⁷

New Zealand judges, by contrast with some United Kingdom judges, have not understood section 6 of the Bill of Rights Act as inviting a new and distinctive approach to statutory interpretation. Rather, they have treated section 6 as a legislative manifestation of the established common law principle that legislation is, where possible, to be interpreted consistently with fundamental rights recognised by the common law. The *Hansen* decision is consistent with that general orientation.

The most recent judicial statement on the relationship between the courts and the Parliament in matters relating to the NZBORA arose in *Boscawen v Attorney-General*³⁸ where the Court of Appeal struck out an application to judicially review the Attorney-General’s decision not to issue a s 7 declaration of inconsistency report to the Electoral Finance Bill 2007. The Court decided on the grounds of comity between the legislative and judicial branches, and that reviewing the decision not to make a s 7 Report would:³⁹

... place the Court at the heart of a political debate actually being carried on in the House. It would effectively force a confrontation between the Attorney-General and the Courts, on a topic in which Parliament has entrusted the required assessment to the Attorney-General not to the Courts. ... A declaration that the Attorney-General should recommend that the Bill be reintroduced would be an even greater interference with the political and legislative processes of the House. In short, a review of the s 7 duty in this manner would be the antithesis of the comity principle.

This position of the New Zealand Court of Appeal accurately reflects the constitutional reality within which the relationship between the courts, the executive and the parliament work. It also reflects that the New Zealand Parliament and executive have worked hard to strengthen legislative responsibility for human rights and avoid conflict between the Parliament and the courts.⁴⁰

34 *R v Hansen* [2007] 3 NZLR 1.

35 *R v Lambert* [2002] 2AC 545 (HL).

36 *R v Hansen* [2007] 3 NZLR 1 at 56 .

37 Claudia Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen* (2008) 6 NZJPIL 59 at 73.

38 *Boscawen v Attorney-General* [2009] 2 NZLR 299 (CA).

39 *Ibid.*

40 There is a literature that argues there is a dialogue between the courts and parliament and that it best characterises the nature of the relationship. See P Hogg & A Bushell “The Charter Dialogue Between the Courts and Legislature” (1997) 35 Osgoode Hall LJ 75; Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321; Sara Jackson “Designing Human Rights Legislation: ‘Dialogue’, the Commonwealth Model and the Roles of Parliaments and Courts” (2007) Auckland U L Rev 89 at 115.

II. CONCLUSION

One of the most significant consequences of the 2001 Amendment then was to make all government action, except in immigration, subject to a human rights regime. It also provided the Bill of Rights, through s 19, with a statutory body mandated to advocate for human rights. It did not, however, give human rights primacy. The 2001 Amendment was an important step in embedding human rights as part of the New Zealand's domestic law. The Human Rights Commission now has the clearly stated role to advocate for human rights, while the Tribunal may now issue a declaration that an enactment is inconsistent with the right to be free from discrimination under s 19 of the NZBORA.

It is a truism that we only know how important human rights are when we need them most. We may be facing a challenge at the moment that will provide the real test of the importance and effectiveness of the reforms to human rights in the 2001 Amendment to the Human Rights Act. The economic recession and the presence of terrorist activity have seen the rights of individuals under attack from the state on the grounds of economic and security necessity. It is in these circumstances that the individual must rely on both political and legal action to protect human rights. The Chief Commissioner Rosslyn Noonan's comments in a recent speech are relevant in this context. She concluded in her assessment that much progress had been made on developing a human rights culture but that there is still much to be done, and warned:⁴¹

Since the beginning of the year it has been clear that the single greatest challenge to further strengthening human rights in New Zealand is the global economic and financial crisis. It is more important than ever that governments prioritise fundamental human rights as they face difficult decisions with fast reducing resources.

The 2001 Amendment was an attempt to provide more effective legal rights to protect an individual's human rights, while at the same time ensuring human rights were an integral part of good governance and were supported by the community. It did not, however, give legal primacy to human rights. This is a constitutional debate that waits its time to be held in New Zealand.

41 *Ibid.*, at 12.

INDIGENOUS PEOPLES: NEGOTIATING CONSTITUTIONAL RECONCILIATION AND LEGITIMACY IN CANADA

BY PAUL LAH CHARTRAND*

This article outlines the argument that the legitimacy of the law of the Constitution of Canada requires the consent of the Aboriginal or indigenous¹ peoples and that Canada has a positive duty to negotiate constitutional agreements with indigenous peoples in certain circumstances. The argument draws upon fundamental unwritten principles of the Constitution that have been elaborated by the courts and also upon express constitutional provisions. It also draws upon precepts from international law.

The distinction between indigenous persons and indigenous peoples is important in this argument. Indigenous persons in Canada have the status, rights and obligations of citizens.² Government policies dealing with Aboriginal persons are usually directed at providing them with the services due to all citizens. The Constitution of Canada and democratic principles require equal and fair treatment of all citizens by the organs of the state. The rationale for positive action in favour of aboriginal persons is often revealed in the labels by which the policies are known, such as “Closing the Gap”, which imply the objective of redistributive justice to remedy the effects of past unequal treatment by the state.

The argument in this article will focus upon the rights of indigenous peoples. Indigenous persons constitute distinct communities with distinct collective rights in Canada, as they do in other former Commonwealth states. The political and legal recognition of this distinct status and of the collective rights of indigenous peoples is evident, *inter alia*, in the history of the early political relations and Treaties between indigenous peoples and British colonial and Canadian state agents.³

The recognition of the distinct status and of the group rights of indigenous peoples is supported and strengthened contemporarily by recent and emerging developments in both domestic constitutional law and in international precepts. Salient features of the former include the express affirmation and recognition of the Treaty and Aboriginal rights of the aboriginal “peoples” in the

* Manitoba, Canada.

- 1 The indigenous peoples in Canada are referred to as “aboriginal peoples” in the text of the Constitution that affirms and recognises their collective treaty and aboriginal rights: Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), Chapter 11, s 35.
- 2 For a discussion of the status and rights of indigenous persons as citizens and the rights of indigenous peoples within states, see Paul LAH Chartrand “Citizenship Rights and Aboriginal Rights in Canada. From ‘Citizens Plus’ to ‘Citizens Plural’” in John E Fossum, Johanne Poirier and Paul Magnette, ed. *The Ties That Bind: Accommodating Diversity in Canada and the European Union* (PIE Peter Lang, Bruxelles, 2009) and the Canadian cases cited therein.
- 3 See, eg John Giokas and Robert K Groves, “Collective and Individual Recognition in Canada” in Paul LAH Chartrand, *Who Are Canada’s Aboriginal Peoples* (Purich Publishing, Saskatoon, 2002) at 41–82. For an excellent overview of the history see J Edward Chamberlin *The Harrowing of Eden: White Attitudes Towards Native Americans* (Seabury Press, New York, 1975).

Constitution of Canada in 1982; the formal recognition of the constitutional role of Aboriginal peoples in constitutional reform, and the judicial elaboration of certain unwritten principles of the Constitution of Canada.

At the international level, the distinct status and rights of indigenous peoples is evident in the right of self-determination that is vested in all “peoples” and in the precepts emerging from state practice and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples. In the Quebec Secession Reference (QSR) the Supreme Court of Canada (SCC) stated;

While international law generally regulates the conduct of nation states, it does in some specific circumstances, also recognize the “rights” of entities other than nation states – such as the right of a *people* – to self-determination.

...the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond “convention” and is considered a general principle of international law.⁴

In brief outline the basic proposition that will be argued is as follows. Where an Aboriginal people expresses by democratic means its will to negotiate the terms of the Constitution under which it is prepared to live, then Canada has a constitutional duty to negotiate an agreement. The result of the negotiations is a political matter over which the courts have no jurisdiction: it is the existence of the duty to negotiate that is at issue. The argument ties the consent of indigenous peoples to constitutional legitimacy in Canada.

Where might the argument be put to good use in contemporary Canada? Three applications present themselves.

It is notorious that the historic treaties with First Nations have been largely overlooked in Canadian law and policy. Now that the Constitution Act 1982 has recognised and affirmed treaty rights, the proposition may be used to require that historic treaties be appropriately respected and implemented.

Second, the proposition may be used to require negotiations on modern treaties where no historic treaty was entered into.

Third, the argument may be advanced to demand amendments to the existing terms of the Constitution, such as the Constitution Act 1930 which contains agreements between the federal government and each of the three prairie provinces on the transfer of lands and natural resources from the former to the latter governments. Those agreements are widely condemned by First Nations as breaches of treaty promises.⁵

Over the past three decades there has been much discussion and writing about the place of Aboriginal peoples in Canada. There are many arguments and judicial authorities to support the recognition of Aboriginal peoples as distinct political and constitutional entities with distinct collective rights. For immediate purposes it is useful to draw attention to two concepts or approaches that inform the argument in this article.

The first concept proposes the existence of conflicting “public interests”. In this view, each Aboriginal people has a right to determine its own vision of its public interest, and to take measures for its identification, recognition, development and protection. This, it seems, is the heart of

4 *In Re Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385, 55 CRR (2d) 1, 1998 CanLII 793 (SCC) at [113], [114] [Quebec Secession Reference].

5 This fact is known from the personal experience of the writer, which includes participation in recent meetings of First Nation leaders to discuss ways to challenge the agreements that form schedules to the Constitution Act 1930 and that are commonly referred to as the Natural Resources Transfer Agreements Acts (NRTA).

the concept of “self-determination” which constitutes the right of all peoples to self-determination. Viewed this way, the meaning of “reconciliation” as described by the SCC is the reconciliation of conflicting public interests.⁶

The second concept conceives the existence of legitimising “compacts” that identify the constitutionally distinct relationships between constitutionally relevant actors whose rights and interests are reconciled by the application of common constitutional values and principles of interpretation. The concept strengthens the argument that consent is essential for a legitimate constitution.

The compact theory⁷ was recently invoked in *Beckman* where Deschamps J stated in a vigorous dissenting minority judgment:⁸

In *Reference re Secession of Quebec*, 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217, at paras. 48-82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual’s fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a “federal compact” between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

Deschamps J then added an observation that shows the distinction that was mentioned earlier between the rights of citizens that Aboriginal persons have and the collective rights and status of Aboriginal peoples:⁹

The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the Constitution Act, 1982. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. Finally, s. 35(4) provides that, notwithstanding any other provision of the *Constitution Act, 1982*, the Aboriginal and treaty rights recognized and affirmed in s. 35(1) “are guaranteed equally to male and female persons”. The compact relating to the special rights of Aboriginal peoples is therefore in harmony with the other two basic compacts and with the four organizing principles of our constitutional system. ...

I. ABORIGINAL ‘PEOPLES’ ARE CONSTITUTIONALLY RELEVANT ENTITIES WHOSE CONSENT MATTERS

Consent is a constitutional principle of the highest order. It is accepted widely as the basis for lawful governing authority, including in the United States of America, in Australia, and in the European Union. In the case of many Aboriginal peoples, finding the basis for their consent to the constitutional order of Canada is problematic.

6 *Mikisew Cree v AG Canada* (2005) 3 SCR 388.

7 See the discussion of the Canadian compact theory in *Canada Report of the Royal Commission on Aboriginal Peoples* Vol 2 *Restructuring the Relationship* Pt 1 ch 3 “Governance” (Ottawa, 1996) 105–419 at 194–195, and see the sources cited in note 146, p 392. [Vol 2 will be referred to henceforth as RCAP Vol 2].

8 *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53 (CanLII) at [97].

9 *Ibid* at [98].

The idea that the consent of the people legitimises governing authority is a widely accepted proposition in political theory.¹⁰ The proposition is, however, not free from philosophical opposition and criticism.¹¹

The philosophical debate need not detain attention for long for the purpose of a Canadian constitutional argument, however, because there is ample Canadian judicial authority in support of the proposition that consent legitimises constitutional authority and governance.

In the QSR¹² case the SCC stated:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. ...

And:¹³

As this Court held in the Manitoba Language Rights Reference, *supra*, at p. 745, “[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.

In Canada there are distinct constitutional entities that categorise “the people” for constitutional purposes. These purposes include self-government. The argument being presented here is that Aboriginal peoples are a relevant constitutional entity and as such they have a right to demand negotiations to reach agreement on the terms of the Constitution under which they are prepared to attach their consent. The proposition has been applied by the SCC in respect to the people of a province and it is proposed here that an Aboriginal people stands in the same position as a province in this respect.

II. SELF-DETERMINATION AND DEFINING THE PUBLIC INTEREST

The provinces are created and recognised by the Constitution as entities with self-government authority and jurisdiction.¹⁴ In the QSR the SCC recognised that the people of a province are organised as a province and as such the people of a province have a right to call for negotiations on the terms of the Constitution to which it will attach its consent.

The broad purpose of recognising that the consent of the people of a province is needed to legitimise the Constitution seems to reflect the value behind the concept of self-determination.¹⁵ Self-determination essentially recognises the right of a people to define its own vision of the good society and to act to implement it. In other words, a people, including the people of a province in Canada, has a right to define its own “public interest”. It is this authority to define and act to promote the public interest of the people of a province that defines the role of provincial governments. None of this should be contentious.

The authority to govern in Canada is constitutionally divided into separate and distinct spheres of jurisdiction within which the federal and provincial governments are free to decide what is in

10 See generally Steven M Cahn (ed) *Classics of Political and Moral Philosophy* (Oxford University Press, New York, 2002); Alan Gewirth *Political Philosophy* (MacMillan, New York, 1965); John Simmons *On The Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton University Press, Princeton, NJ, 1993).

11 See for example, Peter Josephson *The Great Art of Government: Locke’s Use of Consent* (University of Kansas Press, Lawrence, 2002); CW Cassinelli “The ‘Consent’ of the Governed” (1959) 12 *Western Political Quarterly*, 391.

12 *Reference re Secession of Quebec*, above n 4, at [67].

13 *Ibid* at [85].

14 The jurisdictional spheres are identified mainly in ss 91 and 92 of the Constitution Act 1867.

15 See the discussion on the international law right of self-determination in RCAP Vol 2, above n 7, at 169–174.

the public interest of the people, either nationally in the case of the federal government, and provincially in the case of provincial governments. As the SCC has stated, our constitutional regime recognizes the diversity of component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.¹⁶

The courts defer to the authority of elected governments to decide what is in the public interest so long as it complies with the Constitution. The will of the people of a province is expressed in the political actions of the elected provincial government representatives of the people. According to the analysis in the QSR, the government of the people of a province have the authority to organise the way in which the people express their political will.

In the QSR case¹⁷ the SCC also said this:

The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada.

If this test is applied broadly to the case of Aboriginal peoples, in light of the compact theory adumbrated earlier, then an Aboriginal people has the power to effect whatever constitutional arrangements are desired within Canadian territory if an Aboriginal people is a constitutionally recognised governmental authority.

If the duty to negotiate arises upon the expression of the will of the people of a province, it also arises upon the expression of the will of another constitutional sub-state entity: an Aboriginal people. Both are forms of constitutionally recognised political forms under which “the people” may be organised and identified. In these forms, the people are free to express their opinion about what values and rules and principles shall constitute legitimate governance for them. The provinces and Aboriginal peoples share the character of being “constituent” units of Canada, and as “constituting units” of Canada.

We turn then to examine the concept of an Aboriginal “people” and its constitutional and governmental character.

III. ABORIGINAL “PEOPLES” IN THE CONSTITUTION

The Constitution of Canada affirms and recognises, in s 35 of the Constitution Act 1982, the aboriginal and treaty rights of the Aboriginal “peoples” of Canada. The meaning of a “people” for purposes of s 35 has not been judicially determined but it is the constitutional entity the consent of which matters for constitutional legitimacy.

International law provides little assistance in establishing the meaning of a “people” that has a right of self-determination. There is no universally accepted definition of a “people”.¹⁸ The recent United Nations Declaration on the Rights of Indigenous Peoples does not include a definition and

16 *Reference re Secession of Quebec*, above n 4, at 251, as quoted in *Athabasca Chipewyan First Nation v B.C.*, 2001 ABCA 112 (CanLII)

17 *Ibid* at [85].

18 *Reference re Secession of Quebec*, above n 4, esp at [123], [124].

the idea of including a definition was vigorously resisted by indigenous peoples' representatives during the lengthy process of elaborating the text of the Declaration.¹⁹

The SCC has stated that:²⁰

It is clear that "a people" may include only a portion of the population of an existing state. The right of self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

At the same time the SCC also stated that a people's right of self-determination is one that is normally attainable within the constitutional framework of a state:²¹

While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

In its 1996 final report the Canadian Royal Commission on Aboriginal Peoples (RCAP) stated:²²

The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the duty to negotiate in good faith and in light of fiduciary obligation owed by the Crown to Aboriginal peoples. Any reforms must be approved by the Aboriginal people concerned through a democratic process, ordinarily involving a referendum. Where these reforms necessitate alter nations in the Canadian constitution, they must be implemented through the normal amending procedures laid out in the *Constitution Act, 1982*.

The Commission proposed that an Aboriginal people with a right of self-determination is:²³

A sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.

This definition, as elaborated by the Commission,²⁴ is adopted for immediate purposes.

19 The author makes this assertion based upon personal experience as a participant in many of the sessions from 1986 to 2007 at the UN offices in Geneva where state representatives deliberated the text of the Declaration with indigenous representatives from around the world.

20 *Reference re Secession of Quebec*, above n 4, at [124].

21 *Ibid.*, at [130].

22 RCAP Vol 2, above n 7, at 172.

23 *Ibid.*, at 178. For reasons explained there, which are not relevant to the current discussion, the RCAP used the term "nations" as a synonym for "peoples".

24 *Ibid.*, at 178–180. It is beyond the scope of this paper to examine in detail the features that may characterise an Aboriginal people.

IV. THE CONSTITUTIONAL AND GOVERNMENTAL CHARACTER OF AN “ABORIGINAL PEOPLE”

Judicial authority in the SCC supports the proposition that an aboriginal “people” is a distinct political entity that has a governmental character and the collective will of which matters for constitutional purposes. The approach recognises the historical and contemporary constitutional significance of political action by representatives of Aboriginal peoples.

In *Sparrow*, the SCC’s unanimous decision included the following comments:²⁵

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada’s aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place...

And:

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in “An Essay on Constitutional Interpretation” (1988), 26 Osgoode Hall L.J. 95, says the following about s. 35(1), at p. 100:

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from *general principles of constitutional interpretation, principles relating to aboriginal rights*, and the purposes behind the constitutional provision itself. ...

In addition to this judicial support, the text of an amendment to s 35 of the Constitution Act 1982 affirms by implication that Aboriginal “peoples” have a distinct constitutional character and role. That unique character is political and governmental in nature.

Section 35.1 provides:²⁶

The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*”, to section 25 of this Act, or to this Part,

- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada, and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Section 35.1 itself resulted from national conferences on constitutional reform at which the participants were all Canadian first ministers and representatives of the Aboriginal peoples of Canada.

²⁵ *R v Sparrow* [1990] 1 S.C.R. 1075 at 1105.

²⁶ See above n 1.

da.²⁷ Representatives of the Aboriginal peoples of Canada have, since the 1980s participated in intergovernmental meetings on national and provincial political issues.

An Aboriginal “people” is a distinct constitutional entity that has governmental functions and that has a distinct role in constitutional statecraft. The history of Aboriginal peoples, in particular the negotiations and agreements leading to the historic treaties with the First Nations, demonstrates that Aboriginal peoples are distinct constitutional entities whose consent matters for constitutional legitimacy.

It will be recalled that s 35.1 constitutionalises the commitment of the federal and provincial governments to the “principle” that Aboriginal peoples have a role in constitutional reform on matters that affect their interests and rights. If this is a principle then s 35.1 ought to be read so as to apply beyond the specific provisions that are listed in s 35.1 and to include all provisions of the Constitution that affect the interests and rights of Aboriginal peoples, including the relevant provisions of the Constitution Act 1930. This interpretation makes the present argument applicable to the intention of First Nations to seek changes to the lands and natural resources provisions in that Constitutional document, as mentioned above.

The principle that Aboriginal peoples’ representatives have a legitimate role in governmental and intergovernmental affairs in Canada is reinforced by the federal policy first adopted in 1995 which recognises the inherent right of self-government and leads to negotiations on the modern treaties with First Nations.²⁸

V. CANADA’S UNWRITTEN PRINCIPLES OF THE CONSTITUTION

In addition to the political principle in s 35.1, there are the unwritten principles that have been elaborated by the SCC, as mentioned earlier.

Within the limits of this article, the focus will be on the most immediately relevant principles instead of undertaking a comprehensive review. It seems evident that additional arguments may be added to show how the principles support the participation of Aboriginal peoples in the legitimisation of the Constitution of Canada.

To reiterate, the principles that are said to underlie the whole of the Constitution and of its evolution include: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism.²⁹

The SCC explained the function of these unwritten principles in the following terms:³⁰

The principles assist in the interpretation of the text and the *delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions*. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional *development and*

27 For a brief introductory description of the conferences see Paul LAH Chartrand “Background” in Paul LAH Chartrand (ed) *Who Are Canada’s Aboriginal Peoples?* (Purich Publishing, Saskatoon, 2002), at 27–29. See also Peter W Hogg *Constitutional Law of Canada* (Student ed, Carswell, Toronto, 2009) at 673–674 where the author, a leading constitutional expert, opines that by s 35.1 “the aboriginal peoples have gained entry to the constitutional amendment process. This privilege is accorded to no other group outside government, which emphasizes that the special status of the aboriginal peoples is now firmly accepted in Canada.”

28 Canada, *Aboriginal Self-Government* (Minister of Public Works and Services Canada, Ottawa, 1995). For information about the policy and about modern treaties, see <www.ainc-inac.gc.ca/al/lde/ccl/sgb-eng.asp> [Accessed on 08 September 2011].

29 *Beckman v Little Salmon/Carmacks First Nation*, above n 8, at [97].

30 *Reference re Secession of Quebec*, above n 4, at [52].

evolution of our Constitution as a “living tree”, to invoke the famous description in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

In respect to the present argument, the above-quoted commentary is applied in the sense that the unwritten constitutional principles assist to delineate the role of the representatives of Aboriginal peoples and representatives of governments, and the “political institutions” at issue include the participation of Aboriginal peoples’ representatives in intergovernmental meetings and in other statecraft where the interests and rights of Aboriginal peoples are at stake.

Observance and respect for the principles would promote the substantive and aspirational precepts in the United Nations Declaration on the Rights of Indigenous Peoples which exhorts states to: “promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”.³¹

Among the rights of indigenous peoples that states are urged to respect and apply is the right of self-government. Thus article 4 provides:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The significance and role of Aboriginal political institutions within the State are evident in article 5, which also recalls the significance and role of the compact theory outlined by Deschamps J, *ante*:³²

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Returning to the SCC’s explanation of the role of the unwritten constitutional principles, the following may be noted:³³

Underlying constitutional principles may in certain circumstances *give rise to substantive legal obligations* (have “full legal force”, as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. *These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature.* The principles are not merely descriptive, but are also invested with a powerful normative force, and *are binding upon both courts and governments.* “In other words”, as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, “in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada.

This judicial explanation informs the argument that governments have a positive legal obligation to respond to a request by an Aboriginal people to negotiate the terms of the Constitution under which it is prepared to live. The courts have found the existence of the obligation and they have a

31 “United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007” (2007) <www.un.org/esa/socdev/unpfii/en/declaration.html> article 42.

32 *Beckman v Little Salmon/Carmacks First Nation*, above n 8.

33 *Reference re Secession of Quebec*, above n 4, at [54].

role to play in declaring its existence. As will be mentioned below, the courts have no role in the substantive negotiations themselves, or in assessing their results.

The primary objective of this article is to set out an argument in its general outline. Accordingly, although all of the principles have a prima facie application to the argument that is being made, it is sufficient to emphasise that the principle of democracy bears an important relationship to the aboriginal right of self-government, which is at the heart of the argument since an Aboriginal people may choose self-government as one of the choices open to it under the right of self-determination.

According to the SCC:³⁴

Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling*, *supra*, at p. 306, *democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process.

In the present view, the principle of democracy promotes the goal of negotiating and achieving self-government in order to permit an Aboriginal people to identify and realise its vision of its “public interest” within Canada, where governments have the jurisdiction and authority to identify and realise the broader “public interest”. The promotion of self-government and the realisation of a people’s vision of the good society are asserted to be the most legitimate means of accommodating the cultural and group identities of the Aboriginal peoples in Canada.

It is, at the time of writing, an open question in Canadian constitutional law whether an Aboriginal people’s right of self-government is recognised and affirmed in s 35 of the Constitution Act 1982. For present purposes it is assumed that an Aboriginal people has a right of self-government, whether the right is recognised by s 35 or by the common law, or by international human rights norms and obligations that bind Canada.³⁵

In its final report the RCAP wrote:

[T]he inherent right of self-government was recognized and affirmed in section 35(1) of the *Constitution Act 1982* as an existing Aboriginal or treaty-protected right. This constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of Aboriginal peoples, and the *existence of a federal system in Canada*.³⁶

34 *Reference re Secession of Quebec*, above n 4, at [64].

35 For a discussion of the jurisprudence and constitutional status of the aboriginal right of self-government see Hogg, above n 27, at 640–642. See also *Campbell et al. v. Attorney General of British Columbia, the Attorney General of Canada and the Nisga’a Nation et al.* 2000 BCSC 1123. For an example of a UN treaty body urging Canada to implement the recommendations of the RCAP on self-government and lands and resources, see United Nations Human Rights Committee “International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee” (7 April 1999) CCPR/C79/Add.105 at [8] It is disclosed that the author was a commissioner on the RCAP. The federal government has recognised the existence of the right of self-government of Aboriginal peoples as a matter of policy since 1995: see *Canada Aboriginal Self-Government* (Minister of Public Works and Services, Ottawa, 1995).

36 RCAP Vol 2, above n 7 at 202.

In *Mitchell*, the minority in the SCC subscribed to the view that shared sovereignty or authority to govern was a feature of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government.³⁷

In addition to the unwritten principles which have been found by the SCC, there is also judicial support in that Court for the proposition that respect for human rights and freedoms is also such a fundamental principle.³⁸ Accordingly the human right of self-determination of every Aboriginal people in Canada demands the respect of governments and courts. Therefore, governments and courts ought to be receptive to requests by Aboriginal peoples to negotiate or renegotiate the terms of the Constitution to which they are willing to attach their consent. The legitimacy of the law and practice of the Constitution requires the consent of the Aboriginal peoples.

The present argument can promote the “development and evolution of our Constitution as a ‘living tree’”³⁹ in part by drawing upon the concept of “shared sovereignties” that has been proposed by the RCAP and endorsed judicially in a minority decision in *Mitchell v M.N. R.*⁴⁰

In that case the minority reviewed the argument of the RCAP:⁴¹

The final Report of the Royal Commission on Aboriginal Peoples, vol.2, goes on to describe “shared” sovereignty at pp. 240-41 as follows: “Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government....”

“Merged sovereignty” asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners. The final Report of the Royal Commission on Aboriginal Peoples, vol.2 (Restructuring the Relationship (1996)), at p.214, says (sic) that “Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in the Canadian soil.” This updated concept of Crown sovereignty is of importance. Whereas historically the Crown may have been portrayed as an entity across the seas with which aboriginal people could scarcely be expected to identify, this was no longer the case in 1982 when the s.35(1) reconciliation process was established. The Constitution was patriated and all aspects of our sovereignty became firmly located within our borders. If the principle of “merged sovereignty” articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.

This reconciliation of conflicting “public interests” must engage political institutions wherein representatives of Aboriginal peoples and governments negotiate agreements based upon their respective visions of the good society. The role of the courts is to declare the existence of the positive obligation of governments to negotiate.

37 *Mitchell v Canada (Minister of National Revenue – MNR)* [2001] 1 SCR 911; *Mitchell v MNR* 2001 SCC 33 (CanLII) at [130], quoting RCAP Vol 2 at 240–241. See also Sari Graben “The Nisga’a Final Agreement: Negotiating Federalism” (2007) 6:2 Indigenous Law Journal 63.

38 *R v Demers* 2004 SCC 46, [2004] 2 SCR 489 per LeBel, J dissenting, in argument.

39 *Reference re Secession of Quebec*, above n 4.

40 *Mitchell* cases above n 37. See also the discussion in Paul LAH Chartrand, *Reconciling Indigenous Peoples’ Sovereignty and State Sovereignty* (AIATSIS, Canberra, 2009) AIATSIS Research Discussion Paper No 26 at 12–14. <www.aiatsis.gov.au/research/docs/dp/DP26.pdf>.

41 *Ibid.*, at 13.

As stated in *Sparrow*, the political action of Aboriginal representatives has already given rise to particular Constitutional terms, and the text and principles of the Constitution require negotiations by the respective political representatives.⁴²

VI. PROCESS

If the law of the Constitution imposes upon governments an obligation to negotiate legitimate terms of the Constitution with representatives of an Aboriginal people in particular circumstances, the limits of the judicial role must be appreciated. The ambit of the courts' role was explained as follows in QSR:⁴³

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. *To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.*

The basic function of a declaration on the existence of the duty to negotiate is to bring the governments to the negotiating table. Aboriginal peoples suffer from a great imbalance of power in dealings with governments and have great difficulty in getting governments to respond effectively to their attempts to negotiate.

The duty to negotiate would come into existence, or be "triggered", by the means that the SCC identified in the case of a province in the QSR. The trigger is the expression of the will of a people to enter into negotiations. According to the SCC, the expression of the will of the people must take a democratic form. The RCAP and the SCC in QSR both recommended a referendum as the appropriate democratic method of ascertaining the will of the people in this regard.⁴⁴ It is interesting to speculate whether a democratic revolution of a people would also be regarded as an appropriate democratic mechanism to trigger the duty to negotiate.

As mentioned above, it is the expression of the will of an Aboriginal "people" that is relevant. That would in principle exclude the small "bands" that are created and operate under the federal Indian Act. Ultimately the meaning of a "people" would be determined by political means in a political context.

The RCAP has made detailed recommendations on a national process for negotiating contemporary agreements or treaties between Aboriginal peoples and governments.⁴⁵ That work can assist in designing processes for negotiations but, in the long run, it is the experience and good faith of the participants that will determine the best means or procedures to be followed.

42 *R v Sparrow*, above n 25.

43 *Reference re Secession of Quebec*, above n 4, at [153].

44 RCAP Vol 2, above n 7.

45 RCAP Vol 2, above n 7, at 245–418.

VII. ADVANTAGES OF NEGOTIATIONS

Canada's southern neighbours have a history of revolution against British authority. The American model rejects an illegitimate government.⁴⁶ In Canada, we talk. Canadians have an evolutionary political history, which has generated a political culture of deference to authority. The rise of revolutionary and secessionist tendencies in the province of Quebec since the 1960s is itself a recent phenomenon that has been characterised more by talk than by action.

The political commitment to talk has been the central feature of Aboriginal policy in Canada since at least the 1880s, as illustrated by the following extract from a letter written by the Prime Minister of the day in 1884 concerning grievances of western Aboriginal peoples:⁴⁷

I think the true policy is rather to encourage them to specify their grievances in memorials and send them with or without delegations to Ottawa. This will allow time for the present effervescence to subside, and on the approach of winter the climate will keep things quiet until next spring.

The approach in favour of talk over secession developed by the SCC has deep roots in Canadian political culture and history. The approach was developed in response to a political crisis that involved the province of Quebec, a province with great political influence on national politics. The proposal to apply the approach developed in the Quebec case argues that justice demands for the politically weak what it provides for the politically influential. It has been notoriously difficult for Aboriginal peoples to get governments to negotiate any changes to the status quo.

In 1982 the Constitution of Canada was amended to include an express recognition and affirmation of the rights of the indigenous peoples. For a number of years national meetings were held between leaders of indigenous representative organisations and Canadian government leaders to agree on the identification of those rights. No substantive agreements resulted after the constitutional amendments achieved at the 1983 meeting, and since then the nature and scope of the treaty and Aboriginal rights of the Aboriginal peoples have been determined by judges in the courts. The argument outlined in this article offers a new approach which tentatively seems to reveal certain advantages, both practical and theoretical, over adjudication.

First, the approach that is argued here would provide a forum for political negotiations and would, therefore, accord more firmly with the democratic proposition that legitimacy depends upon consent and that each "people" is best able to determine what is the nature and scope of its "public interest" and its vision of the future development of that collective interest.

In this regard the United Nations Declaration provides:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

The SCC is not legitimately competent to determine what is the public interest of an Aboriginal people. The argument here would shift that burden to the legitimate political representatives of an Aboriginal people. Concepts and approaches developed in the SCC, such as the concept of the fiduciary relationship, have the admitted weakness that the Crown "wears two hats" as the protector of the general public interest and at the same time the protector of the particular public interest

⁴⁶ See for example, James Thurlow Adams *Jeffersonian Principles and Hamiltonian Principles* (Little, Brown, Boston, 1928).

⁴⁷ Letter from Sir JA Macdonald to Governor-General the Marquess of Lansdowne, 12 August 1884. <www.archives.org/stream/correspondenceof00macduoft_djvu.txt> last accessed 6 September 2011.

of an Aboriginal people. That inherent tension is removed where each side is represented by its legitimate political representatives.

Second, negotiations that are based upon respect for the general principles of the Constitution of Canada ought to be supported by both sides. This is the basic project of reconciliation in Canada. It involves the reconciliation of conflicting public interests. It can reasonably be expected that agreement can more readily be reached where negotiations are based upon respect for commonly-held constitutional values and principles rather than being asked to compromise them.

Third, the present argument reduces the need for the courts to develop a right of self-government, a task that the courts have been extremely reluctant to undertake while being aware that the right itself is undeniable. The SCC will not fundamentally alter the status quo nor create visions of public interests or negotiate deals, or erect a complex statutory regime.

Fourth, the argument requires political aggregation of small communities into a sizeable “people”, and involves the advantages of aggregated economic, human and other collective resources.

Fifth, the approach has advantages that can deal with current problems associated with the identification of the Aboriginal peoples whose rights are recognised and affirmed in the Constitution. Historically, federal policy based upon the 1876 Indian Act has driven federal recognition of Aboriginal peoples and rights. The 1982 constitutional amendments have specified that Inuit, Metis and Indian people are Aboriginal peoples. Successive governments since then have done very little to alter the historic approach. As the writer has argued elsewhere, there is no constitutional imperative behind the compartmentalisation of Aboriginal peoples’ identities.⁴⁸ Accordingly, the current argument would eliminate the requirement that an Aboriginal people attach any particular label to itself, whether Indian, Inuit or Metis. All that is required is that Aboriginal people be organised and able to democratically express its collective will.

VIII. CONCLUSION

In the Manitoba Language Reference case⁴⁹ the SCC stated:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the “supreme law” of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it...

It has been proposed here that “the will of the people” includes the collective will of Aboriginal peoples. The argument that has been presented aims to shift thinking towards the recognition that, in addition to what the courts seem to be stating, it is not only the *existence* of Aboriginal peoples, and the possession of their lands that matters in law and politics. The approach argues that the *political action* of Aboriginal people matters in law and politics.⁵⁰ The political action mattered historically, and thereby the interests of Aboriginal peoples crystallised into rights recognisable and enforceable within the Canadian legal system. Just as discarding *terra nullius* recognises the equal human dignity and legal significance of Aboriginal peoples, this approach recognises that the political action of Aboriginal peoples matters equally with that of non-Aboriginal actors in the

48 Paul LAH Chartrand, “Defining the ‘Metis’ of Canada: A Principled Approach to Crown-Aboriginal Relations” in Frederica Wilson and Melanie Mallet (eds) *Metis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Irwin Law, Toronto, 2008) at 27–70.

49 *Re Manitoba Language Rights* [1985] 1 SCR 721 at [48].

50 This conclusion draws from the analysis in Chartrand, above n 40.

political processes out of which constitutional and legal norms emerge. This is a forward-looking approach, appropriate for reconciliation. It asserts that Aboriginal peoples' political action mattered, not only yesterday, but matters today and will continue to matter tomorrow.

INDIGENOUS RIGHTS – HOLLOW RIGHTS?

BY VALMAINE TOKI*

I. INTRODUCTION

The Declaration on the Rights of Indigenous Peoples (“the Declaration”) was the initiative of the Working Group on Indigenous Populations (“WGIP”). Established in 1982, the mandate of the WGIP was to develop international standards concerning Indigenous peoples’ rights. The Declaration was a manifestation of this mandate and a clear articulation of international standards on the rights of Indigenous peoples. It was not until 25 years later, in September 2007, that the final text was adopted by the General Assembly with a majority of 143 states in favour. Eleven states offered abstentions.¹ Four states opposed adoption: Australia, Canada, the United States of America (“the United States”) and New Zealand.

This position has now changed with Australia,² New Zealand,³ Canada⁴ and the United States⁵ all signalling their support of the Declaration. While perceived as a major moral victory, a closer analysis of the wording provides concern about intentions to meaningfully recognise the Indigenous rights articulated in the Declaration. This undermines the nature of the rights and questions whether these are mere hollow rights.

To ascertain whether these rights are indeed hollow, after providing a background to the genesis of the Declaration and highlighting the key provisions, including that of self-determination and participation, this paper will analyse the wording of the support that has been offered by Australia, New Zealand, Canada and the United States. Part two will address the legal effect of the Declaration. In conclusion some thoughts will be provided as to a creative way forward to realise the Indigenous rights articulated in the Declaration.

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1 Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

2 Jenny Macklin “Statement on the United Nations Declaration on the Rights of Indigenous Peoples” (2009) <www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>.

3 “Announcement of New Zealand’s Support for the Declaration on the Rights of Indigenous Peoples” <www.converge.org.nz/pma/NZ%20UNDRIP%20statements.pdf>.

4 “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (2010) <www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp#tphp>.

5 Susan E Rice “Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples” (2010) Available also at <usun.state.gov/briefing/statements/2010/153009.htm>.

II. PART ONE

A. *Indigenous Peoples – Indigenous Rights*

The Declaration provides no definition of Indigenous peoples. Sha Zukang offers this definition:⁶

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and 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 system.

The rights of Indigenous peoples that have been recognised are essentially those associated with, and intrinsic to, their custom and culture, such as control over their lands and resources.⁷ For the Sami peoples, it was the watershed *Alta* case that provided the catalyst for recognition of their Indigenous rights to resources.⁸ In Australia the Aboriginal peoples have sought recognition of title to their land in a series of cases illustrated by *Mabo*,⁹ and in Canada recognition was sought through the *Calder* case.¹⁰ In New Zealand the *Attorney General v Ngāti Apa* case¹¹ also centred on determining land and resource rights and the rights of due process.¹²

B. *Declaration on the Rights of Indigenous Rights*

Perceived as a major triumph the Declaration¹³ is the only international instrument that views Indigenous rights through an Indigenous lens.¹⁴ As a Declaration, the orthodox view is that it will not be legally binding upon the states.¹⁵ However, it provides a benchmark as an international standard, against which Indigenous peoples can measure state action, and a means of appeal in the

6 Sha Zukang “State of the World’s Indigenous Peoples” ST/ESA/328 (Department of Economic and Social Affairs, Division for Social Policy and Development, United Nations, New York, 2009) at v.

7 The realisation of these rights are recognised as a form of self-determination.

8 Henry Minde “The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway 1960–1990” in S Jentoft, H Minde and R Nilsen (eds) *Indigenous Peoples, Resource Management and Global Rights* (Eburon, Netherlands, 2003) at 75.

9 *Mabo v Queensland* (No 2) (1992) 175 CLR; *Wiks Peoples v Queensland* (1996) 121 ALR 129.

10 *Calder v Attorney General of British Columbia* [1973] SCR 313.

11 *Attorney General v Ngāti Apa* [2003] NZCA 117.

12 These instances of progress have sometimes been reversed: for example, the ensuing Foreshore and Seabed Act 2004 vested ownership of the foreshore in the Crown, limiting any customary claim. Although this Act has now been repealed, with the Takutai Moana Act, customary claims are still limited.

13 “United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007” (2007) <www.un.org/esa/socdev/unpfii/en/declaration.html>.

14 It is acknowledged that ILO Conventions 107 and 169 also recognise Indigenous rights. However, unlike ILO Conventions 107 and 169, the Declaration has been adopted and/or endorsed by the majority of States.

15 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

international arena.¹⁶ Portions may also represent binding international law. According to Professor James Anaya:¹⁷

the Declaration may be understood to embody or reflect, to some extent, customary international law. A norm of customary international law emerges – or crystallizes – when a preponderance of states ... converge on a common understanding of the norm's content and expect future behaviour to conform to the norm [emphasis added].

The Declaration opens with general statements. Articles 4 and 5 then provide fundamental additions from the perspective of Indigenous people's rights:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State

The Declaration clarifies and places Indigenous peoples within a human rights framework.¹⁸ It recognises Māori, the Indigenous peoples of New Zealand, as a collective, not just as individuals.

The Declaration contains more than 20 provisions affirming Indigenous peoples' right to participate, as a group, in decision making. It emphasises Indigenous peoples' right to participate as a core principle and right under international human rights law. In particular Article 18 provides:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

Further articles supporting this right to participate as Indigenous peoples are articles 19 and 20 of the Declaration. Article 19 states:

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.

The more significant right is contained in article 20. This provides:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

16 See generally Megan Davis "United Nations Reform and Indigenous Peoples" (October 2005) 6(14) *Indigenous Law Bulletin* at 12.

17 S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 80. Kiri Toki "What a Difference a Drip Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 16 *Auckland UL Rev* at 243; Claire Charters "Developments in Indigenous Peoples' Rights under International Law and Their Implications" (December 2005) 21 *NZULR* at 519; and Paul McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) contains a general discussion on the development of Indigenous rights through international instruments at 203–227.

18 Rainforest Foundation US "Promoting Indigenous Rights Worldwide: S James Anaya" (7 July 2009) Blogging the Rainforest <rainforestfoundationus.wordpress.com>.

Article 3, the Declaration's most notable, provides:

Indigenous 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.

The principle of participation in decision-making has a clear relationship with Indigenous peoples' right to self-determination, which includes more particularly the right to autonomy or self-government, and the state's obligation to consult Indigenous peoples in matters that may affect them based on the principle of free, prior and informed consent. These legal concepts are integral to the right of Indigenous peoples to participate in decision-making.

C. *Endorsement*

1. *Australia*

Initially New Zealand, together with Canada, Australia and the United States, did not adopt the Declaration during the final vote in 2007.¹⁹ Australia was the first to reverse its position and officially endorsed the Declaration on the 3 April 2009.

Official endorsement requires a clear, unequivocal statement, which preferably takes place in the General Assembly.²⁰ Applying this standard questions the nature of Australia's endorsement.

The statement made by Jenny Macklin was not delivered in the General Assembly, but in Parliament House.²¹ However, Jenny Macklin's speech was not delivered on the floor of the House of Representatives so, correspondingly, there is no recognition in Hansard.

A closer examination of the wording of her statement reveals ambivalence. Jenny Macklin stated:²²

On 17 September 2009, 143 nations voted in support of the Declaration. Australia was one of four countries that voted against the Declaration. Today, Australia *changes* its position. Today, Australia *gives our support* to the Declaration [emphasis added].

Rather than announce that Australia endorses the Declaration Macklin noted that Australia "changes its position" and "gives [its] support" to the Declaration. For academics, including Rothwell, "these features of Australia's announcement cast serious doubts as to whether any legal effect will arise".²³ Academics assert that in light of these facts the High Court of Australia would not hold this statement as legally binding.²⁴

2. *New Zealand*

In 2007 New Zealand objected to four articles within the Declaration: article 26 (the right to land and resources), article 28 (the right to redress or fair, just and equitable compensation) and articles 19 and 32 (the right to obtain free prior and informed consent and the right of veto over the state). The then New Zealand Labour government viewed these articles as fundamentally incompatible

19 United Nations Department of Public Information "General Assembly Adopts Declaration on the Rights of Indigenous Peoples: 'Major Step Forward Towards Human Rights for All', says President" (2007) General Assembly GA/10612 < www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

20 Toki, above n 17.

21 Jenny Macklin was the Minister of Indigenous Affairs in Australia at the time of Australia's endorsement.

22 Macklin, above n 2.

23 Toki, above n 17.

24 Ibid, for discussion on Rothwell.

with its constitutional and legal norms.²⁵ In particular there was reluctance to accept Article 19, which provides for meaningful participation in decision-making. Rosemary Banks, the New Zealand Permanent Representative to the United Nations, stated that New Zealand's existing measures were adequate:²⁶

We strongly support the full and active engagement of Indigenous peoples in democratic decision-making processes – 17% of our Parliament identifies as Māori, compared to 15% of the general population. We also have some of the most extensive consultation mechanisms in the world, where the principles of the Treaty of Waitangi, including the principle of informed consent, are enshrined in resource management law. But these Articles imply different classes of citizenship, where Indigenous have a right of veto that other groups or individuals do not have.

Following Australia's announcement of support, approximately year later, on 20 April 2010, Minister Pita Sharples, from the General Assembly in New York during the ninth session of the United Nations Permanent Forum on Indigenous Issues, and Hon Minister Simon Power, from Parliament, announced that New Zealand would be reversing its position and officially endorsing the Declaration.²⁷

Unlike Australia this announcement was made in the General Assembly and in New Zealand's Parliament (so, unlike Australia, it was noted in Hansard),²⁸ however the wording of the endorsement is parallel to Jenny Macklin's statement. In his address to the United Nations Permanent Forum on Indigenous Issues, Minister Sharples stated:²⁹

In September 2007, at the United Nations, 144 countries voted in favour of the Declaration on the Rights of Indigenous Peoples. New Zealand was one of four countries that voted against the Declaration. Today, New Zealand *changes* its position: we are pleased to express our *support* for the Declaration [emphasis added].

New Zealand used similar terms to Australia in that it did not state it "reversed" its position, nor that it "endorsed" the Declaration. This raises questions on the intention of the statement and the nature of the endorsement. Minister Sharples then proceeded to outline two specific areas where New Zealand would not follow the Declaration: land and resources, and Indigenous involvement in decision-making:³⁰

In particular, where the Declaration sets out aspirations *for rights to and restitution of traditionally held land and resources*, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach.

That approach... maintains, and *will continue to maintain, the existing legal regimes* for the ownership and management of land and natural resources.

....

25 Rosemary Banks "Declaration on the Rights of Indigenous Peoples: Explanation of Vote" (2007) New Zealand Ministry of Foreign Affairs & Trade <www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php>.

26 Ibid.

27 Simon Power (2010) 662 NZPD 10229 or <www.parliament.nz/en-NZ/PB/Debates/Debates/6/5/a/49HansD_20100420_00000071-Ministerial-Statements-UN-Declaration-on.htm>.

28 Minister Pita Sharples announced New Zealand's support in the General Assembly to the United Nations Permanent Forum on Indigenous Issues. The accompanying announcement was made by Hon Simon Power in Parliament in the form of a Ministerial Statement. This dual announcement was legally significant.

29 Power, above n 27.

30 Power, above n 27.

Further, where the Declaration sets out principles for Indigenous involvement in *decision-making*, New Zealand has developed, and *will continue to rely upon its own distinct processes and institutions that afford opportunities to Maori for such involvement*. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate [emphasis added].

Minister Sharples is identifying two areas where New Zealand held reservations; Article 26 (the right to land and resources) and Article 19 (the rights of obtaining free prior and informed consent). However, it is unclear whether states can place reservations or caveats on their endorsements, supporting some articles, but reserving support on others.³¹

Minister Sharples statement is consistent with the previous comments from Rosemary Banks in 2007 when stating the position for New Zealand. The reluctance of the New Zealand government to acknowledge fully the rights of Indigenous peoples is consistent with its earlier position on the League of Nations.³²

It was the opinion of the government that these provisions were fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all our citizens.³³ However, unlike ratifying an international treaty or covenant, it is unclear whether selective endorsement is acceptable.

Reservations to human rights treaties are contentious, particularly where the extent of a reservation undermines the goals of the treaty.³⁴ To selectively endorse an aspirational human rights declaration contradicts the principles of indivisibility and interdependence of all human rights. Selective endorsement would appear to be the antithesis of what a morally aspirational document, such as a Declaration, seeks to achieve.

Despite concerns over what constitutes official endorsement, the issue, concerning the effect and role of the reservation or caveat New Zealand placed on the Declaration, is far more problematic. In his announcement to the United Nations Permanent Forum on Indigenous Issues, Minister Sharples qualified New Zealand's endorsement. He stated:³⁵

In moving to support the Declaration, New Zealand both affirms [the Declaration's] rights and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system. Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration [emphasis added].

31 The International Law on Treaties Art 2(1)(d) states that a "reservation" means a unilateral statement ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State. See also Malcolm Evans and Patrick Capps (eds) *International Law* (Ashgate Publishing, England, 2009) particularly Jonathan Charney "Universality or Integrity: Some Reflections on Reservations to General Multilateral Treaties".

32 Warrick A McKean "The International Law of Non-Discrimination" in Warrick A McKean (ed) *Essays on Race Relations and the Law in New Zealand* (Sweet & Maxwell, Wellington, 1971) at 1, where the then New Zealand Prime Minister Massey was concerned that the treatment of Māori would come under international scrutiny.

33 For full discussion Banks, above n 25.

34 N Baird "To Ratify or Not: An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific" (paper presented to 10th Pacific Islands Political Studies Association (PIPSA) Conference, Port Vila, Vanuatu, 2007) at 18, where Baird notes that reservations to Declarations can also be a way of "parking" an issue which may disappear off the radar for years. See also United Nations Yearbook of the International Law Commission (1997) 2(2). A/CN.4/SER.A/1997/Add 1 (Part 2) at 44–157. Available also <untreaty.un.org/ilc/summaries/1_8.htm>.

35 United Nations Yearbook of the International Law Commission (1997) *ibid*.

This reservation or caveat provides that New Zealand’s legal and constitutional frameworks will “define the bounds of New Zealand’s engagement” with the Declaration. However Article 46(1) of the Declaration provides that:³⁶

Nothing in this Declaration may be interpreted as... authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

Further, the preambular text reaffirms this position and the statements by Minister Sharples merely reinforce Article 46 of the Declaration. However, it is the specific mention by Minister Sharples of the land settlements and decision-making processes that indicate a clear rejection of the relevant articles in the Declaration.

To be able to “adhere to certain aspects of a Declaration and not others defeats the aspirational nature of the entire document, however, if a State could, this would mean that New Zealand may be exempt from the land, resource and political decision-making clauses of the Declaration”.³⁷

Whilst official endorsement signals a degree of support, the nature of the specific wording and the caveat depict New Zealand’s intention. This caveat appears in past New Zealand statements. Minister Power’s statements in 2009, Rosemary Banks’ statements in the Explanation of New Zealand’s vote to the General Assembly 2007, and former Minister in Charge of Treaty of Waitangi Settlement Negotiations, Doug Graham,³⁸ were all consistent in indicating that the Declaration would only be endorsed “provided that we can protect the unique and advanced framework that has been developed for the resolution of issues related to Indigenous rights”.³⁹ This historical line may “add weight to the caveat New Zealand has placed on the Declaration”.⁴⁰

The issues surrounding the nature of the wording, what constitutes an official endorsement, and the effect of the caveat are far from clear.⁴¹ However New Zealand’s official endorsement of the Declaration provides a clear moral obligation on the New Zealand government to adhere to the rights contained in the Declaration.

3. Canada and United States

On 12 November 2010, the Canadian Government announced its support for the Declaration.⁴² One month later, on 16 December 2010, the United States⁴³ also lent its support to the Declaration.

The terminology does not include the term “endorsement” but instead that of “statements”, endorsements being the stronger language. Both refer to the Declaration as being not legally binding and not a statement of current international law⁴⁴ or, similarly, that it does not reflect customary international law nor change Canadian laws.⁴⁵ Both refer to the aspirational nature of the Decla-

36 Article 46(1) of the Declaration.

37 Toki, above n 17.

38 Doug Graham “The New Zealand Government’s Policy” in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) at 6.

39 Ibid.

40 Toki, above n 17.

41 United Nations Yearbook of the International Law Commission (1997) above n 34.

42 “Canada’s Statement of Support”, above n 4.

43 Rice, above n 5.

44 Ibid, at [2].

45 “Canada’s Statement of Support”, above n 4, at [4].

ration.⁴⁶ The language of the statements employs terms such as “reaffirming” or “continuing” the states’ commitment to Indigenous people.⁴⁷

The nature of this language “qualifies” Canadian and United States’ support of the Declaration. Similar to New Zealand and Australia, the support of the Declaration comes with reservations or caveats.

According to the Government of Canada:⁴⁸

...[Canada’s] concerns with various provision of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self government without the recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, member States and third parties.

Nonetheless it is the opinion of the International Organisation of Indigenous Resource Development, and Wilton Littlechild that:⁴⁹

These concerns are a result of a mischaracterization of the relevant articles of the Declaration ... these concerns can be addressed in a positive way through the application of relevant Treaty principles between the Crown and Indigenous peoples in Canada. These include the principles of sharing, mutual consent, inherent rights, peaceful co-existence and partnership... the preambular paragraph 15 states:

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous peoples and States

On this analysis the “support” of the Declaration elicited by these four countries is problematic, compromising the rights contained within. This questions whether these rights are mere hollow rights. Nevertheless the Declaration continues to have a legal effect in different jurisdictions.

III. PART TWO

A. *Legal effect of the Declaration*

The orthodox view is that the Declaration is soft law⁵⁰ and will not be legally binding upon the state⁵¹ unless it is incorporated into domestic legislation. The doctrine of state sovereignty provides a restriction on international instruments, such as the Declaration, to regulate matters within the realm of the state.⁵²

46 Ibid, at [3]; Rice, above n 5, at [2].

47 “Canada’s Statement of Support”, above n 4, at [1] and last para; Rice, above n 5, at [1].

48 “Canada’s Statement of Support”, above n 4, at [13].

49 Wilton Littlechild on behalf of International Organization of Indigenous Resource Development, submission to the United Nations Permanent Forum on Indigenous Issues pre-sessional meeting, Ottawa, Canada April 2011.

50 The term “soft law” refers to quasi-legal instruments that do not have any legally binding force. The term is traditionally associated with international law including most resolutions and declarations of the United Nations General Assembly.

51 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

52 S James Anaya “The Rights of Indigenous People to Self-determination in the Post-Declaration Era” in Claire Char- ters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) at 194. See also International Law Association “The Hague Conference (2010): Rights of Indigenous Peoples” Interim report (2010) <www.ila-hq.org/.../9E2AEDE9-BB41-42BA-9999F0359E79F62D>.

1. Incorporation

In Bolivia, the recently promulgated Constitution has fully incorporated the collective rights of Indigenous peoples, including those rights contained in the Declaration.⁵³ Bolivia's Electoral Transition Law created seven special Indigenous electoral districts and, for the first time, Indigenous peoples in Bolivia have direct representation in the Legislative Assembly. Nonetheless Indigenous leaders believe that the current number of electoral districts does not give Indigenous peoples enough voice in the Assembly. The intention is that the new electoral law will propose a fairer representation system.⁵⁴ Ecuador has also incorporated the Declaration into its new Constitution, the Constitution of the Republic of Ecuador 2008.

If New Zealand followed this approach and incorporated the Declaration into domestic legislation the onus would be on the New Zealand government to provide to Māori the ability to fully participate in decision-making matters that would affect them socially, politically and economically. As in Bolivia, discrete legislation could be enacted to ensure meaningful Indigenous representation in government.⁵⁵

2. Legal reception

How the Declaration is received depends, in part, on the respective jurisdictions of the area. For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:⁵⁶

Given the Government's support of the *Declaration on the Rights of Indigenous Peoples*... which embodies the general principles of international law relating to Indigenous peoples... *the Government will not disregard the Declaration* [emphasis added].

Belize is a common law jurisdiction. Should reliance be placed on the Declaration this decision provides persuasive authority to, for example, establish the ability for Māori to fully participate in decision-making affairs.

In New Zealand the utilisation of the Declaration in a judicial forum is not novel. The Waitangi Tribunal has positively referred to the then Draft Declaration in respect to claims of tino rangatiratanga.⁵⁷ The High Court in *Ngāi Tahu Māori Trust Board v Director General of Conservation* also referred to the Draft Declaration.⁵⁸

If Māori engaged in a judicial challenge to realise their right to participate fully in the decision-making process, reliance could be placed on Conteh CJ's comments in *Cal & Ors v the Attorney*

53 United Nations High Commissioner for Human Rights "Report of the United Nations High Commissioner for Human Rights on the Activities of Her office in the Plurinational State of Bolivia" (2010) United Nations Human Rights Council A/HRC/13/26/Add.2 18 at [4] <access-dds-ny.un.org/doc/UNDOC/GEN/G09/120/56/PDF/G0912056.pdf?OpenElement>.

54 Ibid, at [16].

55 Also see discussion by Naomi Kupuri "The UN Declaration on the Rights of Indigenous Peoples in the African Context" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) at 255, on the Ilchamus (Indigenous) community who successfully took a case to claim that their rights to political representation were violated. The presiding Judge took into consideration the then draft Declaration to determine this case in favour of the Ilchamus community.

56 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) at [132].

57 "The Taranaki Report: Kaupapa Tuatahi" (Waitangi Tribunal, Wellington, 1996) Wai 143 <www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=3FECC540-D049-4DE6-A7F0-C26BCCDAB345>.

58 *Ngāi Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

General of Belize & Anor. Māori could argue that, as New Zealand has endorsed the Declaration, the government should not disregard these general principles therein.

In the absence of direct incorporation by statute there are different methods of recognising international human rights instruments including recourse through administrative law. First, the (outdated) concept of legitimate expectation in Australia,⁵⁹ and mandatory relevant consideration in New Zealand,⁶⁰ have been utilised to treat unincorporated international obligations as considerations for the decision maker. Also, the presumption of consistency, a common law principle of statutory interpretation, recognises that Parliament is presumed not to legislate intentionally in breach of its obligations.⁶¹ *Zaoui v Attorney-General* applied this presumption using New Zealand's international law obligations.⁶²

If Māori were to appeal against the recent granting by the New Zealand Government of mining licences to Petrobas,⁶³ reliance could be placed on Article 32 of the Declaration for the protection of their land rights. Article 32 states:

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* [emphasis added].

This reliance contextualises the right provided for in s 4 of the Crown Minerals Act, where the Minister shall have regard to the principles of the Treaty including that of partnership. Māori would need to prove that the New Zealand Government, as the decision-maker and Treaty partner, had failed to take into account this provision of obtaining free and informed consent, as a mandatory consideration, when granting the mining licences.

Notwithstanding the success in the application of administrative law to recognise international obligations in *Zaoui*, Gieringer expresses some concern in the application of the principle of mandatory relevant considerations.⁶⁴ It should be noted, however, that despite these concerns, Gieringer still considers *Tavita* to be good law,⁶⁵ and recourse to the principle of mandatory relevant consideration to recognise the Declaration's provision for full participation of Māori in decision-making is available.

59 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

60 *Tavita v Minister of Immigration* [1994] 2 NZLR 257; (1993) 11 FRNZ 508; (1993) 1 HRNZ 30 (CA).

61 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 533; Treasa Dunworth "Public International Law" [2000] NZLR 217, 225, states this area is shrouded in much uncertainty. See for example, *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (UK).

62 [2004] 2 NZLR 339. See also Claudia Gieringer "International Law Through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 318.

63 Gerry Brownlie "Petrobas to Go Ahead as Planned" (2010) Guide2 <www.guide2.co.nz/politics/news/petrobras-exploration-to-go-ahead-as-planned-minister/11/17548>.

64 Gieringer, above n 62.

65 Gieringer, above n 62.

B. Application of the principles of the Treaty of Waitangi – an aid?

Wilton Littlechild proposes that application of Treaty principles, such as partnership, can assist to bridge the gap between the recognition of an Indigenous right and the relevant article in the Declaration. *Is this a viable perspective for Maori?*

1. Treaty of Waitangi

Viewed as a simple nullity,⁶⁶ the orthodox view on the legal status of the Treaty is that, unless it has been adopted or implemented by statute, it is not part of our domestic law and creates no rights enforceable in Court. In *Te Heu Heu Tukino v Aotea District Māori Land Board* (1941) Viscount Simon LC, Privy Council ruled that:⁶⁷

[I]t is well settled that any rights purported to be conferred by such a Treaty of cession cannot be enforced by the Courts, except so far as they have been incorporated in municipal law.

It is the “Principles of the Treaty”⁶⁸ that are referred to in legislation⁶⁹ and policy documents⁷⁰ rather than the *text* of the Treaty itself.

2. Principles of the Treaty

Partnership reflects the purpose of the Treaty, where Māori and the Crown have equal roles with “responsibilities analogous to fiduciaries.”⁷¹ The principle of partnership is arguably the most important principle. In *New Zealand Māori Council v Attorney-General* the Court of Appeal unanimously held that:⁷²

The Treaty signified a partnership between races ...”

... *the issue becomes what steps should have been taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith* which is the characteristic obligation of partnership ... [emphasis added].

The principle of partnership acknowledges both parties and requires the Pakeha and Māori partners to act towards each other reasonably and with the utmost good faith. Justice Casey noted that the partnership principle required the Crown to recognise and actively protect Māori interests. In his view, to assert this was “to do no more than assert the maintenance of ‘the honour of the Crown’ underlying all its treaty relationships.”⁷³ Justice Richardson also agreed that an emphasis on the honour of the Crown was important, stating that the concept of the honour of the Crown:⁷⁴

... [C]aptures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. *In the domestic constitutional field ... there is every reason for*

66 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ. However see also *The Queen v Symonds* (1847) NZPCC(SC) per Chapman J at 390 for earlier recognition of native title at common law and consideration of the Treaty.

67 [1941] 2 All ER 93 at 98; also [1941] NZLR 590.

68 See decision of Cooke P in *NZMC v AG* [1987] 1 NZLR 641.

69 For example, Conservation Act 1987, s 4; State Owned Enterprises Act 1986, s 9.

70 For example, Office for Disability Issues “New Zealand Disability Strategy Discussion Document: Incorporating the Treaty of Waitangi” <www.odi.govt.nz/resources/publications/nzds/discussion-document/tow.html>.

71 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR at 664 per Cooke P (CA).

72 *Ibid*, at 641 per Cooke P (CA).

73 *Ibid*, at 703 per Casey J (CA).

74 *Ibid*, at 682 per Richardson J (CA).

attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions [emphasis added].

Referring to Richardson J's comments, Gendall J stated:⁷⁵

The Lands case recognises that the Treaty created a continuing relationship of a fiduciary nature, akin to a partnership, and that there is a positive duty to each party to act in good faith, fairly, reasonably and honourably towards the other.

The Treaty principle of partnership requires the Crown to act in utmost good faith, with reasonableness, and to actively protect Māori interests in order to uphold the honour of the Crown.⁷⁶ Partnership is not determined in a numeric sense, rather, the intention of this principle is to promote greater protection of, and participation by, Māori.

Sir Robin Cooke (as he was then) also noted that the Treaty must be viewed as a living document capable of adapting to new circumstances. In this sense the Treaty partnership status of Māori is given a range of legislative expressions, but the reality is that political power is not shared equally.⁷⁷ The Treaty partnership is subject to the constitutional norm of Parliamentary sovereignty,⁷⁸ which gives little status to rangatiratanga (Māori self-determination). New Zealand Deputy Solicitor-General Matthew Palmer summarises the position at the constitutional level:⁷⁹

Because of the political nature of the New Zealand constitution, I conclude that Māori political representation is the most significant manifestation of the Treaty of Waitangi in New Zealand's constitution in reality. This accords with representative democracy and parliamentary sovereignty being fundamental norms of New Zealand's constitution. Māori political representation relies on representative democracy to access influence over the exercise of parliamentary sovereignty. Māori have managed to convert a pragmatic Pākehā⁸⁰ initiative, the Māori seats, into a symbolic representation of their own identity and political relationship with the State. MMP has broadened that representation and given it real political power. This ensures that Māori have a voice in the constitutional dialogue in New Zealand – in the branch of government that speaks the loudest, Parliament.

Palmer does, however, sound a note of caution:⁸¹

However loudly Māori voices are heard within Parliament, that institution is ultimately ruled by the majority and Māori do not now constitute a majority in New Zealand. A group of people that consistently forms the majority [i.e. Pakeha] has few incentives not to exploit, or ignore a group of people that consistently forms a minority.

As a minority in Parliament, Māori concerns are at the whim of Parliament and, depending on political mood, Māori may suffer. High Court Justice David Baragwanath echoes this point, commenting that:⁸²

75 *New Zealand Māori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 at [62].

76 Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Melbourne, Australia, 1998) 183. See also discussion in Kelly Russ "Modern Human Rights: The Aboriginal Challenge" (LLM Thesis, The University of British Columbia, 2006) at ch 2.

77 Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 85 for an overview of this material.

78 Constitution Act 1986, s 15(1) which states "[t]he Parliament of New Zealand continues to have full power to make laws."

79 Palmer, above n 77, at 291.

80 "Pākehā" is a Māori word used to describe New Zealanders of European descent.

81 Palmer, above n 77, at 292.

82 David Baragwanath "The Evolution of Treaty Jurisprudence" (2007) 15 Wai L Rev 1 at 10.

The Treaty should like any other treaty be a mandatory consideration when it is relevant to decision-making, including adjudication ... it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society: that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.

Further, Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently noted:⁸³

From what I have observed, the Treaty's principles appear to be vulnerable to political discretion, resulting in their perpetual insecurity and instability.

Nevertheless this does not detract from the ability of the Treaty principles to provide clarity to the rights articulated in the Declaration. The principles of the Treaty could be imported to provide clarity and a bridge between the recognition of a right for Māori and the relevant article within the Declaration.

Chillwell J noted that⁸⁴ "the Treaty is a part of the fabric of New Zealand society" and can provide judicial aid in interpreting statutes "when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material".

During a recent United States Senate Committee meeting Professor James Anaya noted:⁸⁵

[T]he courts should take account of the Declaration in appropriate cases concerning Indigenous peoples, just as federal courts, including the Supreme Court, have referred to other international sources to interpret statutes, constitutional norms, and legal doctrines in a number of cases.

It would then follow that the principles of the Treaty could also, where appropriate, as an aid, provide clarity and support to the rights articulated in the Declaration.⁸⁶

C. *Status Quo*

The Declaration does not create any new rights⁸⁷ but it is the only international instrument that views Indigenous rights through an Indigenous lens.⁸⁸

The Declaration... will go a long way in consolidating gains made by Indigenous peoples in the international arena toward rolling back inequities and oppression. It builds upon numerous decisions and other standard setting measures over recent decades by a wide range of international institutions that are favourable to Indigenous peoples demands...

There should not have been a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression cannot be erased, but the dark shadow that history has continued to cast can and should be lightened.

83 "New Zealand: More to be Done to Improve Indigenous Peoples' Rights Says UN Expert [James Anaya]" (2010) Office of the High Commissioner for Human Rights <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10229&LangID=E>.

84 *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

85 "US Senate Committee Holds Controversial Hearing on UN Indigenous Declaration" (10 June 2011) <bsnorrell.blogspot.com/2011/06/us-senate-committee-holds-controversial.html>.

86 Despite the requirement for domestic legislative recognition, the Waitangi Tribunal established under the Treaty of Waitangi Act 1975 can hear and make recommendations as to claims relating to acts or omission of the Crown that breach the promises made in the Treaty.

87 The rights affirmed are those derived from human rights principles that are deemed of universal application, such as those contained in the Universal Declaration on Human Rights.

88 S James Anaya *"International Human Rights and Indigenous Peoples"* (Aspen Publishers, New York, 2009) at 63.

The Declaration simply affirms rights derived from human rights principles such as equality and self-determination. The Declaration seeks to recognise Indigenous peoples' rights and contextualises those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation.⁸⁹

The significance of the Declaration lies in its effect. The Declaration provides a benchmark, as an international standard, against which Indigenous peoples may measure state action. State breach of this standard provides Indigenous peoples with a means of appeal in the international arena.

Recognised and supported by United Nations member states,⁹⁰ the Declaration contains norms that are already binding in international law. So, the Declaration provides an additional international instrument for Indigenous peoples when their rights, such as the right to participate fully in decision-making, have been breached. Indigenous peoples can now argue that not only have international treaties been broken, but a breach of a right in the Declaration has occurred. The available remedy is uncertain, nonetheless it would be reasonable to conclude that this would provide an avenue to engender effective dialogue between the state and Indigenous peoples. It does however provide Indigenous peoples with an international arena to shame or embarrass a government as happened on 11 March 2005, when the United Nations Committee on Elimination of Racial Discrimination concluded in its 66th session that New Zealand's Foreshore and Seabed Act 2004 contained discriminatory aspects against Māori.⁹¹

IV. CONCLUSION

The recent support of the Declaration by Australia, New Zealand, Canada and the United States is significant. However, a closer examination of the wording of their official statements undermines the nature of the rights, and questions whether these rights are mere hollow rights. Despite this, their actions contribute a moral air of robustness to the Indigenous rights articulated in the Declaration.

The orthodox position on the Declaration is that it will not be legally binding upon the state⁹² unless it is incorporated into domestic legislation. Notwithstanding this position, principles of administrative law provide a window to import these rights. Adopting the perspective of Wilton Littlechild, the principles of the Treaty can be employed to provide clarity and a bridge to the rights articulated in the Declaration.

According to Sir Taihākurei (Eddie) Durie:⁹³

We have completed the trilogy. The 1835 Declaration acknowledged Indigenous self-determination. The 1840 Treaty upheld it within the structures of a State. This Declaration now confirms it and says how it should be applied. As rights go, that's a big step. It fills the gaps in the Treaty of Waitangi. It is something, to famously, applaud.

⁸⁹ Ibid, at 63.

⁹⁰ 148 member states have adopted/supported the Declaration. Columbia and Samoa have reversed their abstention leaving nine states still abstaining. See <www.un.org/esa/socdev/unpfii/en/declaration.html>.

⁹¹ "Committee on the Elimination of Racial Discrimination: Decision on Foreshore and Seabed Act 2004" Sixty Sixth session Decision 1 (66): New Zealand CERD/C/DEC/NZL/1. <www.converge.org.nz/pma/fs110305.htm>.

⁹² Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

⁹³ Eddie Taihākurei Durie "Address on the Declaration" statement given May 2010, Parliament Buildings.

Already it has had practical effect. Last week it was the basis for submissions before the Waitangi Tribunal in North Auckland, to support a more principled approach to managing Treaty settlements, and before the Maori Affairs Select Committee in Wellington, to support a greater Maori role in Maori policy development.

Irrespective of the concerns on the wording of support given to the Declaration, and the legal effect of the Declaration, it is without doubt the most significant document that recognises and acknowledges the rights of Indigenous peoples. The current perspective of States and United Nations Agencies⁹⁴ is one of support and willingness to engage and implement these rights. The challenge ahead will be the practical manifestation of these rights for Indigenous peoples.

94 For example a recommendation from the recent 10th session of the United Nations Permanent Forum on Indigenous Issues noted “The Permanent Forum welcomes the World Intellectual Property Organization facilitating a process, in accordance with the Declaration, to engage with Indigenous peoples on matters including Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore”.

RIGHTS DENIED: ORANG ASLI AND RIGHTS TO PARTICIPATE IN DECISION-MAKING IN PENINSULAR MALAYSIA

BY YOGESWARAN SUBRAMANIAM*

I. INTRODUCTION¹

Despite Malaysia's vote in favour of the 2007 United Nations Declaration on the Rights of Indigenous People ("UNDRIP"),² this paper contends that Orang Asli, the Indigenous minority in Peninsular Malaysia,³ continue to possess, at best, nominal rights to participate in domestic decision-making processes and institutions, particularly in matters affecting them as a distinct Indigenous group. This paper examines existing domestic laws and policies affecting Orang Asli, contending that the position of Orang Asli as wards of the State coupled with the lack of State recognition of Orang Asli legal systems and institutions and lands, territories and resources contribute to this state of affairs.

By way of background, this paper introduces Orang Asli as an Indigenous minority in the context of Malaysia before examining the UNDRIP and its relevance to Malaysia. It then examines the various statutory laws affecting Orang Asli legal systems, institutions and lands and resources with reference to the relevant provisions of the UNDRIP. As the nascent development of the doctrine of common law Orang Asli customary land rights now forms part of the recourse available to Orang Asli for customary land claims, this paper introduces the doctrine but focuses on the challenges faced by Orang Asli in instituting and succeeding in the civil courts. Before making its concluding remarks relating to the challenges faced by Orang Asli in the effective recognition of their rights to self-determination and over their customary lands and resources, this paper includes the recent proposed Orang Asli land titles policy ("the Proposed Policy") as an illustration of the problematic nature of implementing free, prior and informed consent ("FPIC") and consultation without Orang Asli possessing such rights.

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1 The contents of this paper are drawn from various chapters of his draft thesis. Accordingly, the author would like to thank his supervisors, Janice Gray and Sean Brennan for their comments on these chapters. This paper is also a revised version of the paper entitled "Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia" presented by the author at the Justice in Round: Perspectives from Custom and Culture, Rights and Dispute Resolution at Te Piringa-Faculty of Law, University of Waikato, Hamilton, New Zealand from 18-20 April 2011. The author has attempted to state the law as at 15 May 2011. Any views and errors in this paper are solely attributable to the author.

2 GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/Res/61/295 (2007).

3 For a brief account of who are the Orang Asli, see section II below.

II. ORANG ASLI AS AN INDIGENOUS MINORITY IN MALAYSIA

The Federation of Malaysia comprises Peninsular Malaysia,⁴ located between the Straits of Malacca and the South China Sea, and the states of Sabah and Sarawak and the federal territory of Labuan, located on the northern quarter of the island of Borneo across the South China Sea. In 2010, the population of Malaysia stood at 28.3 million.⁵ 2004 estimates indicate that the population is divided into Malays (50.4 per cent), Chinese (23.7 per cent), other Indigenous groups (11 per cent), Indians (7.1 per cent) and other races (7.8 per cent).⁶

Malays, explicitly mentioned in the *Malaysian Constitution*,⁷ are the numerically and politically dominant Indigenous⁸ ethnic group in Peninsular Malaysia. “Orang Asli” (the English version of the *Malaysian Constitution* refers to them as “Aborigines”) refer to 18 ethnic aboriginal sub-groups in Peninsular Malaysia officially categorised as *Negrito*, *Senoi* and Aboriginal Malay and are said to be “first peoples” of Peninsular Malaysia.⁹ Orang Asli groups identify themselves by their specific ecological niche, which they call their customary land (*tanah* or *wilayah adat*), and have a close affinity with it.¹⁰ At the end of 2008, Orang Asli numbered only approximately 141,230, around 0.5 per cent of the population of Malaysia.¹¹ The two “other” Indigenous minority groups mentioned in the *Malaysian Constitution* are natives of Sabah and Sarawak.¹² Both these groups are Indigenous to the island of Borneo, thus having no “traditional connection” with the lands of Peninsular Malaysia.

4 Peninsular Malaysia consists of eleven states (Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Melaka (Malacca), Kelantan, Terengganu, Pahang and Johor) and two federal territories (Kuala Lumpur and Putrajaya).

5 Department of Statistics, Malaysia, *Malaysia @ a Glimpse*, 23 June 2011 <www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=472&Itemid=156&lang=en>.

6 Central Intelligence Agency, *The World Factbook: Malaysia*, 23 June 2011 <www.cia.gov/library/publications/the-world-factbook/print/my.html>.

7 See eg definition of “Malay” art 160(2) repeated below n 14.

8 Whether Malays are indeed “Indigenous” by definitions contained in various international fora has been a subject of contention among commentators due to a number of reasons, including the cultural and particularly, *religious* constitutional criteria to qualify as a “Malay”, their lack of a special attachment to a particular ecological niche and non-self-identification as being “Indigenous” at international fora (See eg Colin Nicholas, Jenita Engi and Teh Yen Ping, *The Orang Asli and the UNDRIP: from Rhetoric to Recognition* (COAC and JOAS, Subang Jaya (Malaysia), 2010)). Notwithstanding these arguments, the special position of Malays as a privileged ethnic group under the *Malaysian Constitution* remains clear. For a definition of a Malay under the *Malaysian Constitution*, see below n 14.

9 See Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia* (IWGIA, Copenhagen, 2000), at 4-6; Robert Knox Dentan et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn & Bacon, Needham Heights (MA), 1997), at 10-12.

10 See eg Nicholas, above n 9, at 12; Colin Nicholas, “Background on the Orang Asli and their Customs on Native Land” (Paper presented for In-Depth Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia, SUHAKAM, Kuala Lumpur, 13 June 2009), at 5.

11 Department of Orang Asli Affairs (“DOA”), *Data Maklumat Asas [Basic Information Data]* (2008) (translated from *Bahasa Malaysia* by the author), at 8.

12 For constitutional definitions of these four groups, see below nn 13-16.

Constitutionally, Orang Asli,¹³ ethnic Malays,¹⁴ natives of Sabah,¹⁵ and natives of Sarawak¹⁶ are afforded distinctive rights and privileges by virtue of their constitutionally-defined ethnicity. Politically, these groups are categorised as *bumiputera*¹⁷ when it comes to policies for the realisation of affirmative action privileges but enjoy a varying level of privileges depending on the group. For instance, Malays and natives of Sabah and Sarawak possess special constitutional rights in respect of reservation of quotas in the public service, education and for the operation of regulated trade or business (art 153). Malays also possess explicit constitutional provisions for the protection of their reservation lands (art 89). On the other hand, the minority Orang Asli, whose history in the Malay Peninsula goes back well before the establishment of the Malay sultanates in the early 15th century, do not enjoy equivalent constitutional rights.

Instead, Orang Asli possess a special status under art 8(5)(c) of the *Malaysian Constitution* that enables laws “for the protection, well-being or advancement” of Orang Asli (including the reservation of land) or the reservation to Orang Asli of “a reasonable proportion of suitable positions in the public service” without offending the constitutional equal protection clause enshrined in art 8(1). In addition, the *Malaysian Constitution* empowers the Federal Government to legislate for the “welfare of Orang Asli”.¹⁸ The preamble to the *Aboriginal Peoples Act 1954* (Malaysia)

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- 13 The definition of an Orang Asli under Art 160(2) of the *Malaysian Constitution* does not shed light on who is an Orang Asli as it is merely stated to mean an “aborigine of the Malay Peninsula”. Section 3 of *Aboriginal People Act 1954* (Malaysia) (“APA”) provides for the definition of an Orang Asli. It defines an aborigine (in Bahasa Malaysia, Orang Asli) to mean (a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendent through males of such persons; (b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or (c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community. Under s 2, an “aboriginal ethnic group” means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group that the State Authority may, by order, declare to be an aboriginal ethnic group. Section 3(3) empowers the Minister having charge of Orang Asli affairs to determine any question whether a person is an Orang Asli. The issue of a member of the Executive having unilateral power over who is an Orang Asli is revisited in section IIIA1.
- 14 A “Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and (a) was before *Merdeka* Day (Independence day, 31 August 1957) born in Malaya or Singapore, or is on that day domiciled in the Peninsular Malaysia or in Singapore; or (b) is the issue of that person (see art 160(2) *Malaysian Constitution*).
- 15 Article 161A(6)(b) of the *Malaysian Constitution* provides that a native in relation to Sabah is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day (16 September 1963) or not) either in Sabah or to a father domiciled in Sabah at the time of birth. For further reading on who is Indigenous in Sabah, see eg Bulan, Ramy, “Indigenous Identity and the Law: Who is a Native?” (1998) 25 *Journal of Malaysian and Comparative Law* 127.
- 16 Article 161A(6)(a) of the *Malaysian Constitution* provides that a native in relation to Sarawak is a person who is a citizen, is the grandchild of a person of the Bukitan, Bisayah, Dusun, Sea Dayak, Land Dayak, Kadayan, Kalabit, Kayan, Kenyah (including Subup and Sipeng), Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Lugat, Lisum, Malay, Melano, Murut, Penan, Sian, Tagal, Tabun and Ubit race or is of mixed blood deriving exclusively from these races. For further reading, see eg Bulan, above n 15.
- 17 Literally translated from Bahasa Malaysia, sons of the soil.
- 18 See ninth sch List I - Federal List Item 16.

(“APA”), the principle statute governing the administration of Orang Asli, states that it is an act for the “protection, well-being and welfare” of Orang Asli.¹⁹

A. Wards or Stepchildren of the State?

Despite their status as wards of the State, Orang Asli continue to be politically, economically, culturally and socially marginalised.²⁰ After more than 50 years of government stewardship and various policy prescriptions, 50 per cent of Orang Asli remained below the poverty level in 2009 when the corresponding national level stood at 3.8 per cent.²¹

It is contended that the legal stranglehold that the government has over Orang Asli by virtue of being their guardians has, in many ways, stifled the voice of the Orang Asli in determining their own priorities in terms of political, cultural, social and economic development. Paternalistic government policies, justified by the need to “mainstream” and “integrate” Orang Asli society and fuelled by the national development agenda, have contributed to the gradual weakening of the inextricable link between Orang Asli and their customary lands through regroupment schemes, expropriation and State acquiescence to encroachment. These lands, like for many other Indigenous communities worldwide, are crucial for the continued vitality of Orang Asli culture, identity and well-being.²²

19 A common law fiduciary duty owed by the Federal and state governments to the Orang Asli has been gleaned by the Malaysian Courts from, amongst others, these provisions (see *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 Mal LJ 591, at 619). However, the true potential and extent of this fiduciary duty is yet to be explored in the Malaysian courts. For commentary, see eg Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Rights in Sarawak* (SUHAKAM, Kuala Lumpur, 2007), at 155-160.

20 These issues have been discussed and analysed extensively. For further reading, see generally eg Anthony Williams-Hunt, “Land Conflicts: Orang Asli Ancestral Laws and State Policies” in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific Sdn Bhd (INAS), Kuala Lumpur, 1995); Wazir Jahan Karim, “Malaysia’s Indigenous Minorities: Discrepancies between Nation-Building and Ethnic Consciousness” in Razha Rashid (ed), *Indigenous Minorities of Peninsular Malaysia: Selected Issues and Ethnographies* (Intersocietal and Scientific Sdn Bhd (INAS), Kuala Lumpur, 1995); Lim Heng Seng, “The Land Rights of the Orang Asli” in Consumers’ Association of Penang (ed), *Tanah Air Ku: Land Issues in Malaysia* (Consumers’ Association of Penang, Penang, 1998); Colin Nicholas, above n 9; Dentan and others, above n 9; Alberto Gomes, *Looking for Money: Capitalism and Modernity in an Orang Asli Village* (COAC and Trans-Pacific Press, Melbourne, 2004); Kirk Endicott and Robert Knox Dentan, “Into the Mainstream or Into the Backwater: Malaysian Assimilation of Orang Asli” in Christopher R Duncan, *Southeast Asian Government Policies for the Development of Minorities* (Cornell University Press, NY, 2004); Alice M Nah, “Negotiating Orang Asli Identity in Postcolonial Malaysia” (MSocSc Thesis, National University of Singapore, 2004); Mustaffa Omar, “Penilaian Impak Sosial Rancangan Pengumpulan Semula (RPS) Orang Asli” [An Evaluation of the Social Impact of Orang Asli RPS] (Paper presented at National Conference “Orang Asli After 50 years of Independence of Malaysia: Contribution and Achievement of the Orang Asli in National Development”, Muzium Seni Malaysia, University of Malaya, 18-19 November 2008) [translated by the author]; Nicholas, Engi and Teh, above n 8; Rusaalina Idrus, “From Wards to Citizens: Indigenous Rights and Citizenship in Malaysia” (2010) 33(1) *Political and Legal Anthropology Review* 89.

21 The Economic Planning Unit, Prime Minister’s Department, *Tenth Malaysia Plan 2011-2015* (Prime Minister’s Department, Putrajaya (Malaysia), 2010).

22 See eg Williams-Hunt, above n 20, at 35-36.

1. National development agenda

The Malaysian government's goal is to make Malaysia a fully industrialised country with a standard of living similar to other developed countries by the year 2020. This goal is known as *Wawasan 2020*.²³ Towards achieving this goal, there has been rapid development in the form of large infrastructure and commercial projects in Malaysia. These projects have many a time involved the dispossession of the Orang Asli, regarded by the State as having an interest in their lands no better than that of a tenant-at-will.²⁴ In fact, landmark cases recognising common law Orang Asli customary land rights involved lands taken for large government infrastructure projects. The case of *Adong bin Kuwau v Kerajaan Negeri Johor*,²⁵ involved around 53,000 acres of *Jakun*²⁶ customary land taken for the construction of the Linggiu hydroelectric dam in Johor. *Sagong bin Tasi v Kerajaan Negeri Selangor*²⁷ concerned land occupied by a *Temuan*²⁸ settlement acquired for the construction of what is presently the highway to the Kuala Lumpur International Airport.

The Department of Orang Asli Affairs (since January 2011, the Department of Orang Asli Development) (“DOA”), the Malay-dominated government agency charged with the responsibility of Orang Asli welfare, frequently appears to be in a position of conflict of interest where the State wishes to appropriate Orang Asli customary lands. On the one hand, they purportedly represent the Orang Asli interests,²⁹ usually without meaningful Orang Asli participation, and on the other hand, their status as a government agency may necessarily involve advancing State interests.³⁰ The competing tensions between these two interests puts the DOA in a difficult position whenever it may need to question government action in order to carry out its assumed function of representing Orang Asli interests.

Private deforestation and development has also contributed to Orang Asli land woes with many cases of encroachment over the years.³¹ One such example is Kampong Sebir in the state

23 Translated literally from Bahasa Malaysia, “Vision 2020”. For further reading on Vision 2020, see Mahathir Mohamad, “The Way Forward – Vision 2020” (Copy of speech by the Prime Minister on 28 February 1991), (2008) *Wawasan2020* <www.wawasan2020.com/vision>. Vision 2020 has been recalibrated by the more recent *1Malaysia* concept but still remains a national aspiration. See 1Malaysia The Personal Website of Dato’ Sri Najib Razak, *1Malaysia Booklet* (2010) <www.1malaysia.com.my/about/about-1malaysia/1malaysia-booklet/>.

24 This is by virtue of the statutory rights of occupancy conferred by the *APA*, that are no better than a tenant-at-will (s 8). Further s 7(3) of the *APA* allows lands declared by the state as Orang Asli reserves to be revoked wholly or in part or varied unilaterally (see See Lim Heng Seng, “The Land Rights of the Orang Asli” (Paper Presented at the CAP National Conference on Land: Emerging Issues and Challenges, Penang, Malaysia, 12-15 December 1997), at 11; Yogeswaran Subramaniam, “Beyond Sagong bin Tasi: The Use of Traditional Knowledge to Prove Aboriginal Customary Rights Over Land in Peninsular Malaysia and its Challenges”, [2007] 2 Mal LJ xxx, at xxxiii; Cheah Wui Ling, “Sagong Tasi: Reconciling State Development and Orang Asli Rights in Malaysian Courts” (Working Paper No 25, Asia Research Institute, National University of Singapore, 2004), at 1; Nicholas, above n 9, at 33).

25 [1997] 1 Mal LJ 418.

26 *Jakun* are an Orang Asli ethnic sub-group.

27 Above n 19.

28 *Temuan* are an Orang Asli ethnic sub-group.

29 The role of *DOA* is critically examined in other parts of this paper. See below Sections IIA3, IIIA1 and V.

30 Nicholas, above n 9, at 110. ‘State’ refers to the Malaysian government and/or individual governments within the nation-state unless defined to the contrary or the context requires otherwise. On the other hand, ‘state’ refers to individual states of the Federation of Malaysia unless the context requires otherwise.

31 The Center for Orang Asli Concerns (COAC) has extensively documented cases of encroachment involving Orang Asli lands. This information can be accessed from COAC’s web site at <www.coac.org.my>.

of Negri Sembilan. In early 2009, the *Temuan*³² settlement in Kampong Sebir complained to the local press of encroachment over their customary land by land developers. The state (presumably on behalf of the developers) contended that it had legally leased the land to the developers. In response, the state assemblyman (a member of the state legislature) commented that “Orang Asli cannot claim ownership of land they claim as customary” while another state official said that the customary land in question belonged to the state and was accordingly leased to developers.³³ In spite of the DOA being party to both earlier mentioned landmark customary land cases,³⁴ its state director was quick to respond that Orang Asli customary land “does not belong to them”.³⁵ The lack of interest in inquiring into the possible existence of common law customary land rights in Kampong Sebir epitomises the continued apathy of the State to Orang Asli customary land rights in the face of development.

2. Orang Asli policies: Integration and assimilation

The 1961 *Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia* (“1961 Policy”),³⁶ still in force,³⁷ states, amongst others, that the “[g]overnment should adopt suitable measures designed for their protection and advancement with a view to their ultimate integration with the Malay section of the community”. While providing a measure of protection for Orang Asli,³⁸ the 1961 Policy reflects the then prevailing attitude towards Indigenous populations as peoples in need of protection pending their eventual integration into mainstream society through paternalistic policies for their “advancement”.

In the 1980s, the integrationist approach was stretched to what may be seen as an assimilationist approach, namely, the *dakwah*³⁹ (Islamic missionary activity) or the process of Islamisation of Orang Asli. Conversion to Islam would arguably facilitate Orang Asli “becoming” Malay as defined under the art 160(2) of the Malaysian Constitution.⁴⁰ Theoretically, a Muslim Orang Asli need only habitually speak Malay and practice “Malay customs” to fulfil this definition. The *dakwah* programme involves the implementation of a “positive discrimination” policy towards Orang Asli who converted, with material benefits given both individually and via development projects.⁴¹ Despite being pursued more or less covertly, there is an abundance of literature to demonstrate that the Islamisation policy is not a closely guarded secret.⁴²

32 *Temuan* are an Orang Asli ethnic sub-group.

33 See Dharshini Balan and Heidi Foo, “Show consideration and respect to us, pleads Tok Batin” *New Straits Times*, (Malaysia, 16 February 2009); Dharshini Balan and Heidi Foo, “Ungazetted customary land belonged to state government” *New Straits Times*, (Malaysia, 16 February 2009).

34 See above nn 25 and 27 and accompanying text.

35 Sarban Singh and CS Nathan, “Orang Asli land dispute” *The Star Metro*, (Malaysia, 3 January 2009).

36 Ministry of the Interior, Federation of Malaya (1961).

37 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 619.

38 The 1961 Policy is examined below at Section IIIA2.

39 Translated from Bahasa Malaysia, Islamic missionary activity.

40 See definition of “Malay” above at n 14.

41 See Endicott and Dentan, above n 20, at 34; Nicholas, above n 9, at 98-102. Nicholas refers, amongst others, to a 1983 DOA Strategy paper in support of this argument (at 98).

42 There is a plethora of literature on the Islamisation policy and its existence, see eg Geoffrey Benjamin, “On Being Tribal in the Malay World”, in in Cynthia Chou and Geoffrey Benjamin (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (ISEAS, Singapore, 2002), at 50-54; Nicholas, above n 9, at 98-103; Endicott and Dentan, above n 20, at 29-30; 44-47; Dentan and others, above n 20, at 79-83; 142-150.

Commentators have argued that absorption of the Orang Asli into the Malay population would increase the number of Malay votes and would eliminate a category of people arguably “more Indigenous” than the Malays.⁴³ This conclusion has been a point of contention. Statements by Malaysian leaders as to Orang Asli Indigeneity have not clarified matters. Post retirement, the first Prime Minister of Malaysia, Tunku Abdul Rahman stated:⁴⁴

there was no doubt that the Malays were the indigenous peoples of this land because the original inhabitants did not have any form of civilization compared with the Malays...and instead lived like primitives in mountains and thick jungle.

Another ex-Prime Minister, Dr Mahathir Mohamad has contended that the Malays are the original or Indigenous peoples of Peninsular Malaysia as they formed the “first effective governments” and outnumbered the Orang Asli.⁴⁵ In addition to being outmoded and discriminatory against Orang Asli social organisation, these arguments erroneously relate to an exclusive notion of Indigeneity in Peninsular Malaysia and avoid a more pertinent “rights” question, namely, the denial of the special rights of Orang Asli as a distinct Indigenous minority under the *Malaysian Constitution* and now, the UNDRIP.

Benjamin has contended that assimilation is seen as acceptable in some quarters of the Malay community where Orang Asli are seen as “incomplete” Malays, requiring only Islam and an acceptance of social hierarchy to make them complete.⁴⁶ Many devout Muslim Malays believe that conversion to Islam would uplift the Orang Asli and provide them “spiritual development”.⁴⁷ Nicholas goes further by contending that the Islamisation policy coupled with other relocation and development policies have a unifying ideological objective.⁴⁸ They enable the control of a people and control their traditional territories. However, official statistics show that only around 20 per cent of Orang Asli households are Muslim after more than 20 years of Islamisation,⁴⁹ in spite of allegations of inaccuracy and bias against these figures.⁵⁰

3. Regroupment policies

The main policies for economically mainstreaming Orang Asli largely centre on “regroupment” plans (“RPS”).⁵¹ The RPS functions to transform participants into settled, self-sufficient farmers after the five years required for their cash crops (usually palm oil or rubber) to become productive.⁵² However, a recent study in relation to the 11 RPS involving 1,905 of the 4,322 participating Orang Asli families revealed that 53.5 per cent of the households lived below poverty level.⁵³ It is no surprise that Orang Asli facing such a predicament end up reverting to their traditional economic activities to supplement their income.⁵⁴ Lack of work opportunities in the RPS have also

43 Endicott and Dentan, above n 20, at 30.

44 “Tunku: No reason to doubt the position Malays”, *The Star*, (Malaysia, 6 November 1986).

45 Mahathir Mohamad, *The Malay Dilemma* (Asia Pacific Press, Singapore, 1970), at 126-127.

46 Benjamin, above n 42, at 51.

47 Dentan and others, above n 9, at 81.

48 Nicholas, above n 9, at 102-103.

49 *DOA*, above n 11, at 18.

50 See Endicott and Dentan, above n 20, at 46.

51 Translated from the Bahasa Malaysia term, *Rancangan Pengumpulan Semula*.

52 Endicott and Dentan, above n 20, at 40.

53 Mustaffa Omar, above n 20, at 9.

54 *Ibid*, at 10.

driven Orang Asli youths to find low wage-earning jobs in urban areas.⁵⁵ The development of the RPS infrastructure, the responsibility of the DOA, has also been said to be poor.⁵⁶ Perhaps more importantly for current purposes, RPS has resulted in the loss of Orang Asli traditional lands. When Orang Asli are regrouped, their lands are substantially diminished in size. In RPS Betau, for instance, a group of east *Semai*⁵⁷ was allotted 95.1 hectares, which represented barely 1.4 per cent of their claim to 7000 hectares of communal land.⁵⁸ RPS also does not provide any security of tenure to the Orang Asli as titles are not automatically issued in respect of land subject to the scheme. Worse still, many RPS are not gazetted as aboriginal reserves or areas under the APA rendering participating Orang Asli worse off as far as security of tenure is concerned.⁵⁹

These land policies, including their variants and the Proposed Policy discussed below at Section V, serve to homogenise many Orang Asli into cash crop smallholders, dependent on Government-aided schemes for individual security of tenure and economic well-being. Continued observance of these policies would adversely impact Orang Asli culture and identity within the nation state yet may not necessarily alleviate their deprived socio-economic status to that of other non-Indigenous communities in Malaysia. More pertinently for the purposes of this paper, seldom are Orang Asli engaged or consulted in a meaningful way when any of these policies are formulated. In other words, they have little or no control over life-changing decisions affecting them.

B. Malaysia and the UNDRIP

While there are strong arguments that certain provisions in the UNDRIP already form part of customary international law and binding international treaties,⁶⁰ it must also be appreciated the Malaysia inherited a dualist theory of law where international laws have no direct application domestically.⁶¹ Unlike some other jurisdictions where international law is incorporated as part of domestic law,⁶² the *Malaysian Constitution* does not contain any provision that deems international law as part of domestic law. Article 74(1) of the *Malaysian Constitution* states that the Federal

55 Ibid, 10-11.

56 For a more recent study on the implementation of RPS, see Mustaffa Omar, above n 20, at 16. For further reading, see Nicholas, above n 9, at 113-119; Dentan et al, above n 9, at 130-136.

57 *Semai* are an Orang Asli ethnic sub-group.

58 See Colin Nicholas, "In the Name of the Semai? The State and Semai Society in Peninsular Malaysia" in LT Ghee and Alberto Gomes (eds), *Tribal Peoples and Development in Southeast Asia* (Department of Anthropology and Sociology, University of Malaya, Kuala Lumpur, 1990), at 71.

59 See Lim, above n 20, at 183.

60 See eg Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis* (1999) 12 Harv Hum Rts J 57; S James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment" (2007) Jurist Legal News and Research <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>>; S James Anaya and RA Williams, Jr, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System" (2001) 14 Harv Hum Rts J 33; S James Anaya, *Indigenous Peoples in International Law*, (2nd Ed, Oxford University Press (NY), 2004).

61 For further reading on the dualist theory of law as applied in Malaysia, see eg Gurdial Singh Nijar, "The Application of International Norms in the National Adjudication of Fundamental Human Rights" (Paper presented at the 12th Malaysian Law Conference, 10-12 December 2003); Abdul Ghafur Hamid @ Khin Maung Sein, "Judicial Application of International Law in Malaysia: A Critical Analysis" (Paper presented at the Second Asian Law Institute (ASLI) Conference, Bangkok, Thailand, 26-27 May 2005).

62 See for example, art 25 of the *German Constitution 1949* that provides "The general rules of international law are an integral part of federal law".

“...Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List”. Item 1 of the Federal List⁶³ empowers the Federal Government to legislate on “External Affairs, including (a) Treaties, agreements and conventions with other countries... (b) Implementation of treaties, agreements and conventions with other countries”. The treaty making power is vested in the executive authority of the Federal government.⁶⁴ Thus, the Federal parliament holds exclusive power to implement international treaties made by the Executive and render them operative domestically through enabling legislation. The Malaysian courts have also given priority to local enabling laws when construing international treaties to which Malaysia is a party.⁶⁵

Notwithstanding this, Malaysian courts have on occasion applied customary international law and international treaties through the medium of the common law.⁶⁶ Malaysian courts appear to have thus far also taken a relatively liberal approach to the assimilation of international standards into the common law in respect of Indigenous customary land rights claims.⁶⁷ While the potential for common law development of international human rights norms in Malaysia may well open up avenues for Orang Asli, the focus of this paper is different, namely, the extent to which the State grants Orang Asli rights to participate in decisions affecting them and their lands and resources with reference to the provisions of the UNDRIP.

It is nonetheless contended that Malaysia’s unreserved votes in favour of the UNDRIP, both at Human Right Council and General Assembly levels,⁶⁸ create, at the very least, a genuine expectation and moral obligation that it would work towards achieving the aspirations of the UNDRIP in the “spirit of partnership and mutual respect”.⁶⁹ As pointed out by the Supreme Court of Belize:⁷⁰

Also, importantly in this regard is the recent Declaration on the Rights of Indigenous Peoples adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, *states are not expected to disregard them.*

63 *Malaysian Constitution*, Ninth Schedule.

64 See *Malaysian Constitution* arts 39 and 80(1); *The Government of the State of Kelantan v The Government of the Federation of Malaya* [1963] Mal LJ 355.

65 See eg *Dato’ Param Cumaraswamy v MBf Capital Bhd* [1997] 3 Mal LJ 824, at 849.

66 See eg *PP v Oie Hee Koi* [1968] 1 Mal LJ 148 (Privy Council); *Olofson v Government of Malaysia* [1966] 2 Mal LJ 300; *Village Holdings Sdn Bhd v Her Majesty the Queen in Right of Canada* [1988] 2 Mal LJ 656. Compare *PP v Narogne Sookpavit* [1987] 2 Mal LJ 100.

67 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, [2008] 2 Mal LJ 677, at 692 (Federal Court, Malaysia); *Kerajaan Negeri Johor v Adong bin Kuwau* [1998] 2 Mal LJ 158 (Court of Appeal, Malaysia) [1998] 2 Mal LJ 158, at 164 (Gopal Sri Ram JCA). In Malaysia, the Federal Court is the apex court of the land while the Court of Appeal is the other superior appellate court.

68 See *Working Group of the Commission of Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, UN HRC Res 2/2006, 1st sess, 21st mtg., UN Doc A/HRC/1/L.3 (2006); Department of Public Information, News and Media Division, United Nations General Assembly, *General Assembly Adopts Declaration on Rights of Indigenous Peoples: Major Step Towards Human Rights for All, Says President*, 13 September 2007, UNGA 10612, 61st sess, 107 & 108th mtgs (2007), 10 October 2010 <www.un.org/News/Press/docs/2007/ga10612.doc.htm> (General Assembly).

69 The quotation is extracted from preambular para 24 of the UNDRIP.

70 *Aurelio Cal In His Own Behalf And On Behalf Of The Maya Village Of Santa Cruz & Anor v The Attorney General Of Belize & Anor* (Claims 171 and 172 of 2007 (Consolidated)), at [131].

As a member of the Human Rights Council, Malaysia is also obligated to “uphold the highest standards in the promotion and protection of human rights”.⁷¹ If Malaysia were to honour its commitment to the UNDRIP, article 38 of the UNDRIP provides “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration”.

Consultation and FPIC are key aspects of the concept of self-determination, allowing Indigenous communities to be included in any decision-making process affecting them and, accordingly, conferring upon them control over their own priorities. A summary of the *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent endorsed by the United Nations Permanent Forum on Indigenous Issues* at its third session in 2005⁷² can be paraphrased as follows.

Free implies no coercion, intimidation and manipulation. *Prior* implies that consent has been sought sufficiently in advance of any authorisation or commencement of activities and respects time requirements of Indigenous consultation/consensus processes. *Informed* implies all information regarding the activity including but not limited to the nature, size, reversibility and scope of the project or activity, its duration and locality, and full assessment of its impact, potential risk and fair and equitable benefit sharing, personnel involved and procedures. All this information should be presented in a manner and language that is accessible and understandable having regard to oral traditions of the affected Indigenous community.

Consultation in good faith and participation are crucial components of a *consent* process. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it. Finally, the Indigenous community must specify the representative institutions entitled to express consent on behalf of the affected community.⁷³

In line with the UNDRIP, consultations should include the provision of full and comprehensible information on the likely impact of the proposed action to all affected Orang Asli. In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court of Canada held that meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained and amongst others, not be conducted for the purpose of convincing the Indigenous community of the State’s point of view.⁷⁴

In the UNDRIP, the requirement of FPIC and consultation ranges from macro-level policy measures for the realisation of the aspirations contained in the UNDRIP⁷⁵ to individual development projects affecting a particular Indigenous territory.⁷⁶ This concept allows Orang Asli communities to play an important role in the type of land ownership, use and management model prof-

71 *Human Rights Council*, GA Res, UN GAOR at [9], UN Doc A/RES/60/251 (2006).

72 UN ECOSOC, UN Doc E/C. 19/2005/3 (2005).

73 For further guidance on engagements with Indigenous communities, see eg “Guidelines for Engagement with Indigenous Peoples” (United Nations International Workshop on Engaging Communities, Brisbane, 15 August 2005).

74 [2004] SCR 511, at [46]. For a recent example of domestic consultation practices, see below Section V.

75 See eg art 38.

76 See eg art 32 para 2.

ferred to the Orang Asli community by way of State recognition and the extent to which an Orang Asli community wishes to practice its customs, traditions and land tenure systems. This concept also finds its way into any move to relocate an Orang Asli community or excise their lands by empowering the Indigenous community to participate effectively before any such move is decided.

III. ORANG ASLI STATUTORY RIGHTS

The following examination of the main pieces of legislation affecting Orang Asli lands and resources fortifies the contention that the protectionist mindset of existing laws stemming from Orang Asli being perceived as wards of the State functions to vest the decision-making power of Orang Asli solely in the State and, in some circumstances, particularly relating to exploitation of lands and resources, neglects the very existence of Orang Asli. UNDRIP standards of self-determination and, FPIC and consultation in matters relating to decisions affecting Orang Asli customary lands and resources have very little place in such a legislative and policy environment.

A. *Aboriginal Peoples Act 1954 (Malaysia) (“APA”)*

The APA reflects the protectionist approach of lawmakers towards Indigenous peoples prevalent during that period. The ongoing Malayan communist insurgency during the 1950s strengthened “protection” provisions due to concerns over the threat and influence of insurgents on Orang Asli living in the fringes and interior of then Malaya. Possibly suitable for its time, the APA confers excessive power on the State over Orang Asli in the name of the “protection, well being and welfare” of Orang Asli. The APA has seen minimal amendment since 1954 and remains in force as the principle statute governing Orang Asli administration.

1. *Identity and customary institutions*

Inconsistent with notions of Indigenous self-identification contained in the UNDRIP,⁷⁷ s 3(3) of the APA empowers the Minister having charge of Orang Asli affairs (“the Minister”), a position never held by an Orang Asli, to decide on “any question whether any person is or is not” an Orang Asli. While possibly understandable during the communist insurgency when there were concerns over the infiltration of communist insurgents and ideologies into remote Orang Asli communities through assimilation and integration,⁷⁸ the continued existence of this provision grants the State excessive powers. Subject only to the court’s common law power of judicial review, s 3(3) empowers the executive to unilaterally regulate and control the composition of the Orang Asli community.

Article 34 of the UNDRIP calls for rights to promote, develop and maintain Indigenous institutional structures. However, interaction with non-Orang Asli society and the effect of State-imposed Orang Asli decision-making institutions has had profound effects upon traditional Orang Asli institutions. Section 16(1) of the APA states that, Orang Asli communities who do not have a hereditary headman are to select, through its members, a headman commonly known as a *Batin*. However, this appointment is subject to confirmation by the Minister (s 16(1)). The Minister may

77 UNDRIP, arts 2, and 33 para 1. See also eg *Working Group on Indigenous Peoples, Working Paper by the Chairperson-Rapporteur, Ms Erica-Irene A Daes on the Concept of Indigenous Peoples*, UNESCOR, UN Doc E/CN.4/sub 2/AC.4/1996/2(1996).

78 The communist insurgency ended in 1989 with the signing of a peace accord between the Communist Party of Malaysia and the Malaysian Government.

also remove any such headman (s 16(2)).⁷⁹ This method of appointment, selection and removal fails to respect and recognise other forms of traditional and communal Orang Asli decision-making institutions and processes. Examples of such institutions include the *Mairaknak* (communal consultation and decision-making body) in the case of the *West Semai* sub-group, *Lemaga Adat* (Customary Council) in the case of *Jahut* and *Lembaga Adat* (Customary Council) in the case of the *Temuan*.

The added application of the *DOA Guidelines for the Appointment of Orang Asli Village Heads*⁸⁰ is said to reduce *Batin* to employees or servants of the *DOA*.⁸¹ In tandem with these developments, the *DOA* has also set up Village Development and Safety Committees (“JKKK”) in Orang Asli villages to manage, among other matters, development activities. To complicate matters, it is not uncommon for the *Batin* and the Chairman of the JKKK of one village not to be the same person.⁸² There is also potential for the abuse of such extensive State powers. Citing three separate incidents involving different Orang Asli villages in the 1990s, Nicholas has argued that the government selectively recognised the *Lembaga Adat* customary institution, JKKK and *Batin* as legal “representatives” of the community in order to extract cooperation, consent and compliance from the affected Orang Asli community.⁸³

Notwithstanding this, many Orang Asli villages still practice their laws, customs, traditions and institutions, albeit in a manner that has transformed with the impact of change from outside interaction.⁸⁴ However, the continued practice of Orang Asli laws, customs, traditions and customary institutions could prove difficult due to a combination of factors, including the lack of legal recognition and protection of such institutions, excessive State intervention in Orang Asli institutions, pro-State *Batin*, religious conversion, the influence of modern culture and allegations of divide-and- rule against the State.⁸⁵

As for participation in the Malaysian political system, art 45(2) of the *Malaysian Constitution* provides for the appointment by the *Yang Dipertuan Agong*⁸⁶ of a Senator “capable of representing the interests” of Orang Asli in the Senate. However, Orang Asli have never appointed this person themselves. Instead, the de facto power of such appointment again lies with the Minister who,

79 The inordinate power that the State has over the headman may compromise Orang Asli interests. For a critique on the selection and removal of Orang Asli headmen, see eg Nicholas, Engi and Teh, above n 8, at 114-115.

80 For a commentary on these Guidelines, see Nicholas, Engi and Teh, above n 8, at 114-115.

81 Ibid, at 115.

82 Dato’ Yahya Awang (ex-Director-General of the *DOA*), “West Semai Customary Laws” (Oral response to presentation by Tijah Yok Chopil at SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011).

83 Colin Nicholas, “Orang Asli Resource Politics: Manipulating Property Regimes through Representivity” (Paper presented at the RSCD Conference on Politics of the Commons: Articulating Development and Strengthening Local Practices, Regional Centre for Social Science and Sustainable Development, Chiang Mai University, Chiangmai, Thailand, 11-14 July 2003).

84 Wazir Jahan Karim, “Constructing Emotions and World of the Orang Asli” in Razha Rashid and Wazir Jahan Karim (eds), *Minority Cultures of Peninsular Malaysia: Survivals of Indigenous Heritage* (Academy of Social Sciences, Penang, 2001) 13, at 14.

85 Tijah Yok Chopil, (Workshop Presentation, SUHAKAM Workshop on Indigenous Legal Systems of the Orang Asli, Kuala Lumpur, 23 March 2011) (translated from Bahasa Malaysia by the author).

86 This is the equivalent of the King of Malaysia who is appointed on a rotational basis every 5 years by the Council of Rulers of the states in Peninsular Malaysia that have Sultans as a head of state, namely, Perlis, Kedah, Kelantan, Perak, Terengganu, Pahang, Selangor, Negeri Sembilan and Johor (see *Malaysian Constitution*, arts 33-8, Third and Fifth schs).

on the advice of the DOA makes the necessary recommendation to the *Yang Dipertuan Agong*.⁸⁷ It is pertinent to note that the DOA has never been headed by an Orang Asli. Non-Orang Asli also make up a majority of DOA employees.⁸⁸

The State also has extensive powers to exclude persons from entering or remaining on Orang Asli areas or reserves or inhabited places if the Minister is satisfied that such exclusion is desirable, having regard to the “proper administration of the welfare” of Orang Asli (s 14(1)). The Director-General of the DOA and any police officer has the power to detain and remove any persons found in these areas whom the Director-General has reason to believe “are detrimental to the welfare” of Orang Asli (s 15). The existence of these powers may serve as a deterrent against Orang Asli exercising their right to freedom of association, a constitutionally guaranteed right under art 10 of the *Malaysian Constitution*.

2. Land and territories

Articles 26 and 32 of the UNDRIP call for, amongst others, the recognition of the rights of Orang Asli to their customary lands, territories and resources and the requirement of FPIC in matters affecting these rights. The APA contains no provisions that recognise Orang Asli customary lands, territories and resources and empowers unilateral acts by the state in respect of these lands.

The State Authority⁸⁹ has the power to declare any area exclusively inhabited by Orang Asli to be an aboriginal reserve by gazette notification (s 7(1)). There is limited security of tenure against encroachment while the lands remain declared aboriginal reserves (s 7(2)) but rights of occupancy within such land are no better than that of a tenant at will (s 8(2)). Further, the State Authority has the unilateral power to revoke wholly or in part or vary any declaration of an aboriginal reserve by a similar gazette notification (s 7(3)). Between 1990 and 1999, 76 per cent of Orang Asli reserves were degazetted in the state of Selangor alone.⁹⁰ To compound matters, the performance in gazetting these reserves has been poor. Official figures indicate that only around 14.6 per cent of applications for aboriginal reserves have been approved as at December 2008.⁹¹ There are no explicit statutory rights of appeal or review against any decision to degazette Orang Asli reserves. Far from FPIC and consultation, it is clear that there is no statutory right to participate in any decision to degazette Orang Asli reserves.

Compulsory compensation for deprivation of Orang Asli land under the APA is limited to fruit or rubber trees where an Orang Asli is able to establish claims to such rights.⁹² Further, there are no statutory provisions for FPIC and consultation pre-acquisition of these lands. Against art 13 of the *Malaysian Constitution* that provides for mandatory adequate compensation for acquisition or use of property, s 12 of the APA leaves compensation for excision of Orang Asli reserves or areas at the discretion of the state. Mandatory and adequate compensation for “acquisition or use” of Orang Asli lands can only be claimed if Orang Asli are able to establish common law Orang Asli customary land rights over a tract of land in the courts.⁹³ The Malaysian legislation governing the

87 Nicholas, Engi and Teh, above n 8, at 114-115.

88 DOA, above n 11, at 2.

89 “State Authority”, whenever referred to in this paper, means the Ruler or Governor of the individual state in Peninsular Malaysia (see *National Land Code 1965* (NLC), s 5).

90 Nicholas, above n 9, at 36-37.

91 DOA, above n 11, at 18.

92 Section 11(1).

93 For a discussion on this doctrine and the challenges faced by Orang Asli in establishing such claims, see below Section IV.

compulsory acquisition of land, the *Land Acquisition Act 1960* (Malaysia) (“LAA”) does not provide the right to participation in a decision to compulsorily acquire land. Under the LAA, proprietors only have rights to prior notification and adequate compensation in accordance with market value of the land acquired or used. In the first place, “market value” compensation does not factor Orang Asli perspectives of lands, territories and resources, and the right to restitution. Further, the right to mandatory compensation for loss of Orang Asli lands, territories and resources under the LAA only crystallises when Orang Asli establish customary land rights under the common law. Even in such circumstances, the Malaysian Courts have limited the payment of market value compensation to settled areas and not other parts of customary lands and territories (for example, foraging areas).⁹⁴

The principle legislation governing titles, dealings and interests in land in Peninsular Malaysia, the *National Land Code 1965* (Malaysia) (“NLC”) that confers indefeasible title to proprietors does not apply to “any law for the time being in force relating to customary tenure”.⁹⁵ As such, Orang Asli do not possess the level of security of tenure enjoyed by other proprietors under the NLC. In terms of statutory rights to their lands and territories, Orang Asli are left with the APA where, as observed, these rights are vested in the State as guardian of the Orang Asli.

The oft-cited and much vaunted 1961 Policy,⁹⁶ while mindful of Orang Asli welfare and the need to protect of the Orang Asli lands, customs, institutions and languages, charts the course for the “development” and ultimate “integration” of the Orang Asli into mainstream Malay society.⁹⁷ In this sense, the 1961 Policy is similar to the outdated⁹⁸ ILO Convention 107,⁹⁹ that charges the State with the primary responsibility of protecting Indigenous rights and calls for systematic action for the protection of Indigenous populations concerned and their progressive integration into national societies.¹⁰⁰ Consistent with the assimilationist orientation of ILO Convention 107 but inconsistent with the concepts of self-determination and FPIC and consultation, the 1961 Policy fails to meaningfully include Orang Asli in any policy decisions affecting them.

94 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615; *Superintendent of Land and Surveys, Bintulu v Nor Anak Nyawai* [2006] 1 Mal LJ 256, at 269 (Court of Appeal, Malaysia). Mandatory compensation for areas outside the settlement, if proven to be Orang Asli customary land by common law in the courts, has been assessed based on loss of future income and livelihood but below the market value of the land (See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 435-6).

95 See NLC s 4(2)(a); *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, at 307-308 (Court of Appeal, Malaysia).

96 See above nn 36-38 and accompanying text

97 Evidence of the integrationist approach of the 1961 Policy within the document can be found in, amongst other paragraphs, (1) the prescriptive wording of paragraph (b) that calls for the promotion of natural integration of the Aboriginal community; (2) paragraph (f) that mentions that replacement of special training with “the advance of the process of integration”; and (3) the paternalistic paragraph (iii)(b) of the notes of explanation to the 1961 Policy that encourages the ultimate replacement of shifting cultivation traditionally observed by some aboriginal communities with permanent agriculture.

98 This is implicit in preambular para 4 of the subsequent *Convention concerning Indigenous and Tribal peoples in Independent Countries*, ILO C 169, (adopted 27 June 1989, entered into force 5 September 1991). It states “considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards”.

99 *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, ILO C 107 (adopted 26 June 1957, entered into force 2 Jun 1959) (“ILO Convention 107”).

100 Art 2, para 1.

Drawing from arts 11 and 12 para 1 of ILO Convention 107, principle (d) of the *1961 Policy* nonetheless provides for the recognition of Orang Asli land rights and the protection from removal without full consent. Principle (b) excludes the use of force or coercion as a means of promoting integration. However, DOA strategies and practice seems to have paid little attention to this part of the 1961 Policy.¹⁰¹ For example, the DOA's 10 point strategy summary of 1993¹⁰² towards improving the wellbeing of Orang Asli and integrating the Orang Asli with national society has notably left out the 1961 Policy requirement of "full consent" before relocation of Orang Asli from their traditional areas. Items 2 and 3 of the DOA's strategy on relocation of Orang Asli again omits any mention of the requirement of "full consent".¹⁰³

B. Resource and Use Rights

Article 26 para 2 of the UNDRIP calls for the recognition of Indigenous rights to resources. The *National Forestry Act 1984* (Malaysia) ("*NFA*"), that provides for the administration and management of forests and forest development in Peninsular Malaysia, does not recognise Orang Asli ownership of forest produce on their customary lands. The *NFA* also does not confer express rights to Orang Asli in respect of the removal or taking of forest produce from Orang Asli customary lands. It merely provides for the State Authority or executive, as the case may be, to grant Orang Asli some allowances and privileges in respect of the removal or taking of forest produce.¹⁰⁴

There are no provisions in the *NFA* for Orang Asli participation in any decisions made affecting forests. Notwithstanding this, there are exclusive rights for the taking and removing of forest produce by Orang Asli within aboriginal reserves¹⁰⁵ but as seen earlier, an aboriginal reserve can be revoked by a unilateral executive act.¹⁰⁶ Section 62(2)(b) of the *NFA* provides that, subject to any contrary direction by the State Authority, the individual state¹⁰⁷ Director of Forestry may reduce, commute or waive any royalty in respect of, or exempt from royalty any forest produce taken from any State or alienated land by any Orang Asli for:

- (i) the construction and repair of temporary huts on any land lawfully occupied by such Orang Asli;
- (ii) the maintenance of his fishing stakes and landing places;
- (iii) fuelwood or other domestic purposes; or
- (iv) the construction or maintenance of any work for the common benefit of Orang Asli.

The provision does not confer rights upon Orang Asli for the removal or taking of forest produce from Orang Asli customary lands. They merely provide for the State Authority or executive to grant at its discretion, some allowance to Orang Asli in respect of the removal or taking of forest produce for the limited purposes set out in that provision.

101 For examples of such practices, see eg Nicholas, Engi and Teh, above n 8, at 57-70; 111-122; Nicholas, above n 9, at chs 5-6; Dentan and others, above n 9, at 73-99; chs 4-5.

102 *DOA, Ringkasan Program* (1993) in Nicholas, above n 9, at 96-98.

103 Department of Orang Asli Development, *Strategy* (2011) <www.jakoa.gov.my/web/guest/strategi>.

104 See *NFA*, ss 40(3) and ss 62(2)(b).

105 *Koperasi Kijang Mas v Kerajaan Negeri Perak* [1991] 1 Current Law Journal 486, at 487-488.

106 See above Section IIIA2.

107 This Act applies throughout Peninsular Malaysia through the adoption of the legislation by the individual states. Despite the uniformity of the laws throughout Peninsular Malaysia, forestry matters nevertheless fall under the state legislative list (see *Malaysian Constitution* Ninth sch List II- State List, Item 3).

As for hunting rights, the recent *Wildlife Conservation Act 2010* unilaterally reduced the number of species that Orang Asli can hunt for subsistence purposes from hundreds to only ten.¹⁰⁸ Against UNDRIP standards of FPIC and consultation, Orang Asli complain that they were never consulted on the repeal of the previous *Protection of Wildlife Act 1972* (Malaysia) and the introduction of the *Wildlife Conservation Bill 2010* (Malaysia). The *Fisheries Act 1960* (Malaysia) does not mention Orang Asli, some of whom rely on fishing for subsistence and livelihood. Despite the presence of Orang Asli in areas that have been declared national or state parks, Federal and state laws relating do not contain any provisions covering Orang Asli.¹⁰⁹ The *Waters Act 1920* (Malaysia) and all other equivalent state enactments in Peninsular Malaysia vests all property and control over rivers in the hands of the state with no provision for Orang Asli.¹¹⁰ In respect of mineral and resource rights, materials and minerals are the property of the respective individual State Authority within Peninsular Malaysia.¹¹¹ Finally, legislation relating to the regulation of use and development of land does not even contemplate the existence of Orang Asli or their customary lands and resources.¹¹²

These laws reflect popular perceptions of State-Orang Asli relations, namely that they are a community under the stewardship and protection of the State whose rights are consequently dependent on State goodwill rather than by virtue of them being a distinct Indigenous minority group within the Malaysian constitutional framework.

IV. COMMON LAW ORANG ASLI CUSTOMARY RIGHTS: CHALLENGES

Applying common law jurisprudence, Malaysian courts have recognized the pre-existing rights of Orang Asli to their ancestral and customary lands at common law.¹¹³ Analyses of this doctrine in an Orang Asli context have been conducted elsewhere and are beyond the scope of this paper.¹¹⁴ As a backdrop to the contention in this section that Orang Asli face formidable challenges in succeeding in such claims, it is nonetheless pertinent to note the salient features of this form of title:

- (1) The common law recognises and protects the pre-existing rights of Orang Asli in respect of their lands and resources.¹¹⁵

108 See s 51(1) and sixth schedule.

109 See eg *National Parks Act 1980* (Malaysia).

110 In respect of the *Waters Act 1920* (Malaysia), see s 3.

111 *NLC*, s 40(b).

112 See for example, *Land (Group Settlement Area) Act 1960* (Malaysia); *Local Government Act 1976* (Malaysia); *Town and Country Planning Act 1972* (Malaysia); *Environmental Quality Act 1974* (Malaysia); *Land Acquisition Act 1960* (Malaysia); *Water Services Industry Act 2006* (Malaysia); *Land Conservation Act 1960* (Malaysia) and the various individual state Mining and Water Enactments In Peninsular Malaysia.

113 See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, (Court of Appeal, Malaysia); *Sagong bin Tasi v Kerajaan Negeri Selangor* above n 19; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95.

114 See eg Bulan and Locklear, above n 19; Subramaniam, above n 24; Yogeswaran Subramaniam, "Common Law Native Title in Malaysia: Selected Issues for Forestry Stakeholders" [2010] 1 Mal LJ xv, at xvii-xxvi.

115 See *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 430; *Kerajaan Negeri Johor v Adong bin Kuwau*, n 67, at 162-163; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai* [2006], above n 94, at 270; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692 (Federal Court).

- (2) The radical title of the state is subject to any pre-existing rights held by Orang Asli.¹¹⁶
- (3) Common law customary land rights in Malaysia do not owe their existence to any statute or executive declaration.¹¹⁷ In Peninsular Malaysia, it has been held that statutory rights under the APA and common law rights of Orang Asli are complementary in that they can exist in tandem.¹¹⁸
- (4) Proof of these rights is by way of continuous occupation¹¹⁹ and oral histories of the claimants relating to their customs, traditions and relationship with their lands, subject to the confines of the *Evidence Act 1950* (Malaysia).¹²⁰ “Occupation” of land does not require physical presence but evidence of continued exercise of control over the land.¹²¹
- (5) These rights have their source in traditional laws and customs.¹²² The particular nature or rights associated with these rights is a question of fact to be determined by the customs, practices and usages of each individual community.¹²³
- (6) Customary rights under the common law and any derivative title are inalienable.¹²⁴
- (7) They can either be held communally or individually.¹²⁵
- (8) Extinguishment of these rights can be by way of clear and unambiguous words in legislation¹²⁶ or an executive act authorised by such legislation.¹²⁷ A reservation or trust of land for a public purpose may not necessarily extinguish these rights unless it is inconsistent with the continued enjoyment of these rights.¹²⁸

116 See eg *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692 (Federal Court).

117 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 270.

118 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 431; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 163; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 615.

119 See *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 269.

120 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 610: 621-624.

121 *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 694-695 (Federal Court). For example, monthly visits are sufficient, where other evidence supports a finding of occupation (see *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 694).

122 See *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 Mal LJ 241 at 268, 286; *Madeli bin Salleh (Suing as Administrator of the Estate of the Deceased, Salleh bin Kilong v Superintendent of Land & Surveys Miri Division* [2005] 5 Mal LJ 305, at 330.

123 *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 94, at 301-302.

124 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 430; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 162.

125 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 613-614; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 692-693 (Federal Court).

126 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 270; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 690, 696-697 (Federal Court).

127 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 612.

128 *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 697-698 (Federal Court).

- (9) If these rights are extinguished, adequate compensation is payable in accordance with art 13 of the *Malaysian Constitution*.¹²⁹ However, “foraging lands” and “settlement lands” have been treated differently in terms of assessing “adequate compensation”. In *Adong bin Kuwau v Kerajaan Negeri Johor*, the Court assessed compensation for loss of foraging lands having regard to deprivations of (1) heritage land; (2) freedom of habitation or movement; (3) produce of the forest; and (4) future living of himself, immediate family and descendants but below the market value of the land.¹³⁰ In respect of settlement lands, the Court in *Sagong bin Tasi v Kerajaan Negeri Selangor* awarded “market value” compensation pursuant to the *LAA*.¹³¹
- (10) The Malaysian courts have also limited the proprietary interest in customary lands “to the area that forms their settlement, but not to the jungles at large where they used to roam and forage for their livelihood in accordance with their tradition”.¹³² The Court of Appeal in Malaysia has held that this view is logical as “otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had foraged in search for food”.¹³³ The limitation, seemingly driven by pragmatism, would appear arbitrary given that the nature of any customary title is to be determined in accordance with the practices of each individual community.¹³⁴

Unfortunately for Orang Asli, their relative success in pursuing civil claims for customary land rights has not elicited any legislative response towards the recognition of Orang Asli customary land and resource rights. Bearing this in mind, this section highlights the significant challenges faced by Orang Asli who bring these claims to the civil courts. First, Orang Asli do not possess or receive funds for making these claims and are largely reliant on *pro bono* legal and technical support from the Malaysian Bar and non-governmental organisations. Second, Orang Asli would need to address any internal conflict before instituting any communal action. This may prove to be particularly problematic where community members under the payroll of the State (for example, *Batin*)¹³⁵ may feel obliged not to act against the interests of the State. Third, such claims usually encounter strenuous opposition from the State who inevitably possesses more power and resources at their disposal.

Fourth, establishing these claims for the substantial number of Orang Asli who have been relocated from their lands may be difficult due to the requirement of “continuous occupation” for generations. Fifth, Orang Asli who have submitted to the various land development schemes by the Government may no longer be seen as having a “traditional” connection with the land. A further challenge to proof relates to the evidentiary requirements under the *Evidence Act 1950* (Malaysia). While allowing for admissibility of oral evidence, the Act does not necessary give due weight to

129 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 434; *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67, at 163-164; *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 617; *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 309-310; *Superintendent of Land and Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)*, above n 67, at 691-2 (Federal Court).

130 *Adong bin Kuwau v Kerajaan Negeri Johor*, above n 25, at 436. Affirmed on appeal by the Court of Appeal, see *Kerajaan Negeri Johor v Adong bin Kuwau*, above n 67.

131 *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19, at 621. Affirmed on appeal by the Court of Appeal (see *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 309-311).

132 See *Sagong bin Tasi v Kerajaan Negeri Selangor*, above n 19 at 615; *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 95, at 269.

133 *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai* above n 94, at 269.

134 *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005], above n 95, at 301-302. For a criticism of this limitation, Yoeswaran Subramaniam, see above n 114, at xxv-xxvi.

135 For the possible influence that the State may have over the *Batin*, see above Section IIIA1.

Orang Asli perspectives and oral traditions. As many experts on Orang Asli laws and customs are employed by the State, there may be further potential resource and ethical challenges in securing expert evidence against the State.

Sixth, experiences from other jurisdictions have shown that the judges of the civil courts may be poorly placed to adequately “translate” Orang Asli customs and traditions into justiciable rights.¹³⁶ Further, judicial conservatism, depending on the presiding bench, may function to roll-back or stunt the development of this nascent doctrine. Seventh, the highly legalistic, adversarial and non-participative nature of a native title claim also reduces the prospect of negotiated outcomes that generate benefits for both Aboriginal and non-Aboriginal claimants.¹³⁷ In this respect, the Canadian Royal Commission on Aboriginal Peoples has pointed out that continued resort to the courts is not only expensive and lengthy in time but risks outcomes (because of the all-or-nothing nature of the process) that may be unacceptable to all sides.¹³⁸

Even if rights to common law Orang Asli customary land rights are established, it is contended that there are other limitations to this form of interest when analysed against the UNDRIP. For example, in Peninsular Malaysia, it is yet to be established whether these rights include rights to *ownership* of resources, provided for in art 26 of the UNDRIP. If Orang Asli customary land rights are limited to uses of the land that are not irreconcilable with a group’s particular attachment to the land in future cases,¹³⁹ this limitation arguably runs afoul of article 32 which calls for the right of Indigenous peoples to determine their own priorities in respect of the development of their lands. Another limit to the doctrine of common law Orang Asli customary land rights relates to the Malaysian courts’ arbitrary spatial containment of these rights to settled lands (as opposed to foraging areas).¹⁴⁰ Against art 26 para 3 of the UNDRIP, this restriction does not provide “due respect” for Orang Asli laws, customs and traditions in relation to, amongst others, customary land boundaries. Further, this form of interest can be extinguished without the FPIC of the Orang Asli, subject only to the payment of monetary compensation, and in the best case, at market value of the land. This method of assessment fails to take into account the cultural, social, economic and spiritual value of the land to Orang Asli and the complex interrelationship and dependence between these values. The Malaysian courts are also yet to grant a remedy for the provision of alternative suitable lands for the deprivation of lands and resources.

Although encouraging, the recognition of common law Orang Asli customary rights to their lands and resources by the Malaysian courts is not a due recognition of Orang Asli legal systems, decision-making processes or institutions. As the doctrine stands in Peninsular Malaysia, custom-

136 See eg Christina Godlewska and Jeremy Webber, *The Calder Decision, Aboriginal Title, Treaties and the Nisga’a’* in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007), at 12; *Delgamuukw v British Columbia* 1997 CanLII 302 (SCC) 302, at [186] (Lamer CJ, Cory and Major JJ); [207] (LaForest and L’Heureux Dube JJ); [209] (McLachlin J, concurring). The report of the *Royal Commission on Aboriginal Affairs* also concluded that negotiation is clearly preferable to court-based solutions of Aboriginal land and resource issues (see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) <www.collectionscanada.gc.ca/webarchives/20071124125812/www.ainc-inac.gc.ca/ch/rcap/sg/shm4_e.html>, at vol 2 ch 4 ss 1 and 6.2).

137 Sean Brennan and others, *Treaty* (Federation Press, Annandale (NSW), 2005), at 114-116.

138 See Royal Commission on Aboriginal Peoples, above n 136, at vol 2 ch 4 s 1.

139 This is the common law position in Canada. See *Delgamuukw v British Columbia*, above n 136, at [111].

140 See above n 132-134 and accompanying text, and *Superintendent of Land & Surveys, Bintulu v Nor Anak Nyawai*, above n 94, at 269.

ary law is only regarded relevant to determine the extent of legal recognition of Orang Asli customary land and resource rights afforded by the courts.¹⁴¹

V. THE PROPOSED POLICY

The recent Proposed Policy, passed by the National Land Council on 4 December 2009, arguably violates provisions of the UNDRIP. Under the Proposed Policy, each Orang Asli head of household is to be individually granted between two and six acres of plantation lands and up to a quarter of an acre for housing depending on land availability as determined by the individual state.¹⁴² In violation of art 26 para 3 of the UNDRIP that calls for States to recognise their rights to their lands and resources, the Proposed Policy contains no provision for these rights and even prohibits Orang Asli who receive benefits under the Proposed Policy from making any claim for common law customary land rights. Further, it only covers lands gazetted as Orang Asli reserves and those approved as Orang Asli reserves but not gazetted yet. As a result of this limitation, an estimated 88,377.87 hectares¹⁴³ or about 64 per cent of land considered by the State as occupied by Orang Asli stands to be excluded from the Proposed Policy without compensation. In addition to contravening art 32 para 2 of the UNDRIP, the Proposed Policy may also offend art 13 para 2 of the *Malaysian Constitution* that requires adequate compensation for compulsory acquisition or use of property. State-appointed external contractors for land development and constraints in the use of Orang Asli land to individual residential plots and plantations lands under the Proposed Policy offend the core UNDRIP concept of self-determination. The restrictions in the use of customary lands to purposes determined by non-community members are also an affront to Orang Asli laws, customs, traditions and decision-making institutions.

On 17 March 2010, 2,500 Orang Asli marched to Putrajaya, the administrative capital of Malaysia, in protest against the Proposed Policy. They delivered a protest memorandum signed by 12,000 Orang Asli to the Prime Minister. The memorandum stated, among other matters, that the Proposed Policy would destroy the communal lifestyle practised by Orang Asli, was in violation of the UNDRIP and the fundamental liberties of Orang Asli under the *Malaysian Constitution* and formulated and passed without prior consultation with the Orang Asli community.¹⁴⁴ The events after the protest are perhaps more illustrative for current purposes. After the protest, a workshop held between the Government and several Orang Asli groups for the purported review of the Proposed Policy was limited to the scope pre-determined by the Government representatives present and did not touch on critical issues raised by the Orang Asli in their memorandum.¹⁴⁵ In the mean-

141 *Kerajaan Negeri Selangor v Sagong bin Tasi*, above n 95, at 301-302.

142 See *POASM and Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli NGO Network], *Memorandum Bantahan Dasar Pemberimilikan Tanah Orang Asli yang diluluskan oleh Majlis Tanah Negara yang Dipengerusikan oleh YAB Timbalan Perdana Menteri Malaysia pada 4hb Disember 2009* [Protest memorandum against Orang Asli land title grant policy approved by National Land Council in a meeting chaired by the Right Honourable Deputy Prime Minister of Malaysia on 4 December 2009 in Putrajaya] (17 March 2010) [translated from Bahasa Malaysia by the author], enc 1.

143 *DOA*, above n 11, at 18.

144 *POASM and Gabungan NGO-NGO Orang Asli Semenanjung Malaysia* [Peninsular Malaysia Orang Asli NGO Network], above n 142, at 5.

145 Bah Tony Williams-Hunt, "FPIC and Orang Asli Lands in Peninsular Malaysia" (Paper presented at a Conference on Customary Lands, Territories and Resources: Bridging the Implementation Gap, Kuala Lumpur, 25-26 January 2011).

time, the DOA also embarked on “road shows” that have been criticised as being more for the purpose of convincing the Orang Asli to accept the Proposed Policy.¹⁴⁶ Subsequent discussions for the refinement of the Proposed Policy mainly involved the DOA, other Government agencies and members of the state executive with very few Orang Asli participants. At the time of writing, the Proposed Policy still looms over the Orang Asli but has not been implemented. Without express rights to FPIC and consultation, it would be difficult to envisage the State voluntarily employing any meaningful and effective standards in its engagements with the Orang Asli regarding the Proposed Policy.

VI. CONCLUDING REMARKS

The evaluation of the existing legal framework on Orang Asli rights to decision-making in respect of land and resource rights against UNDRIP standards can be likened to comparing apples and oranges. Both “laws” (in a broad sense) possess differing philosophies. On the one hand, the UNDRIP emphasises internal autonomy and equal respect for Indigenous society while on the other hand, existing domestic law almost presumes an Orang Asli society incapable of making its own decisions and in need of State control and protection. As argued in this paper, a possible reason for these differing philosophies is the status of Orang Asli as wards of the State dependent on the Government for their welfare. In such an environment, it is easy for Orang Asli “rights” to be viewed as a matter of discretion and benevolence on the part of the State rather than “rights” in the strict sense of the word, meaning a collection of inherent entitlements.

The guardian-ward relationship that the State possesses with Orang Asli gives the State dominion over Orang Asli customary lands and resources. These lands and resources are crucial to the continued survival and vitality of Orang Asli as a distinct Indigenous group. From a legal perspective, Orang Asli are consequently left in a quandary. They can either keep quiet and lose these lands to encroachment and Government-introduced land-development schemes or face the unenviable task of traversing the legal minefield of a customary land rights claim and possible repercussions from the State if they are unsuccessful in their claim.

Orang Asli have repeatedly demanded that the Government take into account the UNDRIP when devising any policy affecting Orang Asli and their customary lands. Having said that the position of Orang Asli as wards of the State enables laws empowering the State to determine Orang Asli priorities, there is no constitutional impediment to laws for the special recognition and protection for Orang Asli customary land and resource rights.¹⁴⁷ Article 8(5)(c) of the *Malaysian Constitution*, an embodiment of the principle of equality before the law, enables positive discrimination legislation for ‘the protection, well being or advancement of the Aboriginal peoples of the Malay peninsula (including the reservation of land)...’ If at all there is a legal question on the conferment of these rights, it would be more a question of the extent of the special rights. At its best, the UNDRIP envisions a land and resource model based on internal autonomy, empowerment and Indigenous systems. While legally possible under the *Malaysian Constitution* without the need for any amendment, the recognition of Orang Asli customary land rights consistent with the UNDRIP may necessarily require the State to reduce or relinquish the excessive control they currently possess over Orang Asli and their lands. The legal power possessed by the State enables it to exercise

146 Ibid. This approach clearly goes against of the standards of consultations adumbrated above at Section IIB.

147 See eg Yogeswaran Subramaniam, “The UNDRIP and the *Malaysian Constitution*: Is Special Recognition and Protection of Orang Asli Customary Lands Permissible?” (2011) 2 Mal LJ lxxv.

political, religious, social and economic decisions affecting the numerically-inferior Orang Asli with virtual impunity. However, the State sees these powers as a necessary tool to align Orang Asli with the national development agenda and for Orang Asli to partake in the benefits of mainstream Malaysian society. An inevitable effect of this scenario would be strong resistance to the gradual reduction of State protection and stewardship over Orang Asli and their lands in favour of increased internal autonomy.

Unless there is strong public sentiment for the recognition of Orang Asli land rights, it would be over-optimistic to assume that the State would initiate any reform towards gradual Orang Asli self-determination over their customary lands and resources and priorities. Legitimacy and internalisation of Orang Asli rights within Malaysian society are a crucial starting point. Legitimacy of the standards contained in the UNDRIP on the part of the general populace and the State would bring about an environment conducive for the existence and growth of political will. If there is a feeling that the standards contained in the UNDRIP lack legitimacy, there would be no pull towards voluntarily and habitually obeying these norms.¹⁴⁸

A distinct challenge to legitimacy in this context would be the complex web of competing and differing notions of domestic and international Indigeneity between ethnic Malays, natives of Sabah and Sarawak and Orang Asli, the distinct constitutional privileges afforded to these groups and their unequal political power. The legal recognition of Orang Asli customary land and resource rights and decision-making institutions by virtue of them being seen as “first peoples” may also be viewed as a challenge to the constitutional and political status of the Malays. On the other hand, it must also be appreciated that affording special constitutional status both to Orang Asli and Malays is not a mutually exclusive exercise. There is little legal doubt that the special position that Malays enjoy under the *Malaysian Constitution*, for example, under art 153 (reservation of quotas) and art 89 (Malay reservation lands) can, at least in principle, exist harmoniously with the legal recognition and protection of distinct Orang Asli rights. Notwithstanding this, such recognition and protection solely in favour of Orang Asli may not sit comfortably with Malays and other Malaysian Indigenous minority communities across the South China Sea. On the assumption that the current situation prevails where Malays do not seek “Indigenous” rights but merely preserve their special position under the *Malaysian Constitution*, a possible way forward, provided there is the political will to so, may be holistic reforms in favour of all Indigenous minority groups, namely Natives of Sabah and Sarawak and Orang Asli based on UNDRIP standards while maintaining the special constitutional position of ethnic Malays.

148 See Claire Charters, “The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples”, in Claire Charters and Rudolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009), at 280.

THE PUNITIVE TURN IN POST-COLONIAL SENTENCING AND THE JUDICIAL WILL TO CIVILISE

BY DR THALIA ANTHONY*

Australian criminal justice in the twenty-first century has been characterised by a law and order agenda that has privileged the interests of the victim and “populist” values of the wider community.¹ These factors have overshadowed considerations of leniency such as offender culpability and rehabilitation, and ultimately have given rise to longer prison sentences.² For Indigenous offenders in the Northern Territory where customary law is a feature of remote community life and can linked to an offence, the Northern Territory Supreme Court has justified increased sentences to the risk Indigenous cultures and customary laws present to victims and the safety of the community.³ This article focuses on the punitive turn for Indigenous offenders delivered by the Northern Territory Supreme Court over the past decade and since accommodated by Federal legislative amendments that outlaw cultural and customary law factors in sentencing.⁴

The major texts in criminology, such as David Garland’s *The Culture of Control*,⁵ identify the punitive turn as emerging across Western societies as a means of controlling social breakdown. The post-war welfarist tendency to support offender rehabilitation has turned to an “urge to punish, to allocate blame, condemn and exclude”.⁶ The key themes in law and order society are lengthy prison sentences, deterrence, pandering to populist demands and vindication of the victim.⁷ However, the general analyses of the punitive turn do not grasp the unique repercussions for minority groups, including for Indigenous peoples in Western societies.⁸ This article suggests that while the “punitive turn” and “law and order” frameworks are a means for analysing the harsher sentences for Indigenous offenders in recent years, they need to be matched with an understanding of how courts and legislatures have positioned Indigenous culture as distinctly threatening to law and order.

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1 Russell Hogg “Resisting a ‘Law and Order’ Society” in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) at 281.

2 Ibid, at 280.

3 See, for example: *R v GJ* (2005) 196 FLR 233 at [36]; *The Queen v Redford* [2007] (Unreported, 26 March, SCC 20624214).

4 Northern Territory National Emergency Response Act 2007 (Cth) s 91; Crimes Act 1914 (Cth) s 16A(2A).

5 David Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001). See also: Jonathan Simon *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, New York, 2007) Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Polity Press, Cambridge, 1985).

6 Garland, above n 5, at 12.

7 Cohen, above n 5, at 35-36. Also see Garland, above n 5, at 11, 27, 142; Hogg, above n 1, at 280, 282.

8 There have been some attempts to explain the impact of punitive crime control on African Americans, see Benjamin D Fleury-Steiner, Kerry Dunn and Ruth Fleury-Steiner “Governing through Crime as Commonsense Racism: Race, Space, and Death Penalty ‘Reform’ in Delaware Governing” (2009) 11(1) *Punishment Society* 5 at 6.

In Australia, the Northern Territory Supreme Court and the Federal Government have characterised Indigenous offenders in cultural contexts as posing a particular danger to victims in order to warrant tougher penalties.⁹ The bases for customary law and cultural submissions to the Northern Territory Supreme Court since the 1950s can be divided into *affirmative forces*, such as cultural expectations imposed on Indigenous offenders by their Indigenous communities, and *negative forces*, such as Indigenous offenders' lack of understanding of the cultural expectations of the non-Indigenous community.¹⁰ Although not commonly heard by the Northern Territory Supreme Court, offenders who rely on cultural submissions are generally from remote Indigenous communities who have had limited contact with European lifestyles, cultures, language and laws.¹¹ The sentencing remarks analysed in this article refer to crimes in remote communities that are informed, although not justified, by Indigenous cultural practice or law. Because there is no cultural defence anywhere in Australia,¹² cultural reasons primarily arise at the point of sentencing mitigation,¹³ which positions sentencing courts as key gate keepers for cultural recognition in the criminal justice system.

Identifying Indigenous culture in post-colonial society is problematic. One of the case studies discussed below relates to statutory rape on a promised bride within (or nearing) a customary marriage under Indigenous law.¹⁴ Promised marriage is a practice that is becoming less common in the Northern Territory and the cases before the Supreme Court are very few.¹⁵ Other cultural practices heard by the Supreme Court, such as "jealousing" (the process of making someone jealous as a test of commitment), emerge from cultural strain rather than pre-colonial culture.¹⁶ A number of academics are at pains to emphasise that family violence is inimical to Indigenous culture.¹⁷ Some of the cases also raise the problematic situation of the offender possessing strong community ties and allegiances to Indigenous laws while the Indigenous victim resists such laws and practices as a result of having greater exposure to European ways, including from living in cities.¹⁸ This article does not seek to analyse the veracity of the cultural claims. This has been hotly contested by academics and policy makers, resulting in greater safeguards for admission of cultural evidence in 2005 to ensure that the offender's reference to the cultural context of the crime (such as promised

9 Senator Chris Ellison "Second Reading Speech: Crimes Amendment (Bail And Sentencing) Bill" *Parliamentary Debates: Senate* (Commonwealth of Australia, Canberra, 8 November 2006) at 16.

10 On both affirmative and negative forces, see *R v Aboriginal Charlie Mulparinga* (1953) NTJ 219.

11 Dean Mildren "Aboriginal Sentencing" (Paper presented to the Colloquium of the Judicial Conference of Australia Inc, Darwin, May 2003) at 3. See for example, *R v GJ*, above n 3, at [9], [29], [34].

12 Law Reform Commission of Western Australia *Aboriginal Customary Laws* (2005) Final Report Project No 94 at 7, 22.

13 There is a limited recognition of cultural factors in relation to bail and the partial defence of provocation in the Northern Territory. On bail, see *Anthony* (2004) 142 A Crim R 440. On provocation, see *Mungatopi v R* (1991) 57 A Crim R 341; *Lofty v The Queen* [1999] NTSC 73.

14 The cases include: *Hales v Jamilmira* (2003) 142 NTR 1; *R v GJ*, above n 3; *The Queen v Redford* above n 3.

15 Rex Wild and Pat Anderson *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Northern Territory Government, 2007) at 71; Northern Territory Law Reform Committee *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003) at 23.

16 Harry Blagg *Crime Aboriginality and the Decolonisation of Justice* (Hawkins Press, Sydney, 2008) at 145.

17 Larissa Behrendt "Politics Clouds Issues of Culture and 'Customary Law'" (2006) 26(6) *Proctor* 14 at 14; McGlade on Damien Carrick "Customary Law and Sentencing" *The Law Report*, Radio National, 22 October 2001.

18 For example: *R v GJ*, above n 3, at [10].

marriage) is not fabricated and is an accepted practice in the community.¹⁹ Rather, this article assumes the long history of cultural submissions to the Supreme Court and assesses how the shifting judicial attitudes to these submissions are linked to law and order discourses.

In order to highlight the contemporary punitive turn, this article opens with a discussion of the preceding historical approach to sentencing Indigeneity through sympathy and lenience between the 1960s and early 1990s. Part II analyses the courts' contemporary re-evaluation of Indigenous culture and emphasis on deterrence, harm and ideal victims. It addresses centrally the practices of customary marriages and "jealousing" in the context of family violence. Part III considers how the recent sentencing reforms passed by the Australian Parliament entrench tough sentences by prohibiting considerations of Indigenous cultures and customary laws to mitigate a sentence. The final part evaluates how Indigenous cases since the late 1990s enhance an appreciation of the punitive turn in the criminology literature. It concludes that representations of Indigenous culture and customary laws further the punitive agenda, and equally, the punitive turn has hardened representations of Indigenous culture.

I. HISTORICAL APPROACHES TO LENIENT SENTENCING FOR CULTURAL CRIMES

Representations of Indigenous cultures and customary laws in post-colonial criminal courts have cohered with dominant ideologies on Indigeneity. This section traces the period when leniency was granted to offenders in remote communities due to sympathetic judicial notions of culture. Broadly, in the 1950s and 1960s when assimilation marked the Federal Indigenous policy, the Northern Territory Supreme Court was compassionate to Indigenous offenders who were perceived as backward and deprived of the virtues of Western society.²⁰ Their backwardness meant that they were not sufficiently developed to comprehend legal norms. "Traditional Aborigines" were regarded as being of lesser moral culpability because of their unfamiliarity with modern, "civilised" ways.²¹ They were akin to the "noble savage" – wild but with capacity for goodness once civilised. Through this lens, courts sought to compensate Indigenous cultural backwardness by sentencing lightly.²² From the 1970s, when there was an official policy of self-determination,²³ courts were more inclined to value the role of the Indigenous community and its culture in deterring criminality.²⁴ They were no longer satisfied that civilisation would cure Indigenous cultural ills, and judges began to view it as a cause of Indigenous disadvantage.²⁵ The Supreme Court exhibited respect for Indigenous culture as a vehicle for restoring Indigenous community harmony.²⁶ Culture would explain, although not excuse, an offence and thereby reduce the offender's culpability and punishment.

19 *Sentencing Act* (NT) s 104A.

20 Heather Douglas *Legal Narratives of Indigenous Existence: Crime, Law, and History* (PhD thesis, Faculty of Law, University of Melbourne, 2005) at ii.

21 *Ibid.*, at 165.

22 *Ibid.*

23 Dean Mildren "The Role of the Legal Profession and the Courts in the Evolution of Democracy and Aboriginal Self-Determination in the Northern Territory in the Twentieth Century" (1996) 7 *Journal of Northern Territory History* at 52.

24 See *R v Davey* (1980) 2 A Crim R 254 at 261-262.

25 Douglas, above n 20, at 183.

26 *R v Minor* (1992) 105 FLR 180 at 181.

When the Northern Territory Supreme Court first recognised the offenders' Indigenous culture in 1950s' sentencing cases, it regarded it as a disadvantage resulting "from lack of civilisation and a concomitant lack of knowledge of white norms".²⁷ Leniency was granted in order to compensate Indigenous offenders for their "backwardness". Douglas points out that the court treated Indigenous people's lack of civilisation as a signifier of disadvantage that needed remedying through lighter sentencing.²⁸ The Court was concerned to "ameliorate potentially harsh penalties in situations where an Aboriginal person was disadvantaged by lack of civilisation."²⁹ Lighter sentences for crimes arising from "tribal law" (such as "traditional" spearing) were handed down.³⁰ Anthropologists' submissions, with their Western view of assimilation, were treated as experts in sentencing for their authority on culture.³¹

The relative leniency that the Northern Territory Supreme Court was willing to hand down for Indigenous offenders, compared with non-Indigenous offenders, is demonstrated in *R v Anderson*.³² The case concerned an Indigenous man who attempted to rape a non-Indigenous woman. The court commented that an Indigenous offender would never receive a more severe sentence than a non-Indigenous offender committing a similar offence. The sole Judge, Kriewaldt J stated, "In general it has been my practice ... to impose on natives sentences substantially more lenient than the sentence imposed on white offenders for similar offences".³³ An Indigenous person's "colour may work to his advantage but never against him".³⁴ An extension of this approach is that Kriewaldt J would exhibit greater leniency where the Indigenous offender came from a more "traditional" lifestyle, whereas a relatively "civilised" Indigenous offender would be dealt with more harshly.³⁵

By the late 1970s, the Northern Territory Supreme Court adopted a view that the creep of "civilisation" into Indigenous communities and the loss of culture had created despair among Indigenous people, especially where alcohol was involved. Where crimes arose primarily from a cultural context, courts treated the context as reducing the offender's culpability. Therefore, cultural explanations were grounds for even greater leniency in sentencing than previously. The Supreme Court valorised the role of "traditional" culture in reducing crime and took a keen interest in Indigenous "customary law" evidence.³⁶ Indicative of the Northern Territory Supreme Court's increased acceptance of Indigenous culture was its willingness to allow submissions on culture from Indigenous people, as opposed to having them filtered by anthropologists or other non-Indigenous experts.³⁷ The evidence was used to not only address the reason for the crime, but also to ascertain the type and length of the sentence that would serve the interests of the community, as

27 Douglas, above n 20, at 165.

28 Ibid, at 174.

29 Ibid.

30 *R v Aboriginal Charlie Mulparinga* (1953) NTJ 205.

31 Douglas, above n 20, at 190.

32 *R v Anderson* (1954) NTJ 240.

33 Ibid, at 249.

34 Ibid, at 249.

35 Douglas, above n 20, at 176, 182.

36 See *R v Job Warusam* [1993] NTSC (Unreported 24 March); *R v Minor*, above n 26, at 192-193.

37 Heather Douglas *Aboriginal Australians and the Criminal Law: History, Policy, Culture* (VDM Verlag, Saarbrücken, 2009) at 181.

demonstrated in *R v Davey*.³⁸ The Court's treatment of such evidence in the 1980s and early 1990s straddled the putative government policy of self-determination that gave Aboriginal people some control over their affairs, communities and land.³⁹

The readiness of the Northern Territory Supreme Court to embrace cultural submissions from the Indigenous community is apparent in the case of *R v Davey*.⁴⁰ In that case a 34 year old Indigenous person from Borroloola, Northern Territory, pleaded guilty to the manslaughter of another Indigenous person. The victim had interfered in an argument between Davey and his wife, and made remarks that Davey's wife was previously promised to the victim as part of cultural marriage arrangements, prompting a violent response. This is part of a process of "jealousing", which Blagg describes as "a deliberate strategy designed to arouse jealousy in relationships to test out commitment" and generally "leads to or involves violence".⁴¹ A community elder gave evidence at trial that the remarks made by the victim were improper under Indigenous law. At first instance the Northern Territory Supreme Court recognised that the offender was "forced to take some sort of an action according to your tribal customs and traditions" and the victim "should not have intervened".⁴² The trial Judge attached significant weight to the views of the offender's community: "It is very important to me that your community think that you should come back into the community".⁴³

On appeal, the Full Federal Court in *R v Davey* noted that the trial Judge took into account "relevant considerations" for "dealing with offences which take place within Aboriginal communities, and involving only those people".⁴⁴ The Court felt that it was appropriate for it to "inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence".⁴⁵ It stated that for cultural crimes it was fitting that the sentence be served in the community for rehabilitation of the offender and reformation of the community to take place.⁴⁶

A series of subsequent cases upheld the importance of Indigenous culture and community considerations in sentencing mitigation in the 1980s and early 1990s. In *R v Burt Lane, Ronald Hunt and Reggie Smith*,⁴⁷ the Northern Territory Supreme Court made it clear that the interests of the Aboriginal community would be given equal weight to the wider community demands for a deterrent sentence.⁴⁸

Some sections of the community may think that it is my duty to impose an exemplary sentence which will serve as a strong deterrent ... My function, as I see it ... is not only to punish the prisoners but to encour-

38 *R v Davey*, above n 24.

39 Mildren, above n 23, at 51.

40 *R v Davey*, above n 24.

41 Harry Blagg *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia* (Law Reform Commission of Western Australia, Perth, 2005) Background Paper 8, Aboriginal Customary Laws Project 94 at 325.

42 *R v William Davey* [1980] NTSC (Unreported, 30 June) at 29-30.

43 *Ibid*, at 29.

44 *R v Davey*, above n 24, at 257.

45 *Ibid*, at 257.

46 *Ibid*, at 261.

47 *R v Burt Lane, Ronald Hunt and Reggie Smith* [1980] NTSC (Unreported 29 May, SCC Nos 16-17, 18-19, 20-21).

48 *Ibid*, at 98-99.

age acceptance of the criminal law by them and by the Aboriginal community as a step towards a more orderly and unified society. It would be inimical to this end if I imposed a harsher sentence because the prisoners are blacks ... The punishment which I impose must be seen to be a well-deserved punishment according to white man's community standards and also according to Aboriginal standards.

The Supreme Court in *Joshua v Thomson*⁴⁹ pointed out that “the continued unity and coherence of the group of which the particular accused is a member is essential, and must be recognised in the administration of criminal justice by a process of sentencing which takes due account of it and the impact of a member's criminal behaviour on it”.⁵⁰ In *R v Miyatatawuy*,⁵¹ the Supreme Court maintained that “facts and circumstances arising from this offender's aboriginality remain relevant ... [to] practices affecting her [the offender]. The courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process”.⁵² In the abovementioned cases, culture was held to be relevant to moral culpability, and the need for deterrence did not overshadow the significance of cultural considerations. Federal and Supreme Courts during the 1980s onwards went further than the Supreme Court in the 1950s in recognising the importance of culture to the offender as an extenuating factor. They identified the role of customary laws in maintaining order, and sought to dispense punishment that would include and serve the offender's Indigenous community.

II. SENTENCING CONTEMPORARY INDIGENOUS CRIMES: IMPUTING CULTURE INTO VICTIMISATION AND DETERRENCE

In the late 1990s there was a shift in sentencing principles that downplayed matters of the defendant's culpability and emphasised principles of deterrence, the interests of the victim, the seriousness of the offence and the interests of the wider community.⁵³ This marked a new sentencing regime for Indigenous offenders. These principles that manifested in the Northern Territory Supreme Court's sentencing remarks were part of a broader challenge to the established thinking on the purpose of punishment and principles of proportionality.⁵⁴ Indicative of this law and order drift was the introduction of minimum and mandatory prison sentences that negated mitigating factors

49 *Joshua v Thomson* [1994] NTSC (Unreported, 27 May).

50 *Ibid.*, at [39].

51 *R v Miyatatawuy* (1996) 87 A Crim R 574.

52 *Ibid.*, at 579.

53 Courts posit the “seriousness of the offence” to refer exclusively to its harm, rather than the culpability of the offender. Criminologists have widely recognised that culpability is a “central dimension of seriousness” (Andrew von Hirsch “Scaling Punishments: a Reply to Julia Davis”, in Cyrus Tata and Neil Hutton (eds) *Sentencing and Society: International Perspectives* (Ashgate, Aldershot, 2004) 360 at 361; Also see Andrew Ashworth “Sentencing” in Mike Maguire, Rod Morgan and Robert Reiner (eds) *Oxford Handbook of Criminology* (3rd ed., Oxford University Press, Oxford, 2002) 1076–1112; Richard Edney and Mirko Bagaric *Australian Sentencing: Principles and Practice* (Cambridge University Press, Melbourne, 2007) at 99. Indigenous cultural explanations can reduce the seriousness of the offence according to the High Court of Australia: *Neal v The Queen* (1982) 149 CLR 305 at 325.

54 For example, preventative detention that emerged in Western societies: Mark Brown “Risk, Punishment and Liberty” in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 253 at 256-257.

relevant to the defendant in the late 1990s.⁵⁵ Mandatory sentences sought to punish the harm alone by sending “a clear and strong message to offenders that these offences will not be treated lightly” and to:⁵⁶

- force sentencing courts to adopt a tougher policy on sentencing property offenders;
- deal with present community concerns that penalties imposed are too light; and
- encourage law enforcement agencies that their efforts in apprehending villains will not be wasted.

While rehabilitation of the offender continued to be listed as a consideration, enactments and amendments of the sentencing legislation in the late 1990s around Australia also included punishment, deterrence, the protection of the community, of the offender, accountability for the offender, denunciation, and recognition of the harm done to the victim and the community.⁵⁷ In the Northern Territory the emphasis of sentencing reform was on “law-and-order”.⁵⁸ In the parliamentary debate on the Northern Territory’s Sentencing Bill, the Government refused to list Aboriginal customary law as a consideration.⁵⁹ Of greater concern than the interests of the Indigenous community or the defendant’s moral culpability, which gave rise to leniency, was the wider community’s interest in the imposition of harsh punishment. This reasoning also surfaced in the Northern Territory Supreme Court’s sentencing remarks from the late 1990s.⁶⁰

Concerns for the victim (and the potential victim) have also pervaded the Supreme Court’s rationale for handing down tougher sentences since the late 1990s. Garland points out that victimisation took a front seat in the punitive shift across the West.⁶¹ He states that “the interests and feelings of victims – actual victims, victims’ families, potential victims, the projected figure of ‘the victim’ – are now routinely invoked in support of measures of punitive segregation”.⁶² The actual victim justifies tougher punishment on the grounds of vindication and the potential victim sanctions harsher penalties to send a deterrence message. The victim is classed as the “ideal victim”

55 John Pratt “Penal Populism and the Contemporary Role of Punishment” in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 265 at 269. On guidelines for minimum sentences, see E McWilliams “Sentencing Guidelines: Who Should be the Arbiter, the Judiciary or Parliament?” (1998) 36(11) LJSJ 48. On mandatory sentencing in the Northern Territory for property offences, see George Zdenkowski “Mandatory Imprisonment of Property Offenders in the Northern Territory” (1999) 22(1) UNSWLJ 302.

56 Mr Burke Attorney General “Sentencing Amendment Bill (Serial 186) Work Health Amendment Bill (Serial 189) Juvenile Justice Amendment Bill (Serial 188) Prisons (Correctional Services) Amendment Bill (Serial 187) Presentation and Second Reading, Debate Adjourned” *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 27 17 October 1996 at 9689.

57 See Crimes (Sentencing) Act 2005 (ACT), s 7; Crimes (Sentencing Procedure) Act 1999 (NSW), s 3A; Sentencing Act 1995 (NT), s 5(1); Penalties and Sentences Act 1992 (Qld), s 9(1); Criminal Law (Sentencing Act) 1988 (SA), s 10; Sentencing Act 1997 (Tas), s 3; Sentencing Act 1991 (Vic), s 5.

58 Mr Finch “Sentencing Bill (Serial 85) – Presentation and Second Reading, Debate Adjourned” *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 10 18 May 1995 at 3387.

59 Mr Bell “Sentencing Bill (Serial 85) – Second Reading in Continuation, in Committee, Third Reading” *Northern Territory Parliamentary Record*, Seventh Assembly First Session No 14 22 August 1995 at 4756.

60 *Hales v Jamilmira*, above n 14, at [27]; *R v GJ*, above n 3, at [27].

61 Garland, above n 5, at 11.

62 *Ibid.*

who is defined by her moral character rather than her injury.⁶³ An attack on the victim is, in the Durkheimian sense,⁶⁴ an attack on the morality of society. The priority given to the interests of the victim is evident in the Second Reading Speech for the Northern Territory Sentencing Bill 1995, in which it was emphasised that “for a number of years, there has been concern about the role of the victim of a crime in the criminal justice process” and on this basis the legislation will “ensure that the victims are not the forgotten people in the sentencing process”.⁶⁵ In parliamentary debate the Opposition noted its support for “indefinite sentences for violent offenders” because “victims of crime have to be satisfied that offenders pay their penalty and that society exacts retribution from offenders”.⁶⁶ After the sentencing legislation was enacted, Northern Territory’s Attorney General noted that imprisonment for offenders sends “the clear message from society and from this government that their behaviour will not be tolerated” and meets the government’s “solemn duty to care for those who have become victims of society’s outlaws”.⁶⁷ He stressed, “When a crime is committed, consideration and priority should be given to the victims. The rights and welfare of the victimisers, the guilty, are a secondary consideration”.⁶⁸

In sentencing Northern Territory Indigenous offenders from remote communities over the past decade, the Supreme Court has mobilised the interests of the Indigenous victim around the risk of the Indigenous male and Indigenous culture. Although Indigenous culture does not condone violence within family relationships,⁶⁹ the Supreme Court has handed down severe sentences to deter the community from practising culture, such as customary marriage. In increasing the sentence in *GJ*, the promised marriage case discussed below, the Supreme Court stated that a tougher sentence was required to deter those “who might feel inclined to follow their traditional laws”.⁷⁰ Shaw points out that the courts have created a “damaging fiction” about the “barbaric” nature of Indigenous culture to impute Indigenous communities.⁷¹ By contrast, the Indigenous victim of violence is cast as an “ideal victim” who is devoid of culture and defined exclusively by her gender and age.⁷² She is the embodiment of “white” social norms. Blagg has noted that Indigenous women have traditionally found it hard to achieve victim status because of racist stereotypes, but they are now afforded victim status, “provided they are positioned within victim discourse as *helpless, hopeless victims of traditional Aboriginal male violence, sanctioned – even encouraged*

63 Kimberle Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour” (1991) 43 (6) *Stan Law Rev* 1255 at 1278. Also see Nils Christie “The Ideal Victim” in Ezzat A Fattah (ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan, Basingstoke, 1986) 17 at 17; Sandra Walklate *Victimology: The Victim and the Criminal Justice Project* (Unwin Hyman, London, 1989).

64 Emile Durkheim *The Division of Labor in Society* (The Free Press, New York, 1964) at 70–110.

65 Finch, above n 58, at 3387.

66 Bell, above n 59, at 4759.

67 Mr Burke Attorney General “Ministerial Statement: Criminal Justice System and Victims of Crime” *Northern Territory Parliamentary Record* Seventh Assembly First Session No 24, 20 August 1996 at 8080.

68 *Ibid.*

69 Behrendt, above n 17, at 14.

70 *R v GJ*, above n 3, at [38].

71 Wendy Shaw “(Post) Colonial Encounters: Gendered Racialisations in Australian Courtrooms” (2003) 10(4) *Gender, Place & Culture* 315 at 329.

72 See *R v GJ*, above n 3, at [36].

– by *Aboriginal law*”.⁷³ In recent statutory rape and jealousy cases the Supreme Court reinforces the Indigenous victim’s helplessness by referring to the victimising nature of customary laws.⁷⁴

A. *Tougher sentencing for statutory rape in customary marriages*

Although statutory rape offences for customary marriage are rare,⁷⁵ with only one case heard by the Northern Territory Supreme Court in the twentieth century,⁷⁶ recent cases nonetheless demonstrate the Full Supreme Court’s downplaying of the significance of cultural circumstances in mitigation. The defendants in these cases sought to argue that sex with their promised (or actual) wives in Indigenous law, who were under the age of consent, was culturally acceptable and allowed under “traditional” law.⁷⁷ Indeed, until 2004 sex with a minor was decriminalised under legislation where the couple was married under Indigenous customary law (*Criminal Code 2009* (NT) s 129⁷⁸). Nonetheless, since *Hales v Jamilmira* the Supreme Court has sent a strong deterrence message about such cultural practices, based on the seriousness of the offence and the interests of the victim and wider community.⁷⁹ Similar judicial approaches are taken in cases involving “jealousy”,⁸⁰ which are briefly discussed towards the end of this article.

The practice of customary marriage has taken place in Northern Territory Indigenous communities for thousands of years and continues to operate in a number of remote communities, although the practice is generally in decline.⁸¹ Customary marriage is based on a highly complex system that involves a myriad of “strictly regulated sets of social and ritual relationships conducted over many years which bound all parties in a mesh of overlapping ties and responsibilities”.⁸² Where it continues to be practised, customary marriage is regarded as essential to the transmission and continuation of Indigenous law, culture, ceremonies, traditional economies, land custodianship and genetic integrity in small communities.⁸³ While arrangements vary among communities,

73 Harry Blagg “Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence” in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, Sydney, 2008) 129 at 138 (emphasis in original).

74 *R v GJ*, above n 3, at [25], [36]; *The Queen v Bara* [2006] NTCCA 17 at [18].

75 This point is made by Mildren J in *Hales v Jamilmira*, above n 14, at [54].

76 The earlier case of *R v Mungurala* (Unreported, SC (NT) 18 April 1975 SCC 313 of 1974) was not analogous to contemporary promised marriage cases because it involved an offender who was not aware that the victim was promised to him, although in fact she was. Therefore, the sexual act was not sanctioned by Indigenous law: *Hales v Jamilmira*, above n 14, at [54].

77 *Hales v Jamilmira*, above n 14, at [61]; *R v GJ*, above n 3, at [21]; *The Queen v Redford*, above n 3, at 4.

78 Section 129(1) of the *Criminal Code 2009* (NT), when read with the definition of “unlawfully” in s 126 and the definition of husband and wife in s 1, decriminalised under-age sex in marriage. This was referred to in *Hales v Jamilmira*, above n 14, at [50].

79 *R v GJ*, above n 3, at [38]; *The Queen v Redford*, above n 3, at 6.

80 *The Queen v Bara*, above n 74, at [18]; *The Queen v Linda Nabarula Wilson* [2006] NTSC (Unreported, 19 May, SCC 20521793) at 4.

81 Wild and Anderson, above n 15, at 71; Northern Territory Law Reform Committee, above n 15, at 23. Customary marriage also exists in Western Australia (see Blagg, above n 16, at 173; Law Reform Commission of Western Australia, above n 12, at 343).

82 Anna Haebich *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Freemantle Art Centre Press, Freemantle, 2000) at 594. Also see Northern Territory Law Reform Committee, above n 15, at 24.

83 Joan Kimm *A Fatal Conjunction: Two Laws Two Cultures* (Federation Press, Sydney, 2004) at 62, 66; Wild and Anderson, above n 15, at 66, 68, citing Geoffrey Bagshaw *Traditional Marriage Practices Among the Burrara People of North-Central Arnhem Land* (North Australian Aboriginal Legal Aid, Darwin, 2002).

customary marriage generally involves promised brides offered as a reward for male initiates. Very young women from appropriate skin groups are promised to men who have undergone initiation, achieved a “certain level of maturity and status” (around 30 years old)⁸⁴ and who have provided food or payment to the promised wife’s family.⁸⁵ Women enter the marriage once they are post-menarche. Neither the man or woman have a choice in the arrangement, which is based on a collective “marriage contract” between groups and families.⁸⁶ Customary marriage is not marked by a symbolic ceremony, making it difficult for courts to determine when it occurs.⁸⁷

Within traditional marriages, Northern Territory Indigenous communities condone sexual relations where the young woman is under 16 years but has reached puberty.⁸⁸ However, they condemn sexual assault. As a result, sexual violence in customary marriages is rare.⁸⁹ The *Little Children are Sacred Report* stated that it did not “come across any evidence ... to show that children were being regularly abused within, and as a result of, traditional marriage practices”.⁹⁰ The sentencing remarks discussed below are concerned with the charge of statutory rape in a customary law context, rather than sexual assault. The Supreme Court made it clear that it was sentencing offenders who had *consensual* sex with a minor.⁹¹ Dwyer has argued that the “issue of promised marriages should be clearly distinguished from sexual abuse, which is part of the breakdown of functioning communities and the cycle of poverty”.⁹² In the case of *R v GJ* violence preceded the sexual act – the victim was threatened and struck with a boomerang.⁹³ However, the assault charge was sentenced separately and was not subject to an appeal.⁹⁴ Therefore, the cultural question for the Court of Appeal was solely whether traditions of customary marriage were relevant in sentencing those who had consensual sex with a wife or promised wife under the age of 16 years; because of the nature of the charge, it was not open to the Court to deal with sexual assault.

In the following cases of *Hales v Jamilmira*,⁹⁵ *R v GJ*,⁹⁶ and *The Queen v Redford*,⁹⁷ the offenders were convicted of statutory rape on their promised or actual brides. In *Hales v Jamilmira* and *R v GJ*, although the promised brides had reached puberty, the offender had not entered into customary marriage with their promised brides in the sense of cohabiting.⁹⁸ The defendants had offered income to the victim’s family as consideration for the promise⁹⁹ and the promise had been

84 However, at least in the past, there was “no concept of ‘age’ as the Western cultures know it today” (Wild and Anderson, above n 15, at 69). The *Little Children Are Sacred Report* noted that “many Aboriginal people were still confused as to the age of consent and as to the general state of the wider Australian law as far as traditional marriage practices were concerned” (Wild and Anderson, above n 15, at 71).

85 Kimm, above n 54, at 62; Wild and Anderson, above n 15, at 68.

86 Wild and Anderson, above n 15, at 68.

87 Dean Mildren “Customary Law: Is it Relevant?” (2008) 1(2) NTLJ 69 at 70.

88 Wild and Anderson, above n 15, at 69.

89 *Ibid.*

90 *Ibid.*, at 68.

91 *R v GJ*, above n 3, at [22]; *Hales v Jamilmira*, above n 14, at [7], [83], [85]; *The Queen v Redford*, above n 3, at 6.

92 Peggy Dwyer “Last Drinks: Correspondence” (2008) 31 Quarterly Essay 87 at 90.

93 *R v GJ*, above n 3, at [2]-[3].

94 *Ibid.*, at [4].

95 *Hales v Jamilmira*, above n 14.

96 *R v GJ*, above n 3.

97 *The Queen v Redford*, above n 3.

98 *R v GJ*, above n 3, at [10].

99 *Hales v Jamilmira*, above n 14, at [12].

made with the victim's family in accordance with "traditional Aboriginal law".¹⁰⁰ The offenders were traditional men who were custodians of traditional knowledge.¹⁰¹ The offences "occurred in communities where the practice of traditional marriage was still relatively strong and the impacts of colonisation [were] reduced due to relative geographical and social isolation".¹⁰² The offenders were nonetheless aware that the sexual intercourse was not required under customary law,¹⁰³ and in some cases believed it amounted to an offence under Anglo-Australian law but chose to follow their customary law nonetheless.¹⁰⁴ In *The Queen v Redford* the offender and victim were married at the time that they were pursuing sexual relations.¹⁰⁵ The offender believed the sexual conduct was an offence even though in the initial period of their relationship it was lawful.¹⁰⁶ While the offenders accepted the wrongfulness of the act, they did not consider the offence to be *as serious* as it would have been if the young women were not promised to them. Defence submissions therefore stressed that the cultural arrangement reduced the moral culpability of the offender. They pointed to the fact that until 2004, Northern Territory legislation decriminalised sexual relations with minors within customary marriage. This, however, did not preclude the courts from handing down sentences that sought to deter both sex with minors and customary marriage altogether.

1. Hales v Jamilmira (2003): statutory rape on a promised bride

The first case of its type of statutory rape on a promised bride before the Northern Territory Court of Criminal Appeal¹⁰⁷ involved a 49 year old Indigenous male from Maningrida who had sexual relations with his 15 year old promised wife. The defendant, Jamilmira, submitted that his sentence should be mitigated on the grounds that the relationship had almost reached the status of customary marriage when sex would have been allowed in customary law and Northern Territory criminal law.¹⁰⁸ Aboriginal witnesses gave evidence that customary marriage was still practised in Maningrida and the victim's family had arranged for the victim to be sent to her promised husband on his outstation.¹⁰⁹ The Northern Territory Court of Criminal Appeal increased the sentence from 24 hours to 12 months, which could be suspended after one month.¹¹⁰ The courts pointed to the "irreconcilable conflict between Aboriginal customary laws relating to promised marriage and the legal system applying generally in the Northern Territory"¹¹¹ and the fact that "the law of the Northern Territory must prevail".¹¹²

100 Ibid, at [16]; *R v GJ*, above n 3, at [10].

101 *Hales v Jamilmira*, above n 14, at [14]; *R v GJ*, above n 3, at [9].

102 Wild and Anderson, above n 52, at 69.

103 *Hales v Jamilmira*, above n 14, at [87]; *R v GJ*, above n 3, at [23], [30].

104 *Hales v Jamilmira*, above n 14, at [87]; *The Queen v Redford*, above n 3, at 4.

105 *The Queen v Redford*, above n 3, at 4.

106 The customary marriage and sexual relations began in 2003. The legislation that criminalised sexual relations in customary marriage commenced in 2004 as a result of the amendment of s 127(1)(a) of the Northern Territory Criminal Code.

107 This is noted by Mildren J *Hales v Jamilmira*, above n 14, at [54].

108 Ibid, at [20], [50].

109 Ibid, at [51].

110 Ibid, at [37].

111 Cited in McIntyre, above n 52, at 344.

112 *Hales v Jamilmira*, above n 14, at [86].

Riley J noted that this was especially the case because it reflects the interests of the “wider community”.¹¹³ Martin CJ stated:¹¹⁴

Personal and general deterrence must feature as significant factors in sentencing for an offence such as this. I am of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community. To hold otherwise would trivialise the law and send the wrong message not only to Aboriginal men, but others in Aboriginal society who may remain supportive of the system which leads to the commission of the offence.

The majority on the Court of Criminal Appeal downplayed the significance of customary marriage laws in sentencing the defendant. It held that while promised marriage was part of the law of the Burarra society, and sex with a promised female under 16 was not considered aberrant in that community, it could not be regarded as a significant factor.¹¹⁵ The Court deferred to the standards of the wider community to set them apart from Indigenous peoples’ values.¹¹⁶ Martin CJ was “of the opinion that notwithstanding the cultural circumstances surrounding this particular event, the protection given by the law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.”¹¹⁷ The Court recognised that for decades the average age of first time mothers at Maningrida was 15 years, however, “the perspective of the wider Territory community” of these breaches “is a good reason to reinforce the operations of the law”.¹¹⁸

Martin CJ and Riley J refer to the victim in terms of the need to “protect young girls” or “women and children generally”.¹¹⁹ The victim is positioned as a weak and passive “ideal”¹²⁰ victim to whom the Anglo-Australian community has an affinity. This contrasts with the offender whose practice of customary law is serious because it offends “white” values.¹²¹ However, Douglas notes that despite the reference to victim’s concerns, there is little evidence taken from the victim herself in *Hales v Jamilmira*: “the victim is rendered mute” as far as “the white legal system is concerned”.¹²² In cases where the Indigenous victim has actively expressed views that reflect cultural interests, the courts have dismissed such views. For example in *R v Miyatatawuy*,¹²³ the Supreme Court refused to canvass the views of the male victim that he would rather the offender be punished by traditional punishment than receive a custodial sentence because this would be beneficial for his relationship with the offender. The Chief Justice remarked, “I am not satisfied that the wishes of a victim of an offence in relation to the sentencing of an offender can usually be relevant. The criminal law is related to public wrongs, not issues which can be settled

113 *Ibid.*, at [88].

114 *Hales v Jamilmira*, above n 14, at [27].

115 *Ibid.*

116 *Ibid.*, at [34].

117 *Ibid.*, at [26].

118 *Hales v Jamilmira*, above n 14, at [26].

119 *Ibid.*, at [49] per Martin CJ, [80], [88], [89] per Riley J.

120 Crenshaw, above n 63, at 1278.

121 *Hales v Jamilmira*, above n 14, at [89] per Riley J.

122 Heather Douglas “‘She knew what was expected of her’: the White Legal System’s Encounter with Traditional Marriage” (2005) 13 *Feminist Legal Studies* 181 at 182.

123 *R v Miyatatawuy* (1996) 87 A Crim R 574 at 580.

privately”.¹²⁴ Therefore, sentencing courts are more inclined to rely on the ideal victim whose weakness justifies higher sentences and represents the wrongfulness of Indigenous practices.

In *Hales v Jamilmira* it was only the dissenting Judge, Mildren J who regarded the “social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs” as “relevant to *moral blame* and therefore to sentencing”.¹²⁵ Mildren J emphasised that *Hales v Jamilmira* “was not a case ... of the respondent using his position as an older person to satisfy his lust”.¹²⁶ Notwithstanding these remarks, the Northern Territory Parliament criminalised under-age sex in customary marriage.¹²⁷ This enactment and the reasoning of the majority in *Hales v Jamilmira* paved the way for higher sentences for this type of offence in subsequent cases.¹²⁸

2. *R v GJ (2005): post-criminalisation of under-age sex in promised marriage*

There was a hardening of judicial views towards statutory rape in customary marriage in *R v GJ*, especially by Mildren J who led the majority and departed from his position in *Hales v Jamilmira*. Three months before the offence the Northern Territory Criminal Code was amended to remove the immunity from offenders who committed statutory rape within customary marriage and to increase the maximum penalty for statutory rape.¹²⁹ In *R v GJ*, a 54 year old male was charged with “unlawful assault” and “statutory rape” of a 14 year old female who was his promised wife under Ngarinaman law. The defendant lived according to his traditional law, with little contact with the non-Indigenous society and had with no prior convictions. English was his fourth language and he had not met a non-Indigenous person until the age of 30. The defendant provided, and continued to provide, goods to the family of the promised wife as consideration for the customary marriage.¹³⁰

The circumstances of the offence in *R v GJ* were that the victim’s grandmother had sent the victim to be with the defendant on his outstation, as she believed it was the victim’s obligation under customary law. From the outset GJ asserted that “he had acted within his traditional rights”,¹³¹ believing it was acceptable to have sex with a 14 year old who was promised to him. The Northern Territory Court of Criminal Appeal imposed a sentence of 3 years and 11 months, which could be suspended after serving 18 months. The Court held that culture did not reduce culpability because while the offender believed he was “entitled” to act in the way he had “according to traditional law”, he was not “obliged” to do so.¹³² Furthermore, the respondent’s belief that he was justified in committing the offence, and thus his lack of remorse, worked against mitigating the sentence.¹³³ In this way, the Indigenous context was not only rendered insignificant in reducing moral culpability, but also gave rise to an aggravating factor in sentencing because it precluded feelings of contrition.

124 Ibid, at 580.

125 *R v Miyatatawuy*, above n 123, at [52] (emphasis added).

126 Ibid, at [49].

127 On 17 March 2004 the Northern Territory Criminal Code was amended by the Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 to make the criminalisation of sexual intercourse with a child under the age of 16 extend to sex within customary marriage.

128 See *R v GJ*, above n 3, at [32]; *The Queen v Redford*, above n 3, at 3.

129 The offence took place on 20 June 2004, three months after the legislation was changed: *R v GJ*, above n 3, at [17], [32].

130 *R v GJ*, above n 3, at [9].

131 Ibid, at [12].

132 Ibid, at [30].

133 Ibid, at [35].

The Court or Criminal Appeal focused on the objective seriousness of the offence, especially given the youthfulness of the victim.¹³⁴ In the hearing, Riley J responded to submissions from the accused about the right to preserve custom and tradition by asking, “but what about the victim? Has anyone asked her if she wants to preserve customs and traditions?”¹³⁵ The Court maintained that the sentence should “reflect and recognise” its seriousness “in the eyes of the wider community”.¹³⁶ The age difference between the offender and victim was particularly threatening for the victim.¹³⁷ Mildren J stated that victims require protection from older male offenders’ “taking advantage of the immaturity of the young in order to *satisfy their lust*”¹³⁸ This is a marked departure from Mildren J’s view in *Hales v Jamilmira*, where he held that the cultural belief removed the imputation of an offence based on lust.¹³⁹

The Court perceived itself as obliged to deter community members and to protect the community through a special punitive sentence against customary marriage. The initial lighter sentence “failed to act as a deterrent to others who might feel inclined to follow their traditional laws”.¹⁴⁰ The Court depicted the threat of violence in Indigenous communities as a greater threat than in the non-Indigenous community because of *inter alia* customary law. This required “appropriate penalties” to deter like-minded men.¹⁴¹ It remarked that courts have been concerned to send “the correct message to all concerned” that “Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so”.¹⁴² Commenting on the Northern Territory *Criminal Code* s 127(1)(a), which in 2004 made it unlawful to have sex with a minor in customary marriages, Mildren J stated:¹⁴³

In the context of a case such as this, where a promised marriage is involved, whilst the law has stopped short of making such marriages illegal, such marriages cannot be consummated until the promised wife has turned 16. Plainly the purpose of s 127(1)(a) in that context is *to give Aboriginal girls some freedom of choice as to whether or not they want to enter into such a marriage and to thereby empower them to pursue equally with young Aboriginal men employment opportunities or further education rather than be pushed into pregnancy and traditional domesticity prematurely.*

Although Southwood J in *R v GJ* generally agreed with Mildren J’s conclusions, he sounded a few notes of caution, which highlighted Mildren J’s symbolic shift away from viewing Indigenous legal entitlements as relevant to moral culpability. Whereas Mildren J stressed the need to teach Indigenous people in GJ’s community to “better understand these important principles” of the criminal law,¹⁴⁴ Southwood J cautioned against the offender shouldering the burden of community education through a particularly harsh sentence:¹⁴⁵

134 *Ibid.*, at [30]-[31], [35].

135 Ken Brown “Customary Law: Sex with Under-Age ‘Promised Wives’” (2007) 32 (1) *Alt LJ* 11 at 14.

136 *R v GJ*, above n 3, at [27].

137 *Ibid.*, at [35].

138 *Ibid.*, at [36] (emphasis added).

139 *Hales v Jamilmira*, above n 14, at [49].

140 *R v GJ*, above n 3, at [38].

141 *Ibid.*, at [38].

142 *Ibid.*, at [37].

143 *R v GJ*, above n 3, at [36], emphasis added.

144 *Ibid.*, at [37], [67].

145 *Ibid.*, at [73].

Where sentencing and the manner of sentencing has the purpose of educating both the offender and the community care must be taken to ensure that an offender is not seen to be doubly punished and is not made to shoulder an unfair burden of community education.

Also, whilst Mildren J emphasised the importance of allowing “freedom of choice” in entering a customary marriage,¹⁴⁶ Southwood J pointed to its utility for Indigenous communities: “It must not be forgotten that Aboriginal customary law often has an important and beneficial influence in Aboriginal communities”.¹⁴⁷ Southwood J also blew a reinvigorating breeze across the embers of moral culpability, by pointing out that the *Sentencing Act 1995* (NT) s 5(2)(c) directed the Court to have regard to the extent to which an offender is to blame for an offence when sentencing an offender:¹⁴⁸

The courts of the Northern Territory when sentencing an Aboriginal offender properly take into account whether he or she has received tribal punishment and whether what he or she has done has been in accordance with Aboriginal customary law and in ignorance of the other laws of the Northern Territory. Clearly, a person who commits a crime because he is acting in accordance with Aboriginal customary law may be less morally culpable than someone who has acted in an utterly contumelious way without any justification whatsoever and this may in appropriate circumstances be a ground for leniency when sentencing Aboriginal offenders: *Hales v Jamalmira*.

Nonetheless, Southwood J’s dissenting remarks are the exception that proves the rule: the Northern Territory Supreme Court no longer treats Indigenous customary law and an offender’s lack of awareness of the Anglo-Australian legal system as significant mitigating factors. Indeed, the Court is more inclined to regard these factors as aggravating a sentence because of the need to send a deterrence message. The current judicial position perceives culture as requiring a punitive sentence to restrain Indigenous people from practising their Indigenous laws and to have a civilising effect.

3. *The Queen v Redford* (2007): statutory rape within customary marriage

The third Northern Territory Supreme Court case indicative of the emergent judicial position on customary marriage is *The Queen v Redford*. It illustrates the problematic intersection between expectations of the Indigenous community, the expectations of the individual offender and the expectations established by the legislature. The offences straddle the legislative transition from the decriminalisation to the criminalisation of under-age sex in customary marriage. The offender, however, was under the apprehension that he was breaching Anglo-Australian law by having sex with a minor, even when it was legal.¹⁴⁹ The sexual acts took place in 2003 and 2004, the criminalisation occurred on 17 March 2004. The facts were that the 13 year old female from Malnjangarak entered a “tribally arranged marriage” with the 25 year old defendant from Buluhkaduru in 2003, based on an arrangement made four years earlier between the parents of the female and the parents of the defendant.¹⁵⁰ They began a sexual relationship at that time and it continued throughout 2004. The prosecution took place in 2004 and the defendant was convicted of statutory rape for the sexual acts between 2003 and 2004.

146 *R v GJ*, above n 3, at [36].

147 *Ibid*, at [71].

148 *Ibid*.

149 Mildren J stated, “It seems to me that I cannot hold it against you that you thought you were breaking the law when you were not breaking the law. On the other hand, I can not [sic] take into account that you may have thought that you were not breaking the law” (*The Queen v Redford*, above n 3, at 4).

150 *Ibid*, at 2.

The Supreme Court accepted that promised marriage “is still a strong tradition in the Maningrida area and has been ... for thousands of years.”¹⁵¹ Nonetheless it stated that promised marriages will not exist forever – “things are changing even in [the offender’s] community and now it is not always the case that promised marriages still go ahead.”¹⁵² The Court sought to hasten this change. Mildren J, the sole judge, ordered a custodial sentence “to deter others from similar offences offending in this way, to underline the message that offences of this nature will not be tolerated and to express the Court’s disapproval of your conduct.”¹⁵³ Commenting generally rather than with reference to the situation of the victim, Mildren J noted that the law sought to prevent young persons from “being pushed into traditional domesticity prematurely”.¹⁵⁴ This comment on the harm of customary marriage reflects a sense of cultural risk that goes beyond the sexual offence and requires a broader deterrence message.

B. Sentencing “jealousing” and decontextualisation

“Jealousing” is another cultural practice that demonstrates the Northern Territory Supreme Court’s retreat from cultural considerations in sentencing. Blagg points out that jealousing exists in Indigenous communities as an expression of insecurities arising from uncertainty in relationships “where old rules no longer apply, particularly those governing marriage and sexual relations, traditionally controlled through skin relationships and promised marriages”.¹⁵⁵ Jealousing was a feature in the aforementioned case of *R v Davey*,¹⁵⁶ in which the Northern Territory Supreme Court and the Full Court of the Federal Court deemed it, and the victim’s desire for a non-custodial sentence, as a relevant mitigating factor. In present jealousing cases, the courts have overshadowed Indigenous victims’ submissions that have sought shorter sentences with considerations of the seriousness of the offence that require longer prison terms.

In *The Queen v Bara*,¹⁵⁷ the offender and victim lived together on Groote Eylandt, Northern Territory. The offender attacked the victim with a knife causing serious wounding after she had made him jealous. The victim, who subsequently reconciled with the offender, made a statement to the Court that she did not want the offender to go to prison.¹⁵⁸ The elders of the community told the Court they would discuss the offence as part of “men’s business” and this would involve a period of isolation in a male-only environment.¹⁵⁹ The Northern Territory Court of Criminal Appeal noted that the victim’s wishes for a non-custodial sentence were not a significant consideration.¹⁶⁰ In this instance the Court sent a “message” to “men in Aboriginal communities that the wishes of a victim, be they freely given or given under some form of duress, will not prevail in the face of serious criminal conduct”.¹⁶¹ Here, the values of the putative victim were more important than the interests of the actual victim.

151 *Ibid.*, at 4.

152 *The Queen v Redford*, above n 3, at 4.

153 *Ibid.*, at 6.

154 *Ibid.*, at 5.

155 Blagg, above n 16, at 146.

156 *R v Davey*, above n 24.

157 *The Queen v Bara*, above n 74.

158 *Ibid.*, at [8].

159 *Ibid.*, at [11].

160 *Ibid.*, at [12].

161 *Ibid.*, at [19].

The main sentencing factors, for the Court in *The Queen v Bara*, were that the “objective circumstances” of the seriousness of the crime and “general deterrence”.¹⁶² The Court noted that because “offences of the type committed by the respondent continue to be prevalent in Aboriginal communities” and because jealousy was “a common motivation for such attacks” there needs to be harsh punishment to send a message to the community.¹⁶³ A significant sentence was also required because “victims lack the support mechanisms that are available in many other sections of our community. These vulnerable victims are entitled to the protection of the law”.¹⁶⁴ Therefore, the Indigenous community context was treated as aggravating the offence because of the defencelessness of Indigenous victims.

In *The Queen v Linda Nabarula Wilson*,¹⁶⁵ a Warlpiri woman in Alice Springs killed her husband in circumstances that constituted manslaughter. Prior to the offence the victim and the offender had a brief verbal argument about another male. The offender stated that she stabbed him because “he was jealousing” her.¹⁶⁶ Disregarding the cultural provocation in mitigation, the Judge focused on restoring the aggrieved victim’s family through a harsh sentence.¹⁶⁷ Cultural factors were overridden by other sentencing considerations. Namely, the Supreme Court noted that “any sentence in this case must stress the need for denunciation, retribution and deterrence both general and personal in this case”.¹⁶⁸

III. SENTENCING REFORMS REMOVING CULTURE

The punitive turn for offenders in Northern Territory remote communities and cultural considerations culminated with Federal Government legislation that excluded customary law and cultural practice in sentencing under the *Northern Territory National Emergency Response Act 2007* (Cth) s 91.¹⁶⁹ The provision was part of a broader legislative and administrative package, labelled “The Intervention”, that required the suspension of the *Racial Discrimination Act 1975* (Cth) and placed restrictions on Indigenous welfare, land rights and community governance.¹⁷⁰ In relation to sentencing, s 91 states:

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates...

162 Ibid, at [16]-[17].

163 *The Queen v Bara*, above n 74, at [17].

164 Ibid, at [18].

165 *The Queen v Linda Nabarula Wilson*, above n 80.

166 Ibid, at 3.

167 Ibid, at 4.

168 Ibid.

169 The Northern Territory National Emergency Response Act 2007 (Cth) s 91 both stated that in “determining the sentence”: “A court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates”.

170 Northern Territory National Emergency Response Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth).

This provision replicates the *Crimes Act* 1914 (Cth) s 16A(2A) for sentencing Commonwealth offences,¹⁷¹ which was introduced in 2006 to overcome sentencing situations where “a practice can be shown to be part of the background and cultural environment of a defendant” and “in conflict with the rights of the victim”.¹⁷² It precludes “any customary law or cultural practice from being taken into account ... in such a way that the criminal behaviour concerned is seen as less culpable.”¹⁷³ Indigenous Affairs Minister Brough stated in Parliament that the sentencing reforms in the Northern Territory seek to privilege the “seriousness” of the offence above cultural factors.¹⁷⁴ The legislation is aimed at increasing sentences for Indigenous offenders. It is exclusively targeted at those offenders whose culpability is reduced due to cultural or customary law factors. Minister Brough claimed that Indigenous offenders have been “hiding behind customary law” to receive reduced sentences.¹⁷⁵

In line with the punitive turn, the legislation responds to the Government’s belief that “we’ve got to have stronger penalties” for Indigenous offenders.¹⁷⁶ The Minister criticised lenient sentences given to Indigenous offenders because these sentences failed to “send strong messages to communities”.¹⁷⁷ In commending to parliament the sentencing reforms and illustrating the Government’s opposition to cultural considerations (albeit with incorrect reference to the role of customary law in sentencing¹⁷⁸), Senator MacDonald stated:¹⁷⁹

Criminal behaviour cannot in any way be excused, justified, authorised, required or rendered less serious because of customary law or cultural practice. The Australian Government rejects the idea that an offender’s cultural background should automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

The sentencing reform in s 91(a) suspends ordinary judicial discretion in sentencing, which enables courts to take into account any material fact relevant to the offender or offence, including cultural factors.¹⁸⁰ The reforms resonate with Mariana Valverde’s notion of “liberal despotism” in which governments brutally enforce liberal notions on groups requiring civilisation.¹⁸¹ In other

171 The legislation does not affect judicial discretion in sentencing in other states and territories despite Commonwealth Government attempts to have states insert the provision: Mal Brough, Minister for Indigenous Affairs, “Second Reading Speech: Northern Territory National Emergency Response Bill 2007” *Parliamentary Debates: House of Representatives Official Hansard* No 11 (Commonwealth of Australia, Canberra, 7 August 2007) at 16.

172 Ellison, above n 9, at 16.

173 Senator Sandy MacDonald “Second Reading Speech Crimes Amendment (Bail and Sentencing Bill)” *Parliamentary Debates: Senate* (Commonwealth of Australia, Canberra, 14 September 2006) at 12.

174 Brough, above n 171, at 15-16.

175 Kerry O’Brien “Australian Law Should Apply to All: Brough” *7.30 Report* Television Transcript, Australian Broadcasting Corporation, 23 May 2006 <www.abc.net.au/7.30/content/2006/s1645722.htm>.

176 Anne Barker “Brough Demands Tougher Sentences for Child Offenders” *PM* Radio Transcript, Australian Broadcasting Corporation, 31 October 2007 <www.abc.net.au/pm/content/2007/s2077867.htm>.

177 Ibid.

178 Contrary to Senator MacDonald’s statement below, evidence of cultural background is not “automatically considered” in sentencing. In the Northern Territory the Sentencing Act (NT) s 104 requires that prior notice of cultural background evidence be given and Crown scrutiny of such evidence before it is admitted. Thereafter the judiciary has discretion to consider such matters as relevant or not. Also, customary cultural evidence cannot be considered as a defence to excuse, justify or authorise criminal behaviour: Law Reform Commission of Western Australia, above n 12, at 7, 22.

179 MacDonald, above n 173, at 12.

180 *Neal v The Queen*, above n 53, at 326.

181 Mariana Valverde “‘Despotism’ and Ethical Liberal Governance” (1996) 25(3) *Economy and Society* 357 at 360.

words, the aspiration of liberal regimes for freedom involves taming those who are different before they too can enjoy the freedom of the majority. Legal philosopher Giorgio Agamben describes how separate legal provisions create states of exception to normalise the dominant culture.¹⁸² The exception, for Agamben, is not simply outside the social order but crucial to its existence.¹⁸³

Avowing the dominant legal norm, Senator MacDonald stated in relation to the sentencing amendment; “All Australians should be treated equally under the law. Every Australian may expect to be protected by the law, and equally every Australian is subject to the law’s authority.”¹⁸⁴ Given that all Australians can otherwise rely on personal and contextual factors relevant to culpability to argue for mitigation, Indigenous Australians are provided with a distinct disadvantage by not being able to plea culture or customary law issues in sentencing. Legal commentators have criticised the provision for suspending judicial discretion in a racially discriminatory manner that nullifies Indigenous-specific sentencing factors.¹⁸⁵ Northern Territory legal services have also identified increased sentences since the implementation of s 91(a) of the *Northern Territory National Emergency Response Act 2007* (Cth).¹⁸⁶ In this respect, the punitive turn for Northern Territory Indigenous offenders involves a unique suspension of their rights in order to send a message to them and their communities that their culture requires normalisation in line with “all Australians”.¹⁸⁷

IV. CONCLUSION: IMPLICATIONS OF THE PUNITIVE TURN FOR INDIGENOUS CULTURAL CONSIDERATIONS

The punitive turn in post-colonial society has not only seen courts and governments endorse tougher punishment, but also reclassify Indigenous culture as threatening to victims and offensive to the wider community. An historical analysis of sentencing jurisprudence on the Northern Territory Supreme Court reveals a shift away from providing significant leniency where cultural circumstances reduced culpability. Over the past decade the Court has primarily emphasised the interests of the wider community, deterrence, the seriousness of the offence and the harm to the victim in its sentencing considerations. While these law and order themes operate across Western societies,¹⁸⁸ they have distinct implications for Indigenous offenders who commit crime in cultural circumstances as well as their communities. As demonstrated in the customary marriage cases, messages of deterrence are directed not only to the offender but to the Indigenous community in relation to their marriage practices. They are intended to have a civilising effect on Indigenous communities. In jealousing cases, the victims’ interests in community punishment are undermined because they do not satisfy the “ideal” victim’s interest in longer prison sentences.¹⁸⁹ The acultural

182 Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* Translated by D Heller-Roazen (Stanford University Press, Stanford, 1998) at 15–16.

183 Agamben, above n 182, at 28–29.

184 MacDonald, above n 173, at 12.

185 Deirdre Howard-Wagner “Legislating Away Indigenous Rights” (2008) 12(1) *Law Text Culture* 45 at 58; Human Rights Law Resource Centre “Practical Implications of the Northern Territory Emergency Response”. Submission to the Northern Territory Emergency Response Review Board, 15 August 2008, at 22.

186 Human Rights Law Resource Centre, above n 185, at 22.

187 MacDonald, above n 173, at 12.

188 Garland, above n 5, at 7.

189 Pratt, above n 55, at 271–272. Also see Garland, above n 5, at 11.

ideal victim is set apart from the victimising *Indigenous* offender and the community that supports non-state punishment.¹⁹⁰

Fleury-Steiner et al inform us that “tough sanctions” have been accompanied by a rhetoric that “creates new forms of knowledge of space, self, and the other”.¹⁹¹ The Northern Territory Supreme Court and Federal policy makers have redefined the space and members of the remote Indigenous community as dangerous to victims. The Court no longer places emphasis on the Indigenous community as a vehicle for restoring the offender and promoting peace with the victim.¹⁹² Conversely, less weight is placed on Indigenous community submissions relating to punishment.¹⁹³ The Federal Government deems culture as a burden on mainstream “social norms”¹⁹⁴ and “safety”¹⁹⁵ in order to remove cultural considerations in sentencing and enforce coercive measures on communities. It encourages tougher penalties through the “imagined possibility of victimization”¹⁹⁶ in remote communities due to the practice of Indigenous customary laws.¹⁹⁷

Analyses of the punitive turn are enhanced with an understanding of its unique impact on minority cultures. The refashioning of Australian Indigenous culture as a threat rather than a benefit for remote communities has provided a catalyst for tougher penalties for Indigenous offenders. The impact of the punitive turn on Australian Indigenous people is revealed in cases on promised marriage and jealousy. Tougher sentences are handed down not merely to discipline the individual, but also as Foucault put it, to exercise “social power” through the body of the individual.¹⁹⁸ The Supreme Court and Federal Government exercise this power to militate against Indigenous cultural practices. Tougher penalties have been justified with reference to cultural crime risks in Indigenous communities and in turn the community’s role in sentencing and offender restoration has been nullified in favour of state coercive apparatus.

190 Blagg, above n 8, at 172.

191 Fleury-Steiner, Dunn and Fleury-Steiner, above n 8, at 6.

192 *The Queen v Bara*, above n 74, at [12].

193 *Ibid.*

194 Brough, above n 171, at 6.

195 *Ibid.*, at 17.

196 Simon, above n 5, at 1043.

197 Brough, above n 171, at 15-16.

198 Michel Foucault *Security, Territory, Population: Lectures at the College de France 1977-78* translated by Graham Burchell (Palgrave Macmillan, Hampshire, 2007) at 11.

THE RANGATAHI COURT

BY MATIU DICKSON*

“Ko te tangata i manaaki i te kainga, ka tu ki te marae, E tau ana!”¹

It has become popular to use the marae setting as an alternative to the mainstream Courts in dealing with young Māori offenders. The rationale is that taking young Māori offenders back to the marae to be dealt with in the youth justice system, encourages them to face up to their responsibilities and aids their rehabilitation back into the community. The expectation is that whānau will be present to support the young person and to help resolve his or her offending and bad behaviour. I supported this innovation when it was introduced but now I have second thoughts having seen that a marae that piloted this scheme was vandalised with graffiti painted on the marae buildings. In my view, when this happened the scheme to use marae should have ceased and an opportunity taken to rethink their use in this way. For a Māori the vandalism of their marae is like a physical assault on the person of their tupuna. This paper looks at the traditional role of marae in the Māori community and questions the use of marae as judicial settings. It suggests what needs to be done first to make this setting tika or appropriate.

I. INTRODUCTION

Māori feature widely and negatively in the statistics concerning criminal offending.² One of the worrying aspects of this situation is the increasing numbers of Māori youth in the statistics. The criminal justice system has been looking at ways to reduce the number of young Māori offenders. One possible way of doing this, is to hold Youth Court hearings on a marae. It is hoped that such hearings, which use marae protocols, could change the behaviour of the young Māori offender for the better. Most Māori people seem to support this move as innovative because it fits with their cultural practice of manāki or to care for others, particularly tribal members of the collective. However, despite my initial support for the concept, I now have some concerns because my experience as a tribal person being raised and living in a marae-based community, shows that the initiative needs to be aware of any long term negative effects there might be on the Māori community. The appropriation by any state agency of indigenous cultural settings and practice to achieve the state’s objectives should be carefully monitored and thought out before implementation. Māori should be given the option to withdraw their assistance to this initiative if they feel it no longer works for them or that its effects impinge on their overall cultural practices. I have a particular concern as to the mana or authority that Māori have over their marae activities. As

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1 *When the person raised in the home stands to speak on the marae, his chiefliness is for all to see!* A whakatauaikī or saying that refers to the value of raising children in their home environment.

2 See Editorial, Waikato Times 10 August, 2010. The newspaper ran a series of informative and generally positive articles when the new Rangatahi Court was opened at the urban Kirikiriroa marae, Hamilton.

shown in this article, the marae is the last “bastion” where Māori can, as much as possible, freely and comfortably carry out traditional practices of their ancestors. This aspect of Māori culture must be maintained.

Tuari and Morris³ refer to this point in their article, where they pose two questions to Māori in their research. These questions ask how Māori communities dealt with offenders and resolved conflict in the recent past and how might Māori justice practices work today. The authors refer to several aims of the Māori justice system shown in their research. These aims are that the marae is the preferred setting for administration of justice, that it should be administered by the elders or kaumātua, and that the harmony of the community has to be reinforced and maintained. I agree that these are the objectives of a Māori justice system though in traditional Māori society justice could be punitive and swift.⁴

In his paper for the Ministry of Justice, Jackson⁵ proposed a system that invited the government to implement a system that used Māori tikanga and marae to administer justice and would run parallel to the mainstream system. Regretfully, the report was not implemented because it was too radical for its time and too hard to sell politically. Thus, the idea of using Māori resources and knowledge to deal with Māori offending is not something new, though the Rangatahi Court is the first initiative that has been applied throughout the country.

II. THE RANGATAHI COURT PROCESS

The Children, Young Persons and their Families Act 1989 is the first piece of legislation in the western world to introduce a new way of dealing specifically with young offenders. One of its main principles is that the primary role in caring for and protecting a child or a young person lies with the child or young person’s family, whānau, hapū and family group.⁶ The vehicle for doing this is the innovative Family Group Conference (FGC).

Youth Court hearings held on marae are called Rangatahi Courts.⁷ The processes of the Rangatahi Court are the same as if the young person (over 10 years and under 17 years) was having their matter heard in a mainstream Youth Court. All matters except murder and manslaughter are heard in the Youth Court.

When a young person offends, the Police may deal with that person in the following ways:

- they may issue a warning not to reoffend;
- they may arrange a formal diversionary response after consultation with all the parties involved;
- if they intend to charge the young person, they can make referrals to Child Youth and Family Services for a FGC;

3 Eugene McLaughlin, “Restorative Justice: Critical Issues” in Juan Tuari and Allison Morris *Reforming Justice: The Potential of Māori Processes* (Sage, London, 2003) at 44.

4 In 1820 the widow of a Ngāiterangi chief was offered an opportunity to administer justice to an unfortunate captive of the tribe that murdered her husband. Despite her years, the widow immediately took a hand weapon and struck the captive on the side of the head killing him instantly. Utu or revenge was made.

5 Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou – a New Perspective* (Department of Justice, Wellington, 1988) at 39.

6 Children Young Persons and their Families Act 1989, s 13.

7 The use of the word “rangatahi” to refer to youth is taken from the whakatauaūki; “Ka pū te ruha ka hāo te rangatahi.” It means the old net is put aside and new net is cast, that is, the new generation will take over the roles of their elders. The term was coined by Te Rangihōia, Sir Peter Buck.

- or they may decide to arrest the young person and lay charges in the Youth Court;
- the Youth Court will refer matter to a FGC.

The FCG is expected to deal with the victim's concerns, the future placement of the young person in the community, and their wellbeing. Other matters that should be addressed are: making the young person accountable for their errant behaviour, repairing the harm done and putting in place systems to keep the young person from reoffending.

Rangatahi Courts are a Māori response to the Māori problem of too many young Māori offenders. It was first trialed at Te Poho o Rawiri marae in Gisborne by Judge Hēmi Taumaunu, a member of Ngāti Kōhōi of the East Coast tribes. The trial was successful though there was a spate of graffiti and extensive damage done to the marae during that time, which gave a negative spin to the new process.⁸ This new way of dealing with these young offenders has now moved to the Ministry of Justice using eight marae, carefully and strategically chosen, around the country.

Regarding Māori offenders, the central role of the whānau in dealing with its young people was promoted in a report produced in 1986 and titled "Puāo-te-atatu" meaning the New Dawn.⁹ The chairman of the Committee that prepared the report, Mr John Rangihau, a respected Ngāi Tūhoe elder, explained the Māori practice of having matters concerning young people dealt with by all family members as a practice worthy of its inclusion in the legislation. So, the legislation in its final form introduced an innovative process called the Family Group Conference. The objective of the FGC was to have the family/whānau members of the young person and the victims decide how to deal with the young person's offending in a supportive way. The restorative justice principle of repairing the harm caused by the offending was one of the main issues addressed at FGCs. Participation was voluntary, the offender was expected to take responsibility for their wrong-doing and the victim was entitled to say how the offending affected them.

Quince,¹⁰ in her article, refers to the FGC as a "co-opted process" which it is. It is the contribution made by the Māori elders at the time of the drafting of the legislation, which utilised cultural practices previously ignored by the criminal justice system, but accepted and still carried out informally by Māori communities. Quince refers to sittings which were initially held on urban marae like Hoani Waititi at Waitakere in Auckland. Strong minded individuals like Judge Michael Brown, Dr Pita Sharples and Kaumātua Dennis Hansen made sure that the system worked on that marae. Being a newly established marae, it had not yet put in place strong tribal traditions and in my experience¹¹ it was sometimes treated more like a community centre. The dining hall was built first and the carved meeting house built some time later. This aspect of the marae probably made sittings a lot easier because at that time the marae tikanga was, and still is I understand, very flexible.

My participation in FGCs in the early 1990s, while acting as a lawyer for the offenders, is that the range of emotions could move from one extreme to the other, that is, from anger to forgiveness. The offender's whānau often felt shame about the offending and wanted to severely punish their whānau member, or they might experience a situation of heartfelt forgiveness by the victim with offers by them to assist in the offender's rehabilitation. On the other hand, some FGCs,

8 Article by Alice Te Puni *Gisborne Herald* (New Zealand, 21 January 2010).

9 Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare. *Puāo-te-atatu: New Dawn* (The Committee, Wellington, 1986) Recommendation 4 at 10 regarding deficiencies in law and practice.

10 Kylie Quince "Māori and the Criminal Justice System in New Zealand" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Auckland, 2007).

11 I was a member (1973–1982) of the Kapa Haka group Te Roopu Manutaki that helped fund-raise for the new marae.

through the lack of attendees, showed the Court the dire circumstances some young people were in when it came to seeking whānau support.

Another interesting observation from that time is that it was not unusual in the Tauranga District Court where I practised, to have all Māori participants, including police prosecutors, in the FGC. However when the matter went back to Court in front of the non-Māori Judge and the Judge disagreed with the FGC recommendation, the young person (and whānau) was unwittingly shown who, in fact, was in charge in these situations.

Despite the improved way of dealing with young offenders in the criminal justice system, the statistics show that yet more needs to be done. These statistics are:

1. 17 per cent of the 14 – 16 year old population cohort identify as Māori
2. 49 per cent of arrests within that age group are Māori
3. 56 per cent of those charged within the age group are Māori
4. Between 66 per cent and 70 per cent of those in that age group in youth custody (youth justice residence/police cell) are Māori.¹²

As shown, the Rangatahi Court deals with young offenders over ten years and under 17 years. In many instances, these young offenders are dealt with outside of the court system by way of warnings, but sometimes the seriousness of the offending requires dealing with the matter through a court, where diversion is available as a sentencing option for minor offences. The Rangatahi Court looks specifically at whether the young offenders understand the consequences of their offending and how they or their whānau can put matters right for all concerned. Importantly, the Rangatahi Court also looks at helping young offenders change the behaviour that has led to their offending.

After the formalities of a Māori welcome onto the marae, the processes of the Rangatahi Court become deliberately informal to make those present more comfortable and relaxed. The judges of Rangatahi Courts are chosen because they have a recognised expertise and affinity for this area of the law. Similarly for other officers of the court, like the lawyer or lay advocate appointed for the young offender. Judges who are Māori have so far been chosen to preside and they each have varying degrees of knowledge of Māori tikanga and reo. However, they are not necessarily Judges who have a tribal or whakapapa connection to the marae on which the Rangatahi Courts are held. More importantly from a Māori cultural perspective, the marae may not be the whānau marae of the young offender. These are major concerns for me.

The restorative nature of the Rangatahi Court system should sit comfortably with the Māori tikanga system of justice. It is a collective process, involving members of the marae and whānau. A genuine enquiry then could be, why do not all Māori not actively support this new process? The answer could be that the offending originates from Pākehā or mainstream law and in the past Māori efforts to resolve these matters have not been looked at favourably, or have often been held in disdain. Māori possibly will not fully commit to a system does not recognise the validity of the justice system that they had, and have retained into modern New Zealand.

The system retained by Māori would probably work better if Māori society was socially intact but it is not. So the Māori system has to work within those limitations and if it is not successful then the concerns of mainstream law promoters, particularly that Māori receive special treatment, are confirmed.

12 Andrew Becroft “2011, a Big Year for Youth Justice: 21 Years Old and Challenging Youth Advocates in Court and Beyond” (paper presented to the National Youth Advocates Conference, Wellington, 2011) at 11.

As mentioned above, the FGC was introduced on the advice of kaumātua who participated in putting together the Puāo-o-te-atatu Report. The kaumātua thought it more appropriate and beneficial to all concerned, that young Māori offenders be dealt with within their whānau and cultural environment, which was the traditional way of dealing with offending in Māori communities. As it was, the mainstream system was not working for Māori.

As an example of the traditional way of dealing with offending, in the Māori community of Matakana Island where I was brought up, the isolation meant that the marae kaumātua enforced rules of good behaviour for all tribal members. A kaumātua, Te Hoe Palmer, was given the nickname “the Sheriff” because it was his responsibility to make sure that tribal members behaved themselves. Bad behaviour ranged from failing to help out at the marae and drunkenness, to domestic violence and assaults. Shaming the offender at public hui was the main deterrent but sometimes people were fined or excluded for a time from public occasions on the marae. The shame of any offender was felt by all the members of their whānau, and as a consequence that whānau tried very hard to rein in their errant whānau member. The elders of the marae collectively decided the fate of the wrongdoer and had a hand in enforcing the chosen sanction. Whakamā, or shaming, was an effective tool to get good behaviour because, ultimately, island existence relied on all whānau helping out and assisting others in a reciprocal way. Matters were dealt with differently when tribal members misbehaved on the mainland and within reach of the Pākehā law and the police.¹³

Thus, the whānau needed to share the responsibility for the offending and to help in the rehabilitation of its young whānau member. Where the young offender had whānau support, this approach was usually successful but if no whānau support existed then the wider tribal members were sought to assist. This is the rationale of the Rangatahi Court system.

Rangatahi Courts are not the first time that a kind of marae justice system has been used. It was used in Hamilton in the early 1990s, when Judge James Rota, a Māori District Court Judge, wanted to use local marae for district court sentencing hearings. In this system, adult Māori offenders were sentenced to community service at the marae, preferably their own marae. Regrettably, it was not too long before some offenders took advantage of the sentencing options by not meeting their obligations, by mocking the use of the marae and, more disappointingly, by disrespecting the voluntary input of the marae people. The newspapers at the time wrote negatively about this innovative approach, referring to the system as unfair, discriminatory and ineffective in reducing criminal offending. Despite the high expectations of Judge Rota, the system fell by the way when he left the district.

III. NGĀ TIKANGA MĀORI

In my view, an important aspect for the success of any marae-based project such as Rangatahi Courts, is that to comply with traditional tikanga practices, there needs to be a personal connection by whakapapa between the parties, that is, the young offender and the marae people.

Tikanga refers to Māori customary practices which must be correct, honest and appropriate. The appropriateness of tikanga depends on the circumstances in which the tikanga is used. Tikanga practice is related to the social controllers of Māori behaviour which are the value systems of tapu and noa. Tapu refers to the sacredness of an activity and can be like a prohibition against

13 Matiu Dixon [sic] “Māori and the Criminal Justice System” in Malcolm Mulholland et al *State of the Māori Nation* (Reed, Auckland, 2006) at 187.

certain behaviour. To breach such a tapu could bring misfortune and even death. A person not in a tapu state is considered noa, which is the safest state to be in so that ordinary activities can be carried out.

Māori act in a collective way and it is a whakapapa link that joins people as the collective whether it be a whānau, hapū or iwi. Whakapapa are the names of the individuals of one's genealogy. They are extensive, going back to the arrival of the canoes of the migration from Hawaiki in Māori traditional history or further to the Gods. Compiling them involved remembering, word perfect, the names of individual ancestors down to the present time and included living relatives. Those who had the ability to remember were chosen for this task; it was also a highly tapu activity and therefore it had an inherent danger about it. Whakapapa knowledge could be used to unite tribes but it could also be used negatively to cast spells on others.

Without this connection the responsibility for reciprocal actions by the tribe and the young person is not present, thus duty and responsibility, the main ingredients of restorative justice, are not necessarily applicable. These are central requirements of Māori tikanga concerning offending and rehabilitation of the offender.

Where there is no whakapapa connection, it is still possible to utilise the marae setting for non-tribal members but I believe that this then compromises the tikanga and kawa of that particular marae. All tikanga and kawa practice on the marae belongs to the people of the marae – that is those who have the mana or authority of the marae – not to the criminal justice system and those who enforce its rules.

This article is not to criticise the efforts being made to combat Māori youth offending but to make sure that the use of Rangatahi Courts does not in itself jeopardise or compromise an important part of Māori cultural practice. The marae is the last remaining “home place” where Māori can openly and comfortably discuss matters of importance for the tribe. Māori hold the cultural authority of the marae and must be careful to protect it. Any incursions onto the marae which might threaten the mana of its tangata whenua should be rejected, or accepted with stringent conditions. If not, the consequences are a loss or usurping of this part of Māori cultural practice.

Māori cultural practice is a sharing one so it is not surprising that requests for the use of marae for Rangatahi Court sittings is met positively. However allowing a person whose authority does not emanate from the tribal whakapapa to use the personal and identity-specific space of a tribal marae to administer justice is an anathema to some Māori. It is acceptable to others up to a point. The intrusion of the state judicial system is problematic if the mana for decision-making is not that of the people of the marae.

IV. THE MARAE

The whakataukī or saying: *He kākano ahau i ruia mai i Rangīātea* (I am a seed spread and sown from the marae at Rangīātea) refers to the ancestral marae of Māori at Rangīātea in Hawaiki, the Māori homeland. On that marae, the karakia or ceremonies were carried out before the ancestors left for Aotearoa. There was knowledge of a place called Aotearoa so that the sailing of waka was a deliberate decision by the people. Aotearoa was not discovered by accident. Māori had an in-depth knowledge of navigation by the stars, the sun and moon, the winds and the waves. Rangīātea is a sacred marae in Tahiti.¹⁴ Some Māori traditional history records that this was the starting place of travel to Aotearoa by the tribal waka. Some of the waka went to Rarotonga and

14 Te Rangihīroa Sir Peter Buck *The Coming of the Māori* (Whitcoulls, Wellington, 1987) at 25.

continued from there. The linguistic similarity of the Rarotongan language and that of the Māori, as well as the oral histories, seem to confirm this version of events. Rangiātea displayed the images of atua or Gods. It was necessary to appease these atua, and acknowledge and respect their tapu or sacredness, to travel in safety. The marae therefore was akin to a place of worship and therefore very tapu for members of the tribe.

On arrival in the new land offerings were made to the atua for completion of the journey. For example in my tribal area, when Tākitimu waka landed at Mauao mountain near the entrance to Tauranga harbour, these ceremonies were carried out by Tamatea-arikinui, the waka leader at Tirikawa rock¹⁵. This rock is at the base of the mountain and its position played an important role when the Ngāiterangi tribe invaded the Ngātiringinui pa on Mauao. An ahure, or altar, was built on the top of the mountain itself, as a sacred platform on which further ceremonies could be performed.¹⁶

Early ethnographers of Māori history referred to the marae ātea as part of a village setting.¹⁷ The village was referred to as a “pā”, being the either fully stockaded pā or a temporary pā near to the tribal cultivations. Artists also showed the marae ātea in their paintings.¹⁸ Village activities, such as the reception of visitors, were carried out on the marae ātea as were other communal activities like food exchange and distribution, food preparation and feasting. All the occupants of the village were related to each other by whakapapa or by being incorporated into the tribal group, for example, by marriage.

The word pā was used to refer to any Māori rural settlement where there was a marae ātea for the tribe. However in the 1960s an educational book called *Washday at the Pa* was highly criticised by Māori who feared the book gave a negative view of Māori communities. Thereafter the use of the word pā was dropped and the use of the word marae became more popular when referring to a part of the Māori community where the ancestral houses stood and were used communally.¹⁹

Sir Āpirana Ngata, the Māori renaissance leader of the early 1900s, promoted the building of modern type marae in support of his desire to have Māori revitalise their culture.²⁰ Māori were emerging from a time when their numbers had fallen so low that there was a common belief that they were a “dying race”.²¹ Ngata quickly recognised that Māori themselves were the only ones who could revitalise their cultural practice and improve their future.

The new marae were an opportunity for tribes to reassert their authority and identity, and instill pride in themselves after suffering the devastating effects of colonisation. Poverty and bad health were rife in Māori communities. For any progress to be made, leadership was required by both men and women in the Māori community. Inspirational leaders arose among the tribes, their authority based on traditional roles and their knowledge of the new Pākehā technology.

15 The name is taken from the phrase: *Ka tiritira te kawa* meaning the ceremonies were performed.

16 The body of my great grandfather Turiri Rikihana was found at Tirikawa Rock. He drowned with three other men in a boating mishap in Tauranga harbour in 1949. Tirikawa Rock holds a special significance for my family.

17 Elsdon Best *The Māori As He Was* (Government Printer, Wellington, 1952) at 177.

18 Augustus Earle *A Narrative of Nine Months in New Zealand in 1827* (Longman, London, 1832) at 28.

19 Hirini Mead, *Tikanga Māori* (Huia, Wellington, 2003) at 95.

20 Ranginui Walker *He Tipua, the Life and Times of Sir Apirana Ngata* (Penguin, Auckland, 2001) at 58.

21 A memorial was erected on One Tree Hill in Auckland by the benefactor John Campbell in memory of the “dying race”.

Ngata tested his theories of cultural revitalisation on his own tribe of Ngāti Porou as an example of what could be achieved. From that success he encouraged wider tribal redevelopment by getting members of his tribe to travel to other tribes to help in the building of ornate carved meeting houses. Pine Taiapa and Hone Taiapa, both of Ngāti Porou, were expert carvers who did just this. That tradition was continued by Paki Harrison, another Ngāti Porou carver who built the marae Tumutumu Whenua on campus at Auckland University in 1987.

Marae are now one of the last home-places where Māori tikanga or cultural practices have precedence, especially during the running of hui or meetings. The language of the hui is Māori. Other home-places which Māori use as marae are the many community facilities including schools or Kura Kaupapa Māori, or even private homes where Māori feel comfortable in carrying out their cultural practices. Most Māori communities have marae on which major Māori tikanga practices are held, the most important of which is the tangihanga or funeral ceremonies.

Essentially there are two types of marae now: tribal marae built in the tribal territory, and urban marae, which are built in the major urban centres of the country to which Māori have moved to live. Urban marae also include marae built for institutions like schools and universities.

A. Tribal Marae

Sometimes referred to as traditional marae, I intend to use the example of my marae on my father's side, Hungahungatoroa Marae, to show how it was established and is utilised.

The marae complex is made up of buildings that have a special status because the buildings are given names of tribal ancestors. The marae ātea is the open space in front of the main ancestral house of the tribe. The traditional ancestral house may not have been as elaborately carved as are the present ancestral houses, however its use was the same. The ancestral house represents the body of the ancestor and the carvings represent the tribal ancestors and stories. The ancestral house symbolically represents the body of the eponymous ancestor of the tribe. From the front, looking at the house, the maihi or bargeboards are the open arms and the intricate carvings at the end of each are the hands. The porch is the roro, or brains, and the kūaha is the opening or door to the body. The carving at the apex of the building represents the face of the ancestor and the tekoteko or human figure at the very top is the guardian of the house. The house is used for people to sleep in and for holding important hui of the tribe. Inside the house, most marae allow women to speak on important matters.

The activities outside of the house are the realm of the atua Tumatauenga and require strict adherence to tikanga practice, whereas the inside of the house is the realm of Rongo, the atua of peace. Thus, the inside of the house is the bosom of the ancestor, so that activities there are protected by that ancestor, and tikanga may be adapted to suit various occasions. The tāhuhu, or ridge pole, and the heke, or rafters, represent the backbone and ribs of the ancestor.

Not every ancestral house is carved and built as I have described but the representations are still acknowledged by hapū members even if the house is plain. The name of the house is the most important consideration because the name is usually the name of the founding ancestor of the hapū or tribe. At Hungahungatoroa Marae the porch of the house is the only traditional part of the building, because the hapū utilised an existing building as a basis for the ancestral house. Be that as it may, the hapū still adhere to the tikanga beliefs of traditionally built marae regarding activities in and outside of the house.

The marae is made up of at least two main buildings which sleep guests in the ancestral house and feed guests in the dining hall. Some marae did not initially have dining halls and in this situation the guests were fed on long picnic type tables set out in front of the meeting house. Cooking was carried out in *kāuta* or shelters for that purpose.

These hospitality functions of the marae are important *tikanga* requirements for Māori: that is, to *manaaki* or care for visitors. Marae are used to give tribal identity to their members and this is done by naming the main buildings after important ancestors, or important past events of the tribe.

B. *Hungahungatoroa Marae*

Hungahungatoroa marae was officially opened²² in 1967 at Matapihi in Tauranga. The *iwi* is Ngāiterangi, the *hapū* is Ngāi Tukairangi and the *waka* is Mātaatua.

Before this marae was established, the *hapū* used the marae at Whareroa and Waikari, both in the Matapihi community. These marae were established in the 1880s. In the late 1950s, it was decided by some of the *whānau* elders that the *hapū* had grown enough in numbers to warrant the setting up of another marae. This decision was not welcomed by all *hapū* members, particularly those associated with Whareroa marae. Those members feared that *hapū* alliances would be divided but the proposal went ahead anyway.

The first of the buildings for the marae was the old Matapihi school house which was moved onto the site,²³ and tennis courts were created. At that time, *hapū* members were very prominent in the national Māori tennis championships and marae tennis. After several years of fundraising and taxing²⁴ *hapū* members, there were enough funds for the *hapū* to build a dining hall. My grandfather, Tapuraka Rikihana, was a prime mover in the building of the marae. The *whānau* affiliated to the marae are the Rikihana, Te Kani and Gear *whānau* who are related by *whakapapa*. They all descend from the ancestor Tāpuiti and his wife Kareretukuroa. Tāpuiti is the son of Te Rangihouhiri the founding ancestor of the Ngāiterangi (Ngāi Te Rangihouhiri) tribe.²⁵

Thus the marae buildings are named Tāpuiti for the ancestral house or *whareniui*, and *Whakahinga* is the name of the dining hall or *wharekai*. The names are displayed above the doors of each building and when appropriate the ancestors are addressed directly by speakers of *whāikorero* on the marae. *Whakahinga* was Tāpuiti's daughter and she was an important *manawahine* leader of the tribe.²⁶ As mentioned, all members of the marae descend from Tāpuiti and are therefore linked to him by *whakapapa* or genealogy. The marae is the *turangawaewae* or home-place of the Ngāitūkairangi *hapū* members who hold the *mana* of the marae. Use of the marae contrary to the *tikanga* of the marae requires the consent and support of marae elders. The *kawa* of the marae is from the Mātaatua *waka* tradition. However there have been some changes to the Mātaatua tradition to suit the historical circumstances of the *hapū*. For example the speaking pattern of the

22 The dining hall called *Whakahinga* was opened after a Ratana church service. The service was hastily called so that the body of an elderly *kuia kauae moko*, Materoa, could be brought onto the marae for the *tangihanga*.

23 The name refers to the name given to the block of land on which the marae sits. It refers to the downy feathers of the toroa or albatross which nested there and is the *kaitiaki* of Mauao mountain. (Matiu Dickson "Hungahungatoroa Papakainga" (unpublished LLM thesis, The University of Waikato, 1999).

24 Adult male members of the *hapū* were "taxed" 25 shillings a month toward the marae building fund.

25 The tribe was referred to as Ngai Te Rangihouhiri. The name changed to Ngai Te Rangi to commemorate the death of Te Rangihouhiri at the battle of Poporohuamea near Maketu.

26 Houses are usually named after husband and wife but the elders decided on *Whakahinga* because she was a warrior ancestress of the tribe.

marae is tau utuutu or speaking in turns, not the usual pācke or block speaking as with the rest of Mātaatua. This change occurred because of the traditional friction between Ngāiterangi and Te Arawa tribes, and Ngāiterangi wanting to reserve having the last say on the marae for themselves. Speaking in turns means that the concluding speaker comes from the home marae.

Marae members keep their ahi kā to the marae by being actively involved in its maintenance and by personally supporting various hui held there. Ahi kā literally means to keep the home fires burning and refers to a person keeping their rights to a marae warm or active. The opposite is to allow those rights to go cold or become ahi mātao by not keeping regular contact with the marae and by not meeting one's obligations to it. Though extinguished, these rights can be re-ignited by that person re-establishing their contact with the marae or it being re-established by that person's descendants.

Marae members recognise the various leadership roles that each member has on the marae; these roles are based on gender, age and importantly on whakapapa as regards the front²⁷ of the marae. As to the work needed to make the marae run smoothly, especially for catering and such like, the hapū relies on the skills that each member has in food preparation and gathering. A hapū member is expected to pitch in where many workers are needed, like meal times, and it is expected that they will eventually choose a role that suits them. Various members have developed an expertise in various tasks on the marae. My mother, Tarati Rikihana, as one of the kuia (elderly female) of the marae takes the responsibility of laying out whāriki (mats) in the wharenui and making sure that bedding is put out properly. She was a caller or kaikaranga on the marae but has given over that role to the next generation of callers. She is also consulted as to when a tūpāpaku is to be moved onto the porch of the wharenui or kept inside. She is like kuia on most marae, who are particular that the tikanga of the marae is carried out properly.

As hapū members get older²⁸ they are expected to gradually take up more senior roles at the front of the marae. For example they are encouraged to be part of the waiata (song) group of the hapū before they become speakers or callers. They form part of the group of elders who oversee and support the front activities of the marae. They are expected to dress appropriately for the new roles²⁹ and take up their places on the marae. They are expected to remain present for the duration of the hui.

At this marae the elderly kuia of the hapū sit on mattresses on the porch of the meeting house during tangihanga (funeral processes) and the paepae (speaking bench) is reserved for the speakers and singers of the hapū. Only the speakers of the hapū sit in the front row of the paepae. The speakers are elderly male members of the hapū who represent each whānau.

Marae members acknowledge the tuakana (senior) and teina (junior) lines of each whānau and the responsibilities of whakapapa. For example this marae practices the tikanga of kiri mate. This means that when the deceased is related to people who normally take roles in calling and speaking, those people are expected to let others of the other whānau do these tasks for them. This favour is repaid by the grieving whānau at future tangihanga.

27 The ceremonies of the marae ātea are the responsibility of the elders. Hapū members take on those responsibilities as representatives of their whānau. The marae ātea is referred to as the "front" of the marae and the kitchen is the "back" of the marae.

28 Turning 60 years in age is a good reason to move to the "front" of the marae.

29 Wearing black clothing by elderly women is still accepted clothing for marae activities. Widows used to wear black clothing all the time, their status as widows being recognised by the whole community.

The *kiri mate*'s role is to concentrate on mourning for the deceased. It used to be that the chief mourners of the *whare mate* (place where the deceased is laid out), the *kuia*, fasted during the day light hours of the *tangihanga*. This allowed them to sit by the deceased and "use up their *aroha* (emotions)"³⁰ in the stylised wailing for the deceased and to show their *aroha* for the *manuhiri* (visitors) coming onto the *marae*. A special lavish meal was prepared for the mourners after sunset and before sunrise and I recall that this was the task for a formidable and hard working *kuia* called *Parekino Gear*. This *kuia* made sure that, during *tangihanga*, all the *tikanga* practices were followed and that the *manuhiri* were fed and looked after. We, the children of the *marae*, avoided this *kuia* but we also understood that the front of the *marae* was only for grown-up people.

The authority or *mana* of the *marae* therefore rests with the *koroua* and *kuia* (elders) of the *marae*. The elders decide the *tikanga* of the *marae* and their authority and knowledge is sought after and respected.

At this *marae*, after any major *hui* like *tangihanga*, a meeting is held on the following weekend to discuss any matters concerning the *hui*. Some matters which are discussed are the financial costs,³¹ the preparation, presentation and variety of the food, its timeliness, and importantly any matters to do with *tikanga* at the front of the *marae*. An example of the latter issue is whether visitors who arrive after or near sunset should be given a formal *karanga* and welcome.³² The tribal flag has been taken down and usually no formal welcome is given to such visitors but if there are important visitors in the group or there are good reasons for lateness (like travel from overseas) then the elders will make an on the spot decision as to whether to overlook that *tikanga*. Thus, the meeting is another opportunity to discuss these matters, particularly if an elder did not support a decision, giving his/her reasons why.

Another *tikanga* discussed at the meeting is the choice of *waiata* or traditional songs to support the speakers, the availability of the *hapū* members to sing and the quality of their singing. *Ngāitūkairangi hapū* is well-known in Tauranga as one that is strong in *waiata* singing. It is expected that this will continue and the *hapū* is always keen to keep up its high standards of *waiata* performance. Only traditional *hapū waiata* are sung. Similarly with the quality of the *whāikorero* which is also discussed if necessary. My experience at these *hui* is that the *kuia* of the tribe use this opportunity to express their views and their displeasure, if the occasion calls for it. For the younger generation present, it is a learning experience about *tikanga* of the tribe since their presence and participation is encouraged. Most of them have worked in the back of the *marae* during the *hui* and this is the first opportunity for them to get an appraisal of how the entire *hui* was run.

Near to this *marae* is a *papakāinga* or *marae* settlement of about thirty houses including eight *kaumātua* flats which house *hapū* members. The people who occupy the houses and *kaumātua* flats are those who are again connected by *whakapapa* to the *marae*. The majority of the houses have solo mothers and their children as was the intention of the Trustees of the *marae* land when the houses were built. The *kaumātua* flats house some of the elders of the tribe. They are always invited to participate in all the activities on the *marae*. Even the house occupiers are expected by

30 Expend their grief.

31 *Moni whiu* is money put down on the *marae* after speaker has finished. The name of the giver of the money is taken down and read out from the list of people who gave money gifts. These amounts will be repaid by the *hapū* when next they go to the *marae* of those people. *Moni aroha* is money given directly to members of the *whānau* and is not repaid.

32 The night is said to be the time of owls and ghosts and therefore not a good time to welcome visitors.

the trustees to contribute in some way to the running of the marae during hui. The house and flats were completed in 1990.

Thus, this marae is well supported by hapū members and has a good reputation within the wider Māori community as one that shows manaaki or cares for its manuhiri. Each marae member knows the tasks that they need to take responsibility for carries it out without much fuss. These members are valued for their skill and presence at the hui to make sure all goes well. If everything runs smoothly and it usually does, the marae and hapu gain positive mana from their achievement.

C. Marae Rangatiratanga

Two marae (Whareroa and Hungahungatoroa) belong to the Ngāitūkairangi hapū, the other marae (Waikari) is of the Ngāti Tapu hapū, another hapū of the Ngāiterangi. Though there are occasions when the three marae come together, especially for tangihanga, the running of each marae is the business of each marae and its affiliated whānau. Most tribal members decide which of the marae they will support primarily and they will stay with that marae, as will their children and grandchildren, though they could easily affiliate to another marae. Thus, most tribal members will continue to support the marae chosen by their ancestors though, as is shown, this can change if there is good reason. This is something that happens not infrequently. Each marae has its own kaikaranga, its own paepae or bench of speakers and whānau helpers at the back of the marae. Each marae has its own committee to run the hui on the marae. This even applies to the two marae that belong to Ngāitūkairangi hapū.

Sometimes these roles will be shared by the three marae if necessary. For example, during the huge tangihanga held in 1990 for Turirangi Te Kani, a kaumātua of the hapū, the tangihanga was held at Hungahungatoroa marae. Because of the many manuhiri who arrived (about 5,000 for the duration of the tangihanga) extra food was cooked at Whareroa marae and brought to Hungahungatoroa marae, and extra sleeping space was available at Waikari marae.

However in usual circumstances, each marae is fairly independent of the other and rarely does a member of one marae try to dictate to the members of another marae how they should do things, especially concerning tikanga. Marae members fiercely guard their independence, though, depending on the mana of an elder of another marae giving advice, they may feel compelled to take note of that advice. An example of this is the gradual acceptance by all three marae that the kiri mate should be welcome back onto the marae when they return from the urupā or cemetery. This was never done previously but was accepted as a way of welcoming the grieving whānau into the world of the living (te Ao Marama) and helping them overcome their grief.

This independence of marae mana is illustrated by an example from my childhood. I recall going with my maternal grandparents to a marae only about ten minutes by wagon down the road on Matakana Island. We were treated like manuhiri, or visitors, though we were from the same community and tribe.³³ The people of the marae extended to us the formalities of karanga, tangi, whāikorero and hariru always given to outside people. This was always the practice then and now. In doing this the home marae was establishing its mana and uniqueness.

33 The marae was Opuhi not far from our own marae at Opureora.

D. Urban Marae

Where Māori have moved away from their tribal homelands to the cities to work and live, their tribal group will gather informally on a regular basis and, after a while, work toward constructing a marae to meet their needs. Some urban Māori will affiliate to such marae as well as to their tribal marae, regularly travelling long distances to meet their obligations at tribal marae and keep their *ahi ka* burning.

The Mātaatua marae in Mangere, Auckland was built to accommodate and meet the *tikanga* needs of members of the tribes of the Mātaatua confederation of tribes. During a visit in 1996 to the traditional resting place of the Mātaatua waka in Northland, the Mātaatua tribes stopped there to rest before continuing their journey from the Bay of Plenty. They used the occasion to renew *whānaungatanga* links to their urban kin.

Again in Auckland, Te Tira Hou marae was established in the 1970s for the members of the Ngāi Tūhoe tribe. Te Tira Hou refers to the new migration mentioned by Te Kooti in his famous *waiata*.³⁴ In both cases, the *kawa* of these marae is Mātaatua while the *mana whenua* is with Ngati Whātua/Tainui. The establishment of these marae was carried out with the support of the *mana whenua* tribes.

In Hamilton, Kirikiriroa Marae was established in 1985 to meet the needs of all tribes, called *maata waka*, that is, those tribes other than those of the *mana whenua*, Waikato-Tainui. In effect though, the marae is used by all Māori people living in Hamilton including Waikato-Tainui. Out of the marae organisation Te Runanga o Kirikiriroa, an urban Māori authority, was established to assist the Hamilton City Council in its consultation with the Māori community. Te Runanga o Kirikiriroa continues that role but is now one of the selected providers of *Whānau Ora* the new social welfare policy of the present government.³⁵ The Kirikiriroa marae committee provided a home-unit right on the marae *ātea* for use by the Te Arikiniui Kingi Tuheitia and the Kāhui Ariki. The name of the meeting house is Te Kōhao o te Ngira (The eye of the needle). This name refers to the *tongi* or saying of Pōtatau Te Wherowhero, the first Māori King who referred to the proverb of his that, when translated, means: “there is one eye of the needle and through it passes the white, the black and the red threads.” Pōtatau was predicting a time when the Europeans and other people would settle in his territory together with his own people. He instructed his people that after his passing they should hold onto their love for one another, the law and their belief in their god. The name is thus appropriate for this meeting house.³⁶ The *kawa* of the marae is Waikato-Tainui.

Thus, sometimes, to accommodate the number of tribes affiliating to a marae in the city, a “neutral” name for the ancestral house or marae is chosen. That is, not the name of an ancestor but a name which encapsulates the purpose of the marae. A good example is the Te Kohinga Marama marae on the Waikato University campus. The name means to seek knowledge, that being the main purpose of students coming to the university. The marae is intended as a refuge for students and a place for them to carry out and celebrate their tribal activities. It also sets the stage for learning marae *kawa* as well as Māori *tikanga*.

34 The *waiata* is *Pinepine te kura*, a version composed by Te Kooti for followers of his Ringatū church.

35 Te Runanga o Kirikiriroa Charitable Trust is part of the National Urban Māori Association which tendered successfully for the *Whānau Ora* service. I am the Chair of the Runanga.

36 The proverb was referred to at the opening of the Law School at the University of Waikato in 1990. The School’s official title is now Te Piringa – Faculty of Law, incorporating the proverb’s message. In Māori it reads: *Kotahi te kōhao o te ngira i uru atu a miro mā, a miro pango, a miro whero*.

The well known marae, Hoāni Waititi marae, in urban West Auckland was named for an important educator Hoāni Waititi of the 1960s. He died prematurely but his work in promoting the teaching of the Māori language in schools was ground breaking. I recall the opening of that marae. Our tribe Ngāiterangi attended because, like the Whānau-a-Apanui tribe to which Hoāni Waititi belonged, we are of the Mātaatua tribes. One speaker for the manuhiri expressed his displeasure at the name of the marae, expressing a view contrary to the view of his elders who had spoken before him. When he had finished talking he asked his tribe to sing a waiata in support of what he had said. However, none of his tribe stood to sing his waiata thus showing their embarrassment at his contrary point of view. Too late, the speaker realised his mistake. He had been censored in the traditional way of his tribe. Such a hara or mistake caused a stir among those present and was a talking point on marae long after the event.

There are some kaumātua who hold the view that speaking on the marae is an opportunity to air controversial issues and to invite reactions by doing this. They say that this is the real purpose of whāikorero, not just the ceremonial aspect of speaking. *Kia tutū te puehu* (the dust is stirred) is the whakataukī that captures this view. Whāikorero is likened to warfare using words (and ideas). The skill of putting together the argument and the rebuttal is one that is admired. Similarly admired is the skill of reciting whakapapa and karakia.³⁷ Some notable speakers are known for their penchant for causing controversy when speaking and other speakers are on the look-out for them, to avoid being in the firing line! Humour is often used by seasoned speakers to deflect what might be insulting remarks and to maintain the decorum of marae speaking.

The trend now is for most tertiary and secondary education institutes to have marae for Māori ceremonies and to recognise the importance of Māori and their culture to the institution and within New Zealand. This can cause problems for some Māori members of such schools and universities. This is because, on these marae, the ultimate authority of their use is usually controlled by the school or university authorities. Thus tikanga Māori is relevant up to a point and this is illustrated below.

At a university marae graduation I attended in 2010, the pōhiri or traditional welcome to visitors was held first and then the graduation proper was to follow. Most organisers of marae graduations and other hui bemoan the fact that pōhiri can use up more time than is allocated. Therefore the organiser, in this case a Pākehā women employee of the university, gave instructions to the main kaumātua of the marae that the pōhiri was to be finished by a certain time. To meet this deadline the speaking order of the marae (tau utuutu or in turns) was changed (called whakakeke) and home speakers who were invited to support the pōhiri were not given an opportunity to speak. This is most unusual for a Māori hui for the reasons outlined below.

The main kaumātua or *kaumātua wawāhi i te kōrero*³⁸ is a person who holds the mana of the marae and is the person who controls the paepae so that the kawa of the marae is not compromised. He arranges the order of seating on the paepae and advises who will speak and in what order. It is important for the kaumātua to acknowledge the presence of group representatives and that they are given an opportunity to speak. If no opportunity to speak is given then the mana of the paepae is diminished in the eyes of those present and by those who are visitors since they can identify recognised speakers. This kaumātua will speak first. Most marae organise their paepae

37 Poia Rewi *Whāikorero: The World of Māori Oratory* (Auckland University Press, Auckland, 2010) at 103.

38 The speaker who starts the whāikorero and sets the scene by referring to the kaupapa (reason) for the hui.

without much trouble. In this instance, the tikanga of the marae is being influenced by the requirement to keep to time as dictated by the university. This would not be acceptable on tribal marae.

However, this order of speaking can be difficult for a visiting paepae where potential speakers are not obvious and some speakers who recognise tuakana/teina roles or seniority of age will decline speaking even though they are experienced speakers. If a discussion as to who will speak has not taken place at the gate, then these decisions will need to be quickly made in the minutes before taking a seat.

Speakers normally speak in the order they are seated in the front row of seats. It is most unusual to speak out of order or to speak when sitting behind the front row. I have seen an elderly person reprimanded by the marae kaumātua for speaking while in the back row because it was that person's responsibility to sit where he would be recognised and therefore properly acknowledged by the marae speakers. The rule of sitting in the front means that as visitors come onto the marae at big hui there can be some jostling to make sure one's duty to speak is not missed. If space is limited in the front row, I have seen seat swapping at opportune times so that a front seated person can talk.

Exceptions to kawa are possible but only with the support of that kaumātua or group of them. For example if a speaker is to speak in English, permission should be obtained beforehand from the marae paepae. This is normally by a request in Māori by the person accompanying the non-Māori speaking person. A person who speaks a language other than Māori without permission may be interrupted and asked to resume his seat.

Similarly for permission to allow a woman to speak if that is not the kawa of the marae. The late Te Arikini Dame Te Atairangikaahu delivered a korero³⁹ from the roro of the meeting house Tamateapokaiwhenua at Huria marae. She acknowledged the kawa of the marae that women did not speak on that marae by taking refuge under the porch of the ancestral house.

Kaumātua of the marae do not take too kindly to outsiders or visitors telling them what the kawa of the marae should be or arbitrarily changing the kawa. They will express this view forcefully if need be. A person who is objectionable when speaking can be physically removed from the marae, as I have seen on Turangawaewae Marae.⁴⁰ Or that person may have his waiata sung for him (by his female kin) before he is finished speaking, to shut him down. I have seen this also on Turangawaewae Marae.

Where the marae represents maata waka tribes, as in this case for Te Kohinga Marama Marae, it would be usual to have a maata waka person speak since they came specifically to support the pōhiri. The marae is an opportunity for any who think they have good reason, to talk to the kaupapa of the day. Importantly also it allows all groups to express their collective support to the kaupapa. However the speaker's success in conveying their ideas clearly and in the appropriate way is entirely up to them. Each time they stand to speak, their reputation in the Māori world of whāikorero is at stake. Such occasions make for a fast learning curve. Therefore one should be vigilant and prepared when deciding to speak formally on marae. A new speaker quickly earns or loses their reputation as a speaker and most of the judges of this new speaker's ability are his elderly female listeners.

At secondary school level, I was closely associated with Hillcrest High School in Hamilton. Our marae building was named for a previous Principal of the School, Jon Leach, who had died

39 Some kaumātua distinguish between a kōrero (talk) and a whāikorero (oratory) delivered by men.

40 The main marae of the Kingitanga Movement at Ngauruawahia.

tragically in a car accident. His body had lain in state in the building. Ngāti Haua are the mana whenua and had declared that from then on, that building would be included as a marae of the tribe known as Tama Wāhine, Tama Tāne. Unfortunately the building was also the auditorium for the school and was used regularly for year one and two student assemblies. School concerts and plays were also held in the building as it had a tiered seating arrangement. The marae was therefore utilised as part of buildings used in the teaching programme and not necessarily for the teaching of Māori kaupapa or tikanga only. Therefore the school deemed it necessary, as did the Ministry of Education, that the designated marae must also be used for other school activities. This was unsatisfactory for Māori members of the school community and the Board. In this instance, as with many other secondary schools that have marae, calling the facility the marae but also using it as a class room was highly unsatisfactory. On these occasions then the mana of the marae did not rest with the kaumātua but with the School authorities.

E. Marae Use – Tangihanga

Te ngaki o te mate, or avenging death, is one of the main reasons for disagreements and warfare for the old time Māori. Many tribal conflicts occurred to avenge the death of relatives. In my tribe the torture and killing of Tauaiti, the grandson of Te Rangihouhiri, prompted this utterance from before he died: *He papaku te moana o Tauranga i te riri o taku tuakana*, meaning Tauranga sea is shallow when compared to the anger of my brother. As Tauaiti predicted, his older brother Kotererua took revenge for the killing and invaded the pā at Mauao.

Tangihanga are the most important of Māori ceremonials in modern times. Thus the use of marae for tangihanga takes precedence over any other hui organised for the marae. This is the reality of marae use and it can be upsetting for whānau who have organised weddings and birthdays to have to shift them to another marae because of a tangihanga. However, I have seen instances when the tupapaku or deceased is kept at a house overnight to accommodate a double booking of the marae. Most hapū and marae are flexible in this matter. The important aspect is that where ever possible the important hapū hui be held on the appropriate marae.

As to the use of a marae, I want to refer to an incident regarding Te Kohinga Marama Marae at the University of Waikato. The late Anaru Paenga⁴¹ lay on that marae for several hours before he was taken to his tribal marae at Whangara on the East coast. He was a student at the University when he passed suddenly. As I was a close friend of his, I went immediately to his home where he had died. His body was still there. According to tribal custom I asked his family who had gathered already, if he could lay for a time at the University marae. The idea for this was to acknowledge his association to the University and to allow family and friends to pay their respects before he was taken to his tribal marae, some distance away. Using a marae to cope with visitors was easier too.

This tonono or request would normally have come from the elders of the marae but it was not possible at the time. Fortunately his wife and close family agreed to my tonono and thus Anaru lay at the marae to be farewelled by family and friends from Auckland who had already travelled to the tangihanga. This would be one of the main purposes of having a maata waka marae and I have seen it done often. Sometimes however, the entire tangihanga will be held at the maata waka marae but this depends on the close and long association of the deceased and family to the marae. This incident raises another tikanga which shows the whakapapa connection one has to one's

41 From Ngāti Konohi at Whangara. He died in 2009.

marae, the connection may rely on whakawhānaungatanga or relationship built up over the years to make lying at a maata waka marae appropriate.

At the time of the imminent death of a tribal member, the whānau and hapū members will have gathered at the home or hospital wherever the ill person is. In the past the hapū or iwi gathered in case the ill person wanted to express his wishes for the future. This was called an ōhākī or an oral will declared in the expectation of death. Much importance was placed on the final words of the deceased and the directions he gave.

When death did occur (literally the last breath being heard) it was immediately announced by the wailing of the kuia. According to Māori belief, the wairua of the deceased is still present (and aware of what is happening) and will remain so till the end of the tangihanga ceremonies. After a time a speaker of each of the groups present will stand to express their condolences to the kiri mate or family of the deceased, they will then offer their marae as the appropriate marae for the tangihanga. They base their tono primarily on the whakapapa connections of the deceased to that particular marae. After that speaker is finished, another will stand and follow the same procedure.

When my grandmother, Waimihi Rikihana, passed, I was present and heard the tono being made by three speakers. Although it seemed to be a foregone conclusion that my kuia would go to her husband's marae, which in fact happened, it was appropriate for other speakers to make the request anyway because they were able to recite their whakapapa connection to my kuia. By doing this, our death was became theirs as well and from that basis, the duties of each whānau were being established. Thus the bereaved whānau are referred to as kiri mate or those who are "touched by death".

When the deceased is close in whakapapa to a whānau member, that member becomes kiri mate, that is, their responsibility is to focus on their loss and by doing this it is believed that they expend all the grief that they have. A spouse, children, brothers and sisters and parents of the deceased are examples of kiri mate though depending on the whānau member, the "net" of kiri mate might spread wider.

Kiri mate are not required to take any role in performing the kawa of the marae. This happens on my marae. Kiri mate whānau do not speak or karanga, those roles are taken up by the other whānau of the marae so that the kiri mate may concentrate on lessening the grief of the whānau. Their kuia become the chief mourners of the tangihanga. The father, brothers or sons of the deceased do not speak but are permitted to take part in waiata singing if they wish. The close female members of the deceased's whānau sit near the deceased and lead the wailing and tangi apakura. On one side of the coffin will be the widow and daughters and on the other side will be the mother and sisters. Throughout the tangihanga these positions are usually held because it is bad form to leave no one seated next to the coffin. In figurative way, they are keeping the deceased warm. In my tribal area it is still traditional for women to wear the black clothing of mourning and head scarf. Traditionally, Māori wore a garment to signify that they were in mourning and therefore in a tapu state. The coffin is always open if possible.

When the deceased is taken to the undertakers it is always accompanied by members of the whānau and lately it has been the practice that undertakers will allow those members to dress their loved one. When the deceased is returned to the marae, for our marae it is always taken inside the ancestral house and placed at the wall to the right looking in the door on a prepared mattress. This part of the ceremony is always highly emotional for the whānau because it is the beginning of what they see as a journey for their loved one. The whānau also see this as perhaps the first of several occasions when they can really express their grief because after this they will be busy making

sure that the other tasks of the marae are being seen to. For the next two days the marae will be committed to meeting the needs of the expected visiting mourners and the kiri mate.

Each hapū or marae person knows the task that they need to take responsibility for to make the marae work and they do this without any drama. The occasion is a sad one but working together as a hapū compensates for this and makes, for most hapū members, the task bearable and enjoyable. The mana of the marae people rests on the “success” of the tangihanga, that is that the tikanga was carried out and that the marae looked after their visitors well.

The funeral day is chosen and the next important ceremony for the whānau is the poroporoaki or farewell on the night before burial. After the church service, the paepae are given an opportunity to farewell the deceased and sing the appropriate songs. Importantly, there is then an opportunity for a male representative of the kiri mate to speak formally and to farewell the deceased. Most often he is the elder son of the deceased who has not spoken formally on the marae before, so he is encouraged by his whānau and any mistakes are excused by the elders.

The speaker may decide to use the opportunity to thank the marae members for their contribution in caring for the manuhiri. Our marae custom is that once that person has spoken that signals the end of all formal speaking for the night. The evening is then open for anyone to have their say about the deceased and the occasion. I recall the time when speaking carried on through the night and kaumātua would use the time to recall stories and songs of the tribe.

On the day of the funeral, the important task for the marae is to prepare for the hakari or feast which is held after burial when everyone comes back to the marae. This is a major meal which allows people to removed the tapu of the occasion and urupa but also fortifies people before they return home. It is manaaki. After the hākari the kiri mate, the elders and the minister will go to the home of the deceased to “trample” the house, that is, to remove the tapu of the house so that the whānau feel safe in it. This ceremony is called takahi whare. The extended whānau will return to the home of the deceased and stay there for several days to keep whānau members company and alleviate any pressures on them.

Slowly things get back to normal, but for a time after it is expected that the elders of that kiri mate will attend any tangihanga in the tribal area to share their grief with the new kiri mate of other marae and hapū.

For our whānau, the process of the tangihanga is not completed until the unveiling of the memorial headstone for the deceased, a ceremony which once again the marae and hapū play an important part. That ceremony is carried out one year after the tangihanga was held but often, to save cost for the ceremony, the whānau will hold the unveiling ceremonies of several members of the same whānau. This ceremony is a carry over from the traditional hahunga ceremony when the bones of deceased people were exhumed, cleaned and deposited in secret caves or places so they were not defiled.

F. Marae Ātea

Outside activities on the marae were within the realm of Tūmatauenga who was the god of war. This meant that those activities required particular attention to the protocol kawa of the marae because breaching of the kawa could result in harm to the participants or to the tribe. Therefore, in some tribes like my own, women are not permitted to speak on the marae ātea during public cere-

monies. In speaking publically on the marae, it was explained to me,⁴² those women opened themselves to being the target of mākutū or witchcraft. This could be carried out by anyone who might feel aggrieved by such behaviour or blame the woman's whānau. Also, it could be explained as retribution by the atua. Mākutū needed to be dealt with immediately it was detected because, if not, it was believed that it would adversely affect any children or even grandchildren the woman might have. As mākutū could sometimes not be detected, it was considered better to play safe and not put oneself in potentially dangerous situations.

An explanation to me by another kaumātua for a kuia suffering a serious stroke while only in her early 60s, was that it occurred because the kuia pushed in front of men singers in her group as though to take over the talking role. He believed the incident as clearly one of mākutū.

Despite the prohibition on women talking on the marae, they have the equally important role of delivering the karanga. The karanga is the stylised call given by elderly women of the marae to announce the arrival visitors or manuhiri to the marae. Significantly it also announces the start of the welcoming ceremonies, that is, the ceremonies do not start till this is done. I have heard this reason used to explain the important mana of women in Māori ceremonial even among those tribes that do not allow women to speak formally on the marae.

Most kaikaranga or callers nowadays recite calls that they have learnt for each kaupapa of hui, but, given that I have heard many callers, I note that the good callers will incorporate within their call their own thoughts about the hui similarly to the oration given later by koroua of the marae and manuhiri.

The calls, particularly at tangihanga, were delivered in a heightened emotive state always accompanied by audible crying and wailing (called tangi apakura) by both marae and visiting groups. Various kuia in the tribe were sometimes recognised by the strength and style of their wail and the movements of their body while out on the marae ātea.⁴³ These kuia led the wailing and took places at the head of the group as it came onto the marae. We children took the opportunity to identify our kuia as each group came onto the marae. One does not see such emotions displayed on the marae except where there is a close relationship to the deceased, when the kuia is returning to her home marae or the kuia is of an age that she has been brought up with that style of expressing emotion. The last time I witnessed this to any great extent was at the tangihanga for the late Māori Queen, Te Arikini Dame Te Atairangikaahu in 2006. Although in some tribal areas audible wailing is the norm, particularly parts of Mātaatua.

Like most mokopuna, I accompanied my kuia on to marae for these occasions and I used to be surprised how my kuia could immediately take part in the wailing of the ceremony when only seconds before she would be telling me stay close to her. The sound of wailing focused everyone's attention to the purpose of the hui which was to mourn the passing of the deceased. I have seen elderly kuia who started the wailing before coming onto the the marae and, when they did enter, they went straight to the coffin where they placed their faces near to the deceased and wailed in a seemingly uncontrolled way. However it was not a random way of wailing because every now and then the kuia would compose herself and talk about something else and then start the wailing again when new visitors arrived. The kaikaranga's task was to start the wailing so that the manuhiri would not feel inhibited and join in. Sometimes one can go onto marae now and not feel

42 This explanation was given to me by kaumātua Turi Te Kani regarding our tribal practice, though I know that other tribes also hold this view.

43 Te Urumahora a kuia from Waikari Marae often demonstrated this.

that invitation from the kaikaranga if she is inexperienced, so that the tangi apakura is not heard and the mourning ceremonial falls short of what it used to be.

When the kaumātua Turi Te Kani died in 1990⁴⁴ one of the first persons to get to the tangihanga at Hungahungatoroa marae was the kaumātua Hohua Tutengahe. He was from our hapū but he lived in Christchurch. He arrived late on the first day of the tangihanga and though it was already dark a karanga was given to announce his arrival. He was given the karanga because he was an important member of the tribe and he responded by wailing audibly and for a long time when he came onto the marae. He stood directly in front of the coffin and he was visibly upset by the death of our kaumātua. He was returning to one of his marae after a long sojourn in the South Island. It was one of the rare times I have seen men carry out the wailing normally ascribed to women. Another occasion I remember is when Tam Rolleston wailed when his sister died and her tangi was held at Rereatukahia marae. Early ethnographers recorded this practice among Māori men and women, but it is a practice not often seen.

These ceremonies happen inside of the meeting house as well as on the marae. The interior of the house is within the realm of Rongo and therefore the kawa of the marae is tempered with manaakitanga. There is a more relaxed atmosphere but the marae people are still in charge. The people in the meeting house are symbolically within the bosom of the ancestor (for whom the house is named) and therefore protected by that ancestor.

Thus marae settings allowed Māori to show, without inhibition, their feelings when mourning their dead and through this the closeness of their connection to the marae. At a tangihanga the caller will refer to the images of the deceased being shown on the faces of the visitors as the make their way onto the marae:⁴⁵

Hoki wairua e koro ki runga I koe kua eke mai ki te marae nei e...Hoki wairua mai ra...

These are the usually the first words delivered in the karanga. The response is to identify the group and to inform if any are the kiri mate or mourners of other people are in the group. Māori join all the wairua of the recent dead and farewell them accordingly.

V. CONCLUSION

The intention of this paper is to show the importance of the marae to Māori tikanga practice. Hopefully the reader will also appreciate the complexity of marae tikanga practice and the integral part it plays in the whole of Māori cultural practice. My experience as to my marae at Hungahungatoroa is probably the same for other people and their own marae.

Tomas⁴⁶ has written succinctly on the importance of the marae to Māori, particularly as a place of sharing and healing. She also refers to the important value systems which Māori try to live by and their application to Māori cultural practice.

Though each marae will have its own tikanga practice there is an underlying similarity of values on which Māori tikanga practice is based. Those are manaakitanga and whakawhānaungatanga. These cultural practices can fit quite easily in what is required for a successful Rangatahi

44 This kaumātua died when crossing the road after attending a tangi on the East Coast. He was knocked over by a vehicle he did not see coming. He died unexpectedly, a bad sign for Māori.

45 Meaning: welcome the spirit of the deceased in the faces of those who come onto your marae! This is a karanga given to me by my cousin the late Ngaroimata Ereata.

46 Nin Tomas, "Māori Justice: The Marae as a Forum for Justice" in Amanda McCaslin (ed) *Justice as Healing: Indigenous Ways* (Living Justice Press, Minnesota, 2005) at 134.

Court process, particularly if the offenders are the young Māori members of the marae hapū. As mentioned, not long ago the elders of the marae dealt with some offending by their hapū members in a way that suited their cultural practices. The elders used their authority to make the decisions and took the responsibility to see them through.

The basis of Māori dispute resolution was to allow a free discussion on the marae amongst the elders so that eventually the leader of the hapū would summarise the discussion and make a decision that was considered appropriate for the tribe and the individual involved. The individual was the tribe and vice versa so that the benefits accrued to all present.

The trick was that once the decision was made that decision had to be supported by everyone, even those who might have initially disagreed. The mana of the leader ensured a consensus decision. The Ngāiterangi tipuna Rauru ki Tahi was such a person. His descendants are the Ngāitūkairangi branch of Whareroa marae.⁴⁷ Their tipuna whare is named for him, and his wife Kuraimonoa is the name of the dining hall. Rauru is legendary as the chief who, having heard the arguments for and against a matter concerning the tribe, would then give his considered view of way that was the best option for the tribe. Having given his view, the strength of his mana was such that all the tribe would support him and carry out his wishes, Thus his name of Rauru who speaks but once.

The other important factor in dealing with offenders is that the elders, having reprimanded the offended and punished him, began to look for the positives that the offender could offer to the community. It was important that the offender and the community be reconciled by the offender behaving himself and offering positive contributions to the hapū. An offending young person who worked tirelessly in the marae kitchen quickly redeemed themselves in the eyes of their elders. Opportunities to improve oneself were more available in the Māori community to which the offender belonged.

The Rangatahi Court is described as a youth court process in a Māori cultural setting that encourages strong cultural links and meaningful involvement of the Māori community in the process.⁴⁸ The Rangatahi Court is not a separate justice system but designed to use the marae setting to connect the young offender to their identity and culture. If it were a separate justice system the use of the marae would be more meaningful.

My suggestion is that serious consideration should be given to having the marae setting as a separate system by which the authority of dealing with the young offender is given over to the elders of that young offender. As difficult as that may be, it is in fact an honest and culturally appropriate way of using the marae setting. It is not merely a setting, as has been shown, because every part and every role on the marae has a cultural significance to the people of that marae, and no other marae. Using the marae as it is now used undermines an important cultural practice of Māori. As a Ngāitūkairangi person, if I were asked if my marae could be used for Rangatahi Court sittings or similar, I would agree, subject to these conditions:

- I retain the mana and authority for decisions made concerning the young offender;
- the young offender be connected by whakapapa to my marae.

47 Whareroa marae is near to the Tauranga harbour bridge and was the main settlement of the chief Taiaho during the 1800s. His hapū connections are to Ngāitūkairangi and Ngāti Kuku of Ngāiterangi.

48 Human Rights Commission “A Fair Go for All? Structural Discrimination and Systemic Barriers to Ethnic Equality: a Discussion Paper” (The Commission, Wellington, August 2011) at 47.

Insisting on these conditions would make me true to the original teachings of my tipuna as to the importance of the mare to our hapū. As our elders nurtured and protected their cultural rights on the marae, so must we as their descendants and rangatahi.

“THREE STRIKES” SENTENCING: ANOTHER BLOW FOR MĀORI

BY WAYNE RUMBLES

On June 1, 2010 the Sentencing and Parole Reform Act 2010 amended the Sentencing Act and introduced into New Zealand the so-called “three strikes” sentencing regime.¹

The rationale for introducing this sentencing regime was that it would protect the public, deter offenders, and improve public confidence in the criminal justice system.² The stated purpose of the Act is:³

- To deny parole to certain repeat offender and to offenders guilty of the worst murders.
- Impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

This legislative comment will argue that this regime will disproportionately impact on Māori who are already over represented in the criminal justice system at every level. The Department of Corrections has reaffirmed that amplification of Māori within the system is at least in part due to systemic factors that operate at one or more steps of the criminal justice process which make it more likely for Māori to be apprehended, arrested, charged, convicted or imprisoned, with the result that Māori “accumulate” in the system in greater numbers.⁴ Given that there is some systematic bias discernable around Māori in the criminal justice system, any habitual offender-sentencing regime will disproportionately impact on Māori, feeding a cycle of increasing Māori incarceration. This comment argues that application of this amendment without first addressing the systematic bias toward Māori in the criminal justice system is unjust. Brookbanks and Ekins have produced a thorough and excellent critique of the “three strikes” regime which details strong arguments as to why the law is unjust, while I fully support the findings of their article, I am not going to repeat their critique, but rather add another possible reason why the “three strikes” regime is unjust and should be repealed or amended as Brookbanks and Ekins suggest.⁵

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1 For a discussion of the introduction of the Sentencing and Parole Reform Act see Waren Brookbanks and Richard Ekins “The Case Against the “Three Strikes” Sentencing Regime” (2010) 4 NZ Law Review 689 at 690.

2 Law and Order Committee, Full Report “Sentencing and Parole Reform Bill” (26 March 2010), 1; see also J Collins, “National and ACT agree to three-strikes regime” 19 January 2010 <www.beehive.govt.nz/release/national-and-act-agree-three-strikes-regime>; Rodney Hide and David Garrett, “Three Strikes Policy. The Sentencing and Parole Reform Bill,” (Auckland: ACT Party, 2010) <www.act.org.nz/files/features/three-strikes.pdf>.

3 Section 3 of the Sentencing and Parole Reform Act 2010.

4 See Department of Corrections “Over-representation of Māori in the Criminal Justice System :An exploratory report, (Policy, Strategy and Research Group Department of Corrections September 2007) especially Part 2 “Criminal Justice Bias and Accumulation.”

5 See generally Brookbanks and Ekins, above n 1.

I. THE THREE STRIKES LEGISLATION

In the 2008 National-Act Confidence and Supply Agreement, the National Government agreed to support the introduction of the Sentencing and Parole Reform Bill.⁶ This Bill proceeded through the house and was duly enacted as the Sentencing and Parole Reform Act 2010. It inserts sections 86A-86I into the Sentencing Act 2002.⁷ These reformed sections apply to 40 offences, which are considered to be serious violent offences,⁸ with special provisions for murder and manslaughter.⁹ The trigger for application of the “three strike” regime is a conviction of a qualifying offence, regardless of seriousness or level of sentence.¹⁰

A. *Strike One*

When a defendant is convicted of a qualifying offence for the first time, the Court must warn the offender of the consequences of the offender being convicted of any further qualifying offences.¹¹ This section of the “three strike” sentencing regime contains no particular sentencing directives, so normal sentencing consideration would apply.

B. *Strike Two*

If an offender goes on to commit another qualifying offence after receiving a first warning, the Judge must issue a final a warning which includes the consequences that will follow if the offender is convicted of any further qualifying offences.¹² In addition to this warning any custodial sentence imposed for the second strike offence must be served in full, without parole. The sentencing Judge has no discretion in terms of non-parole.¹³

C. *Strike Three*

If offender is convicted of a qualifying offence committed after the second and final warning, having thus committed three qualifying offences they must then be sentenced in the High Court. The sentencing Judge must sentence the offender to the maximum term of imprisonment specified for the offence, and has no discretion in that regard.¹⁴ In addition to imposing the maximum sentence being prescribed, the Court must also order that the offence is served without parole.¹⁵ In this regard, the sentencing Judge does have discretion. The sentencing Judge is not required to order the

6 “National-Act Confidence and Supply Agreement” (16 November 2008) <www.act.org.nz/files/agreement.pdf>.

7 Sentencing and Parole Reform Act 2010, s 6.

8 Sentencing Act 2002, s 86A includes: robbery, aggravated burglary, assault with intent to rob, wounding with intent to cause grievous bodily harm, wounding with intent to injure murder, manslaughter, rape, indecent assault.

9 Sentencing Act 2002, s 86E.

10 Some of the offences listed under s 86A can range from relatively minor that may normally attract a custodial sentence to the serious violent offences. Under normal sentencing this range can be accommodated by the discretion of the sentencing Judge.

11 Sentencing Act 2002, s 86B, the Court must also give a written warning, the offender must be over 18 years of age and the offence must have been committed after the legislation came into force. See s 12 of the Sentencing and Parole Reform Act 2010.

12 Sentencing Act 2002, s 86C(1).

13 Sentencing Act 2002, s 86C(4).

14 Or each offence if there is more than one. Sentencing Act 2002, s 86D(2).

15 Sentencing Act 2002, s 86D(3).

sentence be served without parole if satisfied that ‘it would be manifestly unjust to make [such an] order’.¹⁶

Although “manifestly unjust” is not defined in the Sentencing Act, it has been interpreted to be a high threshold elsewhere in our sentencing law.¹⁷

There are special provisions that apply if manslaughter is the third strike conviction. In this the case, the Court must impose a life sentence, however it is not required to order the life sentence to be served without parole. The Act requires a minimum non-parole period of imprisonment of 20 year unless the Court considers 20 years imprisonment to be ‘manifestly unjust’. If that is found to be the case, the Court must set a 10 minimum non-parole period.¹⁸

In the case of murder at the second or third strike stage, the Court must sentence the offender to life imprisonment without parole, again, unless the Court is satisfied that it would be ‘manifestly unjust’ to do so. If the Court does deem that life imprisonment without parole would be ‘manifestly unjust’, then whether the murder conviction has come as a second or a third strike becomes relevant.

In a second strike murder conviction, the Court can apply the normal murder sentencing; either a minimum 10 years non-parole period¹⁹ or, if certain aggravating factors were present, a 17 years non-parole period.²⁰ In the case of a strike three murder, if life imprisonment without parole has been deemed ‘manifestly unjust’, the Court must then order a 20 year non-parole period unless it deems that that also would be ‘manifestly unjust’. If so, it can then apply either the 10 or the 17 year minimum non-parole periods as explained above.

II. MĀORI ACCUMULATION IN THE CRIMINAL JUSTICE SYSTEM

There have been a number of empirical studies of the experiences of Māori with the colonial criminal justice system. Simone Bull’s study of Māori and crime in New Zealand from 1853-1919 concludes that early Māori offending could be explained by the ongoing process of colonisation and by a need to project an illusion of state control.²¹ She views the early phase (prior to 1911) of Māori offending as primarily cultural conflicts,²² added to over-policing of Māori alcohol consumption to placate Pakeha and specific instances of the criminalization of Māori Independence movements (mid 1860s, 1881 and 1897).²³

16 Sentencing Act 2002, s 86D(3).

17 See s 102 of the Sentencing Act 2002 regarding the presumption in favour of life imprisonment for murder to be rebutted where life imprisonment would be “manifestly unjust.” See *R v Williams & Olsen* [2005] 2 NZLR 506 (CA). The high threshold of the term “manifestly unjust” is also discussed in terms of departure from life imprisonment See *R v Rawiri* (HC, Auckland T 014047, 16 September 2002, Fisher J).

18 Sentencing Act 2002, s 86D(4).

19 Sentencing Act 2002 s 103.

20 Sentencing Act 2002 s 104.

21 Wayne Rumbles “Treaty of Waitangi Settlement Process: New Relationship or New Mask?” in Greg Ratcliffe and Gerry Turcotte *Compr(om)ising Post/colonilaim(s)* (Dangaroo Press, Sydney, 2001) 225 at 225-226.

22 These included a small number of charged for fishing without a licence, breaches of Cemeteries Act and the Tohunga Suppression Act 1907. See Simone Bull “The Land of Murder, Cannibalism and all Kinds of Atrocious Crimes?” *Māori and Crime in New Zealand 1853-1919* (July 2004) 44(4) *The British Journal of Criminology*, 496 at 505.

23 1860s Waikato Wars, Pai Marire and the criminalization of rebellion, 1879-1882 Parihaka, and 1890s Dog tax and 1897 Parihaka revisited. Bull, above n 22, at 506-510.

However between 1906 and 1911, a 130 per cent increase in the number of charges laid against Māori defendants occurred. This can be explained in part as a second wave of Pakeha focus on Māori and alcohol. However much of the rise in Māori prosecutions can also be tied to a prevalent focus on “law and order” after New Zealand’s 1907 attainment of dominion status. New Zealand was a new and geographically isolated dominion with emerging political structures, which were still unstable. Bull argues that policing was necessarily focused towards those who, by class or by race, were perceived as actual or potential threats to the state-centred concepts of order and regularity. Therefore with a view to state control, legislation was used to facilitate the over-policing of Māori. The focus on Māori offending meant that reported offending statistics increased, setting up a cycle of focusing on the “Māori” criminal problem, which increased reporting of Māori crime, thus justifying the need for further official intervention, with the deeper concern being linked to the new dominion’s focus on state control and law and order. This cycle set up a self-fulfilling prophecy, which still is manifest today.²⁴

There are many other contributing factors to this accumulation of Māori in the criminal justice system. The effects of colonisation through cultural marginalisation and the undermining of the existent traditional Māori legal system ought not be underestimated as ongoing contributors to the high numbers of Māori in the criminal justice system.²⁵ Negative socio-economic factors and negative early life experiences have a criminogenic effect on all people. Unfortunately Māori disproportionately find themselves subject to those circumstances.²⁶

A. *The Systemic Biases of the Cycle*

I will now focus on a number of systematic factors at work in the justice system itself which aggravate the historical and socioeconomic/psychological factors just discussed, and which are likely to exacerbate the injustices to Māori, adding injustice inflicted by the likely disproportional application of the “three strikes” regime. This amplification explanation posits that, whatever the real rate of criminal behaviour, any crime committed (or indeed suspected) is subject to systemic processes that make it more likely that Māori will be apprehended, and then will be dealt with more severely. These processes have variously been described as “unintended consequences of discretion”, “unevenness of decision-making”, “bias” and “institutional racism”.²⁷

Each stage of the criminal justice system has significant inbuilt discretion. The Police have significant discretion. That discretion ranges from whether to investigate a particular complaint of criminal offending through from what process to follow for the apprehension of suspects, whether or not an arrest will be made, whether an arrest will proceed to prosecution and, in many cases including, to what charges will be laid.²⁸ After prosecution the Court may or may not convict, and once convicted the sentencing Judge has discretion as to which sentencing options are suitable.

24 Ibid, at 516-17.

25 Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (LexisNexis, Auckland, 2007) at 9-13, R Ranganui Walker *Ka Whawhau Tonu Matou* (2nd Ed, Auckland: Penguin Books, 2004).

26 Ministry of Justice “Social Risk Factors for the involvement in Crime” *Strategic Policy Brief* (Ministry of Justice, Wellington March 2009) and Ministry of Justice “Māori at Risk of Crime: Some Factors” *Strategic Policy Brief* (Ministry of Justice, Wellington April 2009).

27 Department of Corrections, above n 4, at 7.

28 Crown Law *Prosecution Guidelines* (Crown Law, Wellington, 1 January 2010).

Although Māori make up approximately 15 per cent of the New Zealand population,²⁹ the crime statistics reflect a disproportionality that cannot easily be explained.

Māori are more likely to be apprehended for a criminal offence and more likely to be prosecuted than non-Māori, and Māori are nine times more likely to be remanded in custody while awaiting trial.³⁰ Māori account for 41 per cent of all accused offenders,³¹ 44 per cent of all convictions, 46 per cent of violent convicted offences, 47 per cent of property convicted offences and 41 per cent of all convicted drug offences. Māori are nearly three times more likely to be convicted of criminal offences than non-Māori,³² receiving 53 per cent of all custodial sentences and 50 per cent of periodic detention – but only 35 per cent of monetary sentences.³³

New Zealand's imprisonment rate is high compared to similar countries with a rate of 199 per 100,000 (as at June 2010).³⁴ England and Wales have a rate of 152/100,000, Australia has a rate of 134/100,000 and Canada a rate of 117/100,000. Countries that have similar rates of imprisonment to New Zealand include Namibia 194/100,000, Costa Rica 198/100,000, Mexico 207/100,000, Uruguay 193/100,000 and Malaysia 192/100,000.³⁵ New Zealand is out ranked in terms of imprisonment rate by the United States of America with the highest prison population rate in the world of 748 per 100,000.³⁶ The United States of America is often criticised as being out on its own imprisonment trajectory of harsh and exclusionary justice.³⁷ However if Māori are considered in isolation from the rest of the New Zealand population, their imprisonment rate is already about 700/100,000 or on a par with the United States' astonishing statistics. If the Sentencing and Parole Reform Act 2010 does increase the accumulation of Māori in the prisons, the rate of Māori imprisonment may well approach that of or even exceed that of the United States.³⁸

This accumulation of Māori in the Criminal Justice system results in Māori making up 51 per cent of the prison population is not new and a body of research has developed particularly since the 1970s in an attempt to explain the disparities.³⁹ There are several ways that apprehension rates

29 National Ethnic Population Projections: 2006 (base)–2026 update (Statistics New Zealand, 2010).

30 Quince, above n 25, at 1-3.

31 "Crime in New Zealand A Statistical Profile: Statistics" Information Briefing for members of Parliament (Parliamentary Library, 2000) at 9.

32 "Gaps between Ethnic Groups: Some Key Statistics" Information Briefing for Members of Parliament (Parliamentary Library, 2000).

33 Crime in New Zealand, above n 31, at 9.

34 This is the sixth highest rate of imprisonment in the OECD and the 60th highest rate in the world. Prison facts and statistics – September 2010 (Department of Corrections) <www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2012.html>. Note prison statistics change daily but general the imprisonment rate and percentage of Māori inmates remains fairly constant over time.

35 Roy Walmsley "World Prison Population List (8th edition, King's College International Centre for Prison Studies London, 2009).

36 Prison facts and statistics - September 2010 (Department of Corrections) <www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2012.html>.

37 See Nicola Lacey, "Criminal Justice and Democratic Systems: Inclusionary and Exclusionary Dynamics in the Institutional Structure of Late Modern Societies" (Center for European Studies Working Paper Series #148, 2007) at 9-11.

38 National Health Committee "Health in Justice: Kia Piki te Ora, Kia Tika! – Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau" (Ministry of Health, Wellington, 2010) at 22.

39 See for example L Duncan "Explanations for Polynesian Crime Rates in Auckland" (October 1971) Recent Law at 283-288; Moana Jackson, *The Māori and the Criminal Justice System: He Whaipanga Hou – A New Perspective, Part 2* (Department of Justice, Wellington, 1988); Quince, above n 25, and Bull, above n 22.

may be amplified, and while each may only have a small impact on its own, their cumulative and compounding effects significantly contribute to Māori accumulation in the criminal justice system.

A considerable number of arrests do follow from police stopping and questioning citizens in public places. There is evidence that Māori are more susceptible to police stopping and checking.⁴⁰ Police do engage in profiling both explicitly and implicitly (even unconsciously) as an aid to crime prevention. Given New Zealand's crime statistics and the position of Māori in those statistics, ethnicity appears to be a salient characteristic for police inquiry. This will undoubtedly be reinforced by past experience.⁴¹

Although racial profiling is a controversial subject for law enforcement and has been denied as being attributable to the New Zealand Police environment,⁴² nevertheless, a number of studies in counties with similar disproportionate crime statistics for certain sub-groups ethnic find profiling has been a factor.⁴³ It is likely that some form of racial profiling is impacting on apprehension discretion. Maxwell and Smith's report on police perceptions of Māori clearly showed some elements of ethnicity based profiling by the New Zealand police.⁴⁴

Wortley and Tanner describe racial profiling existing:⁴⁵

...when the members of certain racial or ethnic groups become subject to greater levels of criminal justice surveillance than others. Racial profiling, therefore, is typically defined as a racial disparity in police stop and search practices...increased police patrols in racial minority neighbourhoods and undercover activities or sting operations which selectively target particular ethnic groups.

Maxwell and Smith illustrated that the many Police officers were more likely to carry out a routine vehicle stop of a known offender if they were Māori, more likely to ask what a Māori person is doing if seen out in the small hours of the morning, and most significantly, much more likely to suspect a Māori of an offence or carry out a vehicular stop if a Māori is driving a "flash" car.⁴⁶ It is clear the ethnicity based profiling does not explain the whole of the extent of apprehension disparity – other possible factors may be the dualistic stereotyping of police about Māori and Māori about police.⁴⁷

Through these stereotypes police are more likely to suspect Māori of offending and Māori are more likely to distrust the police, believing any negative response to be racism. This helps cre-

40 Maxwell and Smith, above n 44, at 15.

41 Department of Corrections, above n 4, at 15.

42 "Police Complaints Authority response to Māori Party complaint about Police use of Tasers" (3 April 2007) 638 NZPD 8574.

43 See for example Candice Batton and Colleen Kadleck "Theoretical and methodological issues in racial profiling Research" (2004) 7(1) *Police Quarterly* at 30-64, Ben Bowling and Coretta Phillips *Racism, Crime and Justice* (London: Longman, 2002), Robin Engel, Jennifer Calnan, and Thomas Bernard "Theory and racial profiling: Shortcomings and future directions in research" (2002) 19 *Justice Quarterly* at 249-273, and Lorie Fridell, Robert Lunney and Drew Diamond "Racially Biased Policing: A Principled Response" (Washington, DC: Police Executive Research Forum, 2002).

44 Gabrielle Maxwell and Catherine Smith, "Police Perceptions of Māori: A Report to the New Zealand Police and the Ministry of Māori Development: Te Puni Kokiri" (Institute of Criminology, Victoria University of Wellington 1998).

45 S Wortley and J Tanner "Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor's Critique of Racial Profiling Research in Canada" *Canadian Journal of Criminology and Criminal Justice* (2005) at 581-583.

46 Maxwell and Smith, above n 44, at 11-16.

47 See Gabrielle Maxwell "Police and Māori: Perceptions of One Another". Paper presented at Ngakia Kia Puwai, Auckland, 2005.

ate a self-perpetuating and self-fulfilling cycle, as both groups have negative expectations of the interaction. This means that Police may have a heightened response to any suspicious behaviour of Māori, and Māori, through distrust and the belief that police are biased, may respond uncooperatively, which then in turn is further interpreted as suspicious.⁴⁸ Even the Department of Corrections acknowledges that apprehension rates do not simply reflect actual offending behaviour of persons in the community and acknowledge that some form of bias appears to be occurring.⁴⁹

Following apprehension, a decision must be made to initiate a formal prosecution. As the “three strikes” sentencing regime is triggered by the initial conviction of qualifying offence, which charge is laid is crucial to the application of the regime. This sharply increases the significance of prosecutorial discretion and the risk of arbitrary and selective law enforcement.⁵⁰

While overall apprehended Māori are “moderately” more likely than non-Māori to be prosecuted,⁵¹ the higher apprehension rate means proportionately more Māori will be prosecuted. Māori are more likely to be convicted of qualifying offences than non-Māori,⁵² and as only a qualifying conviction (regardless of seriousness) is required, Māori will be more likely to come under the regime. This is supported by a 21-year longitudinal study, which showed apparent bias in arrest and conviction rates for Māori relative to non-Māori with similar backgrounds and offending history.⁵³

The “Three Strikes” sentencing regime will only exacerbate the accumulation process outlined above and will disproportionately increase the number of Māori in our prisons.

III. HABITUAL OFFENDER SENTENCING LEGISLATION IN OTHER JURISDICTIONS

New Zealand is not unique in applying habitual offender sentencing legislation.⁵⁴ The application of those laws and their effect on certain ethnic groups within the society, tend to reinscribe the racial biases within criminal justice systems.

In the 1969 report *Towards Unity: Criminal Justice and Corrections*, The Canadian Law Reform Commission considered their habitual offender legislation. This legislation shared some of the elements of the New Zealand “three strikes” regime, namely that the strikes would only apply only after the offender was 18 years of age or older, and that there was no time restrictions to the qualifying offences.⁵⁵ In other ways it was a much more measured regime. It effectively operated as four strike regime requiring three previous indictable offences for which the offender was li-

48 Department of Corrections, above n 4, at 16.

49 Department of Corrections, above n 4, at 17.

50 Brookbanks and Ekins above n 1, at 714-717.

51 Department of Corrections, above n 4, at 20.

52 Ministry of Justice “Conviction and Sentencing of Offenders in New Zealand 1995-2004” (Ministry of Justice, Wellington, 2006).

53 David Fergusson, John Horwood and Nicola Swain-Campbell “Ethnicity and Criminal Convictions: Results of a 21-year Longitudinal Study” (2003) 36(3) *The Australian and New Zealand Journal of Criminology* 354 at 362-363.

54 Twenty two States of the United States of America have some form of three strikes legislation, Most States of Australia have some form of weaker habitual offender legislation. In Canada, the Habitual Offender Act dealt with multiple offences. The law was repealed after a Law Commission Report of 1969 found it to be erratically applied and that it was often used against non-violent and non-dangerous offenders. More recently there has been discussions as to whether to re-enact some form of habitual offender legislation in Canada.

55 Compare the definition for Stage-1 offence in 86A of the Sentencing Act 2002 and ss 660-667 of The Criminal Code (Canada as at 31 March 1969).

able for five years (or more) imprisonment. This in effect introduces a seriousness threshold to the offences. The Canadian system required application to be made detailing previous conviction and evidence that the accused was "leading a persistently criminal life".⁵⁶ The applications were considered by a judge alone (without a jury), thus preserving judicial discretion in applying the increased sentencing for habitual offenders.⁵⁷

However the Canadian Law Reform Commission recommended repeal of the habitual offender sections and that they be replaced with what was in effect a preventative detention regime similar to one in the present New Zealand Sentencing Act.⁵⁸ In their justifications for recommending repeal, the Commission noted that the application of the Habitual Offenders sentencing was inconsistent, discriminatory and any deterrent value was slight:⁵⁹

Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice among the ... offenders against whom it has been applied

In studying the cases of offenders incarcerated under the habitual offender regime, the Commission noted that the regime had been primarily invoked for offences against property.⁶⁰ Although the justification of the regime was to protect the public from the most dangerous offenders, in reality many of those incarcerated may have been a social nuisance but did not pose a grave threat to public safety.⁶¹

There are also numerous studies that demonstrate the disproportionate effect of California's three strike legislation on African Americans and Latinos.⁶² Although the following words are referring to California's three strike laws they resonate with our own regime in New Zealand.⁶³

The [] inequality is in the race and ethnicity of people subject to the law. In the state as a whole and most localities in particular, minorities are treated more harshly at every stage of the system—beginning at arrest and ending, for some of them, with a sentence under Three Strikes.

56 The Criminal Code (Canada as at 31 March 1969) s 660(2)(a).

57 It should be noted that this regime provided for preventive detention to be applied to habitual criminal offenders in lieu of any other sentence imposed. An application could be applied for up to three months after the sentence had been passed.

58 See *Towards Unity: Criminal Justice and Corrections* (Canadian Law Reform Commission, Ottawa, 1969) at 258-261 which also included the repeal of the dangerous sexual offenders legislation and recommended that both of these be covered by a preventative detention regime (Dangerous Offenders Legislation). Eventual repeal and replacement of the section was not until 1977 but the Dangerous Offender Legislation was based on the 1969 report. See also John Howard Society "Dangerous Offender Legislation around the World" (1999) <www.johnhoward.ab.ca/pub/C20.htm> and Sentencing Act 2002, ss 87-90.

59 *Towards Unity*, *ibid*.

60 *Towards Unity*, *ibid*, at 251.

61 *Ibid*, at 251- 252.

On analysis the Commission came to the following conclusions:

- Almost 40% of those incarcerated under the regime appear not to be a threat to the public
- Perhaps 1/3 would appear to pose a serious threat
- Substantial number where there was not enough evidence to warrant a conclusion that they posed a threat.

62 See for example Elsa Chen "The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law" (2008) 6(2) *Journal of Ethnicity in Criminal Justice* at 85 and 87-89; Lawrence Bobo and Victor Thompson "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment" in Hazel Markus and Paula Moya (eds) *Doing Race: 21 Essays for the 21st Century* (Norton New York, 2010) at 322.

63 Scott Ehlers, Vincent Schiraldi, and Eric Lotke "Racial Divide: An Examination of the Impact of California's Three Strikes Law on African-Americans and Latinos" (Justice Police Institute, Washington, 2004) at 19.

Of course, the racial disparities in the criminal justice system are the result of many causes. Minority communities often experience higher rates of poverty or unemployment; individuals may have less money and more trouble making bail or hiring private attorneys who can advocate on their behalf for better treatment under the law. However, the present system appears to exacerbate rather than ameliorate these underlying inequalities. Attention needs to be paid to ensure that the justice system of California reaches as near as possible to the aspiration of equal justice under law. The Three Strikes law, as it is currently structured, does not appear to be meeting that aspiration.

Māori already feel alienated by a criminal justice system that is perceived as treating them unjustly,⁶⁴ the “three strikes” sentencing regime is just another blow for Maori. Applying habitual offender sentencing legislation to a criminal justice system, which already has systematic bias towards apprehending, prosecuting and convicting one social group within a society cannot lead to greater security for the public. While there are many other reasons why the Sentencing and Parole Reform Act 2010 is bad law⁶⁵ and should be repealed, I argue that the exacerbation of underlying inequalities in the criminal justice system is one of them. The Canadians recognised the injustice of this type of legislation in 1969. My hope is that here in New Zealand we also may see this legislation to be what it is, unjust, arbitrary and disproportionate, and that we will either repeal or extensively amend it.⁶⁶

64 “Perspectives on Responding to the Over-Representation of Māori in the Criminal Justice System. The Views of Māori Stakeholders” (Justice Sector Policy Group, Ministry of Justice and the Social Policy Branch, Te Puni Kōkiri, 1998) at 9-10. A 1998 joint Te Puni Kōkiri and Ministry of Justice study found Māori feel alienated from Police and criminal justice agencies. Responses of the criminal justice system to offending were perceived as unhelpful for Māori offenders in particular. By not effectively dealing with crime, the criminal justice system may actually contribute to re-offending. Some contributing factors noted include:

- the court system is meaningless to many Māori;
- poor quality legal advice to Māori;
- prosecution practices for Māori differ from that of non-Māori;
- culturally inappropriate behaviour of lawyers, court staff, and the judiciary;
- inappropriate sentencing of Māori offenders;
- ineffectiveness of imprisonment.

65 See Brookbanks Ekins, above n 1, generally.

66 Ibid, at 696-699.

FROZEN RIGHTS? THE RIGHT TO DEVELOP MĀORI TREATY AND ABORIGINAL RIGHTS

BY DR ROBERT JOSEPH*

I. INTRODUCTION

Bishop Manuhuia Bennett often asked the question: “What did Māori call New Zealand before the arrival of the Pākehā [Europeans]?” After a deliberate pause, he would then simply utter: “Ours”.¹

It is beyond doubt that at a point in the history of Aotearoa New Zealand, everything belonged to Māori where Māori had property rights over the whole of the resources of this country. It is moreover, somewhat ironic that such a historic truism becomes the hardest fact to prove when scrutinised by imposed statutory tests and judicial frameworks. Furthermore, such tests appear to freeze already severely depleted Treaty and aboriginal title rights within a historic strait-jacket thereby prohibiting the contemporary development of these rights.

The historical practices and customary traditions that form the basis for the contemporary Treaty and aboriginal rights of Māori were not and should not be frozen in time. Māori identities, practices and rights, like all cultures, were and are constantly undergoing renegotiation, change and development. Nevertheless, the law in New Zealand has frozen Māori rights to a hunter-gatherer lifestyle that is inappropriate for contemporary Māori development.

So what is the appropriate development of Māori rights in New Zealand today? What does it mean to be Māori, Tainui, Maniapoto, Raukawa, Ngāi Tahu, Kahungunu, or a “traditional” Māori group in contemporary 21st century New Zealand? Is it best to accept the omnipotent, omniscient and omnipresent assimilation of Māori into the pervasive global culture and economy or should Māori continue to strenuously resist this type of “development” and to hold on to remnants of a bygone culture that struggles to co-exist within this neo-liberal globalised world? The seductive lure of corporate wealth and alleged prestige may well be assimilating Māori communities into a neo-liberal and neo-tribal corporate identity but there are others who fight vehemently for the survival of Māori as Māori but in a contemporary context.

This article will analyse the right of Māori to develop their Treaty and aboriginal rights and to not be frozen in time to a bygone hunter-gatherer lifestyle which hinders 21st century self-determination aspirations and realities. It is acknowledged that Māori Treaty rights, aboriginal rights, and customary rights differ in origin, content and enforceability but these distinctions are beyond the scope of this article. Although important, the author has grouped these rights together in this article in terms of analysing how they have been frozen in time by legislative and judicial tests. The following discussion will address a number of challenges surrounding frozen Māori rights that

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1 Cited in A Sykes “The Tide is Turning: Foreshore and Seabed Presentation” (Unpublished Paper, 9th Annual Māori Legal Forum, Wellington Townhall, 21 July 2010) at 1.

ultimately hinder the right of Māori to develop their self-determination rights commensurate with the ever changing world in which we live.

The article first discusses the inherent right of indigenous peoples to diversity and self-determination that provide scope for updated rights. We then analyse briefly the inevitable adaptation and development of culture, then extensively aboriginal rights jurisprudence in New Zealand and Canada with reference to key judicial tests that freeze indigenous development. The article then critiques the Foreshore and Seabed Act 2004 (now repealed) and the recent Marine and Coastal Area (Takutai Moana) Act 2011 in New Zealand, which continue to perpetuate these flawed tests. Finally, the article explores how the Waitangi Tribunal and international law have considered the right of Māori to develop their aboriginal, Treaty and customary rights in a 21st century context.

II. RIGHT TO DIVERSITY AND SELF-DETERMINATION

From the outset, the author's opinion is that in a 21st century development context, cultural diversity is as valuable as the biological diversity upon which the world depends for its proper functioning. Appropriately acknowledging cultural diversity within the nation-state and globally is a positive development hence ancient indigenous cultures (and non-indigenous cultures for that matter) are worthy of preservation, conservation and development. Rather than transforming Māori cultural heritage into what Benjamin Barber has so aptly called "McWorld",² the kind of development advocated by the Indian economist Amartya Sen³ should be sought – a development that brings with it the freedom to individuals and peoples to develop their capabilities, including, most importantly, the capability to be themselves. For Māori, this type of development is a fundamental tenet of the right of indigenous peoples to self-determination in international legal discourse which as a minimum is about the advancement and development of Māori in New Zealand, as Māori according to their worldviews, aspirations and priorities but in a modern 21st century context.

However, a contemporary legal and political challenge that continues to hinder this kind of development is the fossilisation of indigenous treaty rights and the common law doctrine of aboriginal rights. Consequently, contemporary indigenous development is frozen into that of a bygone age which does not allow for the development of these rights for contemporary 21st century indigenous self-determination.

A. *Cultural Development Inevitable*

There is no culture in the world that does not adapt and evolve with changing environmental, political, social and economic circumstances.⁴ Indeed Underwood held that cultural identity is not a static essence that moves unchanged across time. It is constantly, if subtly and perhaps not altogether consciously, being constructed and reconstructed in response to changing circumstances

2 B Barber *Jihad v McWorld* (Ballantyne Books, New York, 1996).

3 A Sen *Development as Freedom* (Knopf, New York, 2000).

4 Granted, the Jewish diaspora may be one exception to this rule and it is a remarkable exception but orthodox Jews are a very interesting and exceptional group of people in this regard. Still, Jewish culture and identity have shifted and changed in some aspects albeit incrementally since the time of Moses.

and new ideological resources encountered by participation in the wider world.⁵ It is, to use Jolly's apt phrase, a process of "continual recreation rather than passive perpetuation".⁶

Change does not necessarily imply that a culture is dying or is less authentic. It depends, among other things, on the degree of change that occurs. For example, the respected anthropologist Dame Joan Metge discussed the ability of Māori tikanga⁷ (Māori customary laws and institutions), indeed Māori as a people, to change and adapt when she noted:⁸

The process of transmission between generations inevitably involves adaptation and change, while traditions take only a few generations to become established. Māori beliefs and practices are legitimately described as "tuku iho no ngā tūpuna" and "traditional" if they have been handed on from generation to generation, whether they were first adopted five hundred, one hundred or fifty years ago.

The author subscribes to the view that so long as the core values of the culture are maintained, but outwardly manifested in an updated contemporary context, then the culture still has some life to it as Judge Eddie Durie (as he was then) noted:⁹

The lesson of history appears to be that change can be effected without prejudice to customary law provided the core values of that law are maintained.

Once those core values are lost, however, then the culture begins to lose its authenticity and, in the author's opinion, legitimacy and perhaps even efficacy.

Despite the major societal transformation Māori communities in New Zealand have undergone, Bennion believes the changes to tikanga Māori rarely produced changes to the "fundamental value system".¹⁰ Traditional tikanga Māori are still regularly adhered to by many Māori in their most overt form on the various marae (Māori meeting houses). Māori communities may apply traditional Māori custom, consciously or unconsciously, in the everyday management of community and family affairs. Today, they may also apply custom consciously, for example, as a result of provisions in the charters of Māori governance entities that they have established for the administration of their tribe's affairs.¹¹

III. NEW ZEALAND – ABORIGINAL RIGHTS JURISPRUDENCE

The common law doctrine of aboriginal title is relevant to the thesis that Māori rights have been frozen in time by both judicial and legislative decree. For example, in the 1908 decision of the High Court of *Public Trustee v Loasby*,¹² Cooper J instituted a three tier customary law test (based on aboriginal rights) when deciding whether to adopt a rule of Māori customary law. The first tier was whether the custom existed as a matter of fact, whether "such custom exists as a general cus-

5 G Underwood "Mormonism, the Māori and Cultural Authenticity" (2000) 35(2) *Journal of Pacific History* 133.

6 M Jolly "Specters of Inauthenticity" (1992) 4 *Contemporary Pacific* 57 at 59.

7 For references, see E Durie "Māori Custom Law" (Unpublished Paper, Wellington, 1994); and "Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law: Proto-Compendium" (Unpublished, Draft Version, Te Mātāhauariki Institute, The University of Waikato, June 2007). The latest version is forthcoming in 2012.

8 J Metge "Iwi: Word and Meanings" (Unpublished Paper in author's possession, 1991) at [8.9].

9 E Durie "Governance" (Conference Presentation, "Strategies for the Next Decade: Sovereignty in Action" School of Māori and Pacific Development International Conference, The University of Waikato, 1997) at 116.

10 T Bennion *The Māori Law Review* (March 2001), online at <www.bennion.co.nz/mlr/2001/mar.html>.

11 Durie, above n 9, at 7.

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

tom of that particular class of the inhabitants of this Dominion who constitute the Māori race.”¹³ The next tier was whether the custom was contrary to statute. The last tier was whether the custom was “reasonable, taking the whole of the circumstances into consideration.”¹⁴

Subsequently in *Huakina Development Trust v Waikato Valley Authority*¹⁵ Chillwell J applied the *Public Trustee v Loasby*¹⁶ customary title test to find that “customs and practices which include spiritual elements are cognisable in a court of law provided they are properly established by evidence.” The judiciary appears then to have acknowledged that aboriginal rights may evolve and develop in time under this third tier of what is reasonable.

The latest and most authoritative New Zealand decision on aboriginal title is the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*¹⁷ which affirmed the Māori Land Court’s jurisdiction to investigate claims of Māori aboriginal rights in the foreshore and seabed.¹⁸ However the decision was overturned by the controversial and hastily enacted Foreshore and Seabed Act 2004 which is discussed later in the article.

Still, it is clear that Māori customary law, via the doctrine of aboriginal rights, is cognisable and enforceable in the New Zealand courts with some hints of a right to evolve these rights but the recognition and inclusion of Māori custom appears to have been redefined and fossilised by Parliament and the judiciary.

We will now discuss briefly the leading Canadian decision that contributes to freezing Māori aboriginal rights in New Zealand.

IV. 1996 VAN DER PEET DECISION FREEZES ABORIGINAL RIGHTS

The 1996 Supreme Court of Canada decision of *R v Van der Peet*¹⁹ outlines the most exhaustive analysis by Commonwealth courts of the notion of “aboriginality” and what makes a right “aboriginal” in character. In other words, the case law prescribes or defines customary indigenous identity and rights that accrue to that identity. *Van der Peet*, moreover, refined the test for recognising indigenous rights by defining the rights identified by s 35 of the Constitution Act 1982 to include both aboriginal and treaty rights.²⁰

The Stó:lō appellant sold ten salmon contrary to s 27(5) of the British Columbia Fishery Regulations. She challenged her conviction arguing that the provincial law violated the constitutional protection of aboriginal rights in s 35(1) of the Constitution Act 1982. At issue was whether the

13 Ibid, at 806.

14 Ibid.

15 *Huakina Development Trust v Waikato Valley Authority* (1987) 2 NZLR 188 at 215.

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

17 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

18 Ibid.

19 *R v Van der Peet* (1996) 2 SCR 507. For a good discussion, among many, on the *Van der Peet* decision, see RL Barsh and JY Henderson “The Supreme Court’s Van der Peet Trilogy: Native Imperialism and Ropes” (1997) 42 McGill LJ 994.

20 *R v Van der Peet* [1990] 1 SCR 1075 at [31] and [40]. See also *R v Côté* [1996] 3 SCR 139; *Kruger v The Queen* [1978] 1 SCR 104; *R v NTC Smokehouse Ltd* [1996] 2 SCR 672; *R v Nikal* [1996] 1 SCR 1013; *R v Gladstone* [1996] 2 SCR 723; *R v Pamajewon* [1996] 2 SCR 821; and *Mitchell v MNR* [2001] 1 SCR 911.

aboriginal right of fishery included a right to sell for commercial purposes. The Court agreed that the doctrine of aboriginal rights arose through Canadian law as Lamer CJ expounded:²¹

In my view the doctrine of aboriginal rights exists, and is recognised and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

The majority held that the commercial selling of salmon however, was not an “aboriginal” aspect of the fishing right.

The majority took an “integral-incident” test. Lamer CJ found that in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition *integral* to the distinctive culture of the aboriginal group *at the time of contact* with Europeans.²² In identifying practices, traditions and customs integral to the distinctive cultures of aboriginal peoples, there are a number of factors a court must take into account.

- First, they must consider the perspective of aboriginal peoples themselves.
- Secondly, they must identify precisely the nature of the claim being made, notably the possibility that the activities may be the exercise in modern form of practice, tradition or custom that existed *prior to contact*.
- Thirdly, in order to be “integral,” a practice, tradition or custom must be of central significance to the aboriginal society in question.

Lamer CJ stated that “a practical way of thinking about this problem is to ask whether, without this practice, tradition, or custom, the culture in question would be fundamentally altered to other than what it is”.²³ The practices, traditions and customs that constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed *prior to contact*. McLachlin J held that barring extinguishment or treaty, an Aboriginal right will be established once “continuity” can be shown between a modern practice and the Native laws that “held sway before superimposition of European laws and customs”.²⁴ Lamer CJ explained the emphasis upon pre-contact rather than pre-sovereignty aboriginal society:²⁵

Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is that period prior to the arrival of the Europeans, not the period prior to the assertion of sovereignty by the Crown.

Lamer CJ noted that the practice must be of “independent” significance to the aboriginal culture, “distinctive” and not merely “distinct”.

Lamer CJ noted further that while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Stó:lō culture, this was not sufficient without a demonstration that it was the exchange of salmon which was a significant and de-

21 *R v Van der Peet* (1996) 2 SCR 507 at 538, 137 DLR (4th) 289. See also *R v Sappier*; *R v Gray* [2006] 2 SCR and *R v Sundown* [1999] 1 SCR 393.

22 *Ibid.*, at 310–315. See also *Campbell v British Columbia* [2000] BCJ. No. 1524 (BCSC) 139 at [79], [52].

23 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 24 per Lamer CJ.

24 *R v Van der Peet* (1996), above n 21; 137 DLR (4th), above n 21 at 634–635.

25 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 34.

fining feature of Stó:lō culture.²⁶ Given that salmon exchange, although part of the interaction of kin and family exchange, was not an integral part of pre-contact Stó:lō society, the pre-sovereignty trade which the band established with the Hudson's Bay Company did not have the necessary continuity to support an aboriginal right. Moreover, the Stó:lō were at a band rather than a tribal level of social organisation and the specialisation of labour characteristic of the tribe was absent and, therefore, the absence of regularised trade or a market is suggestive that the exchange of fish was not a central part of Stó:lō culture.²⁷

The case therefore, concluded that those self-defining practices, customs and traditions that qualify as “aboriginal” must be part of a central aspect of pre-contact society which has continued to the present. In British Columbia, the magic date for aboriginal rights seems to be 1846.²⁸ In New Zealand, the 1840 rule of the signing of the Treaty of Waitangi is the magic date for the affirmation of aboriginal rights.

A. *Frozen Aboriginal Rights*

The Stó:lō First Nation asserted that the traditional process used to determine the content of an aboriginal right (in this case to fish commercially) created a traditional practice and the doctrine of aboriginal rights should transform that practice into an aboriginal right. The Supreme Court did not address this aspect of the appellant's argument but it constructed a standard test to determine the content of an aboriginal right by a process that emphasised the need to look at the actuality of indigenous practices that created a right to a custom exercised traditionally. The dissenting judgment of L'Heureux-Dube J highlighted the fossilisation of Indigenous traditional rights through this process:²⁹

The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture to which they are rooted. The analysis turns on the manifestations of the “integral” part of [the aboriginal's] distinctive culture.

*R v Pamajewon and Jones*³⁰ confirmed that the exact nature of the activity claimed to be a right must be a defining feature of the culture in question *prior to contact* with Europeans.³¹

The majority's decision in *Van der Peet* has been heavily criticised for freezing aboriginal rights to only those practices that existed prior to colonisation. Indeed, John Borrows opined: “Aboriginal rights should exist to ensure Indigenous Peoples' physical and cultural survival, not necessarily to preserve distinctive elements of pre-contact culture.”³²

Moreover, making aboriginal rights dependant on the factual continuation of a practice for 170 or so years is also unreasonable given the fact that indigenous peoples have been dispossessed, disempowered and forcibly assimilated into mainstream during this time. The law is allowing colonial history to dictate what is and what is not able to be recognised as a right of indigenous

²⁶ Ibid, at 41–42.

²⁷ Ibid, at 42–43.

²⁸ As per *Delgamuukw v British Columbia* [1998] 1 CNLR 14, (Supreme Court of Canada) cited in *British Columbia, Provincial Policy for Consultation with First Nations* (BC Consultation Policy, Victoria, BC, October 2002) at 10.

²⁹ *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 345–349.

³⁰ *R v Pamajewon and Jones* (1996) 2 SCR 821.

³¹ Ibid, at 833.

³² J Borrows “Frozen Rights in Canada: Constitutional Interpretation and the Trickster”(1998) 22(1) *Am Indian LR* 37 at 49.

peoples.³³ In other words, only those practices that were able to survive colonisation, as opposed to those practices which were created in response to it, are deemed sufficiently “indigenous” or “aboriginal” by the courts.³⁴

Still, L’Heureux-Dube J noted that all practices, customs and traditions sufficiently connected to the self-identity and self-preservation of organised aboriginal societies should be held to deserve the constitutional protection of s 35(1) Constitution Act 1982. What constituted a practice, custom or tradition distinctive to native culture and society should be examined through the eyes of aboriginal people themselves through a dynamic, as opposed to a frozen, approach. The activities which comprise the alleged right need not have existed in pre-contact society because that would limit any subsequent self-defining capacity only to those pre-contact activities.³⁵ L’Heureux-Dube J insisted that the contemporary relevance of aboriginal rights must be considered in relation to the needs of the natives as their practices, customs and traditions evolve with the overall society within which they live. The activity upon which the right is founded must have formed an integral part of a distinctive aboriginal culture “for a substantial period of time, a period of 20 to 50 years.”³⁶ Morse added that the Canadian *Van der Peet* approach tells aboriginal people that “what is relevant about them is their past – not their present or their future”.³⁷

What is determined through this fossilising test is not what indigenous peoples had a right to do but what they actually did. If there is no clear evidence of a traditional practice, then that will be detrimental to determining a customary right, although the maxim applies that absence of evidence is not necessarily evidence of absence. Thus, the *Van der Peet* aboriginal rights-defining process conflicts with the inherent rights of indigenous peoples to self-determination including the preservation and development of indigenous peoples’ laws and institutions and the process eliciting the content and scope of those traditional laws and institutions.³⁸

In summary, the *Van der Peet* principles affirm the notion of “aboriginality” for establishing aboriginal rights but they stress the historic origin and continuity of the indigenous practices that constitute the group and comprise a particular aboriginal right. In effect, the *Van der Peet* test for aboriginal rights fossilises indigenous customs, practices and traditions in time, thereby limiting indigenous self-determination and development rights as Professor Slattery noted, “aboriginal title is like an historical diorama in a museum”.³⁹

33 L Godden “Grounding Law as Cultural Memory: A ‘Proper’ Account of Property and Native Title in Australian Law and Land” (2003) 19 AFLJ 61 at 72.

34 MT Kennedy “The Tide of History: Canadian Waves Washing Away Māori Rights in the New Zealand Foreshore and Seabed Act” (Unpublished Student Essay, School of Law, University of Victoria, Wellington, New Zealand, 2010) at 3.

35 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 60–61.

36 *Ibid.*

37 BW Morse “Permafrost Rights: Aboriginal Self-Government and The Supreme Court in *R v Pamajewon*” (1997) 42 McGill LJ 1011 at 1031.

38 For a good analysis of *Van der Peet* and its implications for Māori customary laws in New Zealand, see J Kilgour “The Te Ika Whenua Decision as an Obstacle to the Right to Development: A Discussion of the Fossilisation of Māori Rights in New Zealand Law” (2001) 1; Te Taarere aa Tawhaki (Journal of the Waikato University College) at 192–210; and J Kilgour “Rights Reductionism, Māori Rights and the New Zealand Common Law: An Essay on Cultural Oppression” (Thesis (LLM), School of Law, The University of Waikato, 2000).

39 B Slattery “Understanding Aboriginal Rights” in T Isaac (ed) *Readings in Aboriginal Studies* (Vol 5 Aboriginal People and Canadian Law, Bearpaw Publishing, Manitoba, 1996) at 24–25.

V. NEW ZEALAND – CONSTITUTIONAL VIEW OF THE TREATY AND ABORIGINAL RIGHTS

The Canadian approach to the fossilisation of aboriginal rights in *Van der Peet* is germane to Māori in New Zealand. Although aboriginal rights have not received formal constitutional protection via an entrenched constitutional statute similar to s 35 of the Canadian Constitution Act 1982, relevant comparisons can still be made with the Canadian approach given that the Treaty of Waitangi has received some constitutional recognition, albeit limited. For example, in the New Zealand Court of Appeal, Cooke P implicated the constitution-like status of the Treaty of Waitangi in *New Zealand Māori Council v Attorney-General*⁴⁰ when he opined:⁴¹

The Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms ... I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

Furthermore, Lord Wolf, in the Judicial Committee of the Privy Council noted that the Treaty of Waitangi “is of greatest constitutional importance to New Zealand”⁴² and the Waitangi Tribunal asserted that the Treaty must be seen as a “basic constitutional document”.⁴³ Chilwell J recorded in a key 1987 High Court decision that the Treaty of Waitangi is “part of the fabric of New Zealand society”.⁴⁴ Sir Robin Cooke speaking extra-judicially added that the Treaty of Waitangi is “simply the most important document in New Zealand’s history”.⁴⁵ Moreover, Cooke P expressly left open the question of the Treaty’s precise constitutional status when he wrote that “a nation cannot cast adrift from its own foundations. The Treaty stands”.⁴⁶

In terms of aboriginal rights in New Zealand, the common law has evolved in a manner that directly recognises aboriginal rights. In *Te Weehi v Regional Officer*⁴⁷ the judiciary consented to recognise the mana (authority)⁴⁸ of local tribes over sea fisheries according to their customary law. The guarantees of the Treaty of Waitangi were also indirectly recognised in *Te Rūnanga o Te Ika Whenua Inc Society v Attorney General*.⁴⁹ In this decision, Cooke P stated that unless special circumstances existed, aboriginal title should not be extinguished without Māori consent.⁵⁰ It stands to reason that this standard should apply to all aboriginal rights. In the 1997 High Court decision of *The Taranaki Fish and Game Council v McRitchie*,⁵¹ Becroft J permitted the defendant’s fishing methods to be employed and extended this aboriginal right to include fish species introduced after the Treaty of Waitangi.

40 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (SOE Case).

41 *Ibid*, at 655–656 per Cooke P.

42 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 516 (Broadcasting Assets Case).

43 Waitangi Tribunal *The Ngāi Tahu Report* (GP Publications, Wellington, 1991) at 224.

44 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

45 R Cooke “Introduction” (1990) NZLUR at 1.

46 *Te Rūnanga o Wharekauri Rekohu v Attorney-General* [1993] 2NZLR 301 at 308–309 (CA).

47 *Te Weehi v Regional Officer* (1986) 6 NZAR 114 (HC).

48 “Mana” is loosely translated as prestige, respect, honour or intrinsic authority that is spiritually endowed and maintained. See Mead, HM *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–35.

49 *Te Rūnanga o Te Ika Whenua Inc. Society v Attorney General* [1994] 2 NZLR 20 [Hereinafter *Te Ika Whenua*].

50 *Ibid*, at 24.

51 *The Taranaki Fish and Game Council v McRitchie* (Unreported, 27 February 1997, Wanganui District Court, ORN 5083006813-14 per Becroft J) (Overturned by the High Court, 1998).

However, in New Zealand jurisprudence there is no absolute standard test to determine the content of a traditional aboriginal right, but there are some requirements that must be fulfilled. There must be detailed and convincing evidence that a traditional practice existed.⁵² There seem to be restrictions as deemed in traditional Māori society such as tribal jurisdiction over territory (mana whenua) and membership of a tribe or who might gain authorisation from a relevant tribal authority.⁵³ A stricter test was applied by Hammond J, requiring that the custom must prove to have existed since time immemorial (assuming 1840 is “time immemorial”), it must be reasonable, certain (in nature, locality and who it affects) and must have continued without interruption since its origin.⁵⁴ This test has not been affirmed elsewhere until recently in the Foreshore and Seabed Act 2004 (now repealed) and the Marine and Coastal Area (Takutai Moana) Act 2011 which may reflect the ad hoc nature of aboriginal rights determination, which requires an empirical determination of a custom as evidence of a proprietary or usufructuary right. Moreover, in determining whether an action translates into a customary right, the courts will examine whether that act featured in traditional Māori society,⁵⁵ hence what is determined through these flawed tests is what Māori did, not what they had a right to do.

VI. NEW ZEALAND – FROZEN RIGHTS – TE IKA WHENUA

In the 1994 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*⁵⁶ decision (*Te Ika Whenua*), the full bench of the New Zealand Court of Appeal was confronted by an application from Te Rūnanganui o Te Ika Whenua Inc Society for an interim declaration by way of judicial review. Te Ika Whenua was seeking to stay the privatisation of two Bay of Plenty dams on the Rangitaiki and Wheao Rivers until the Waitangi Tribunal could make a recommendation on their claims.

The *Te Ika Whenua* decision represents the view that Māori culture and any rights that derive from it cannot develop beyond colonisation and are, thus, fossilised as Cooke P held:⁵⁷

... [neither] under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Māori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power.

The Court of Appeal also held:⁵⁸

However liberally Māori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside contemplation of the Māori chiefs and Governor Hobson in 1840.

This *Te Ika Whenua* test to determine whether a particular object was within the reasonable contemplation of Māori chiefs at the time of the signing of the Treaty was applied in *Ngāi Tahu Trust*

52 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 690, 691 per Williamson J; *Taranaki Fish and Game Council v McRitchie* [1991] 2 NZLR 139 (CA) at 147.

53 *Ibid.*

54 *Knowles v Police* (1998) 15 CRNZ 423 at 426.

55 However, in *MAF v Love* [1998] DCR 370 (DC), it was held that Māori had no commercial fishing right regardless of evidence of bartering.

56 *Te Ika Whenua*, above n 49,

57 *Ibid.*, at 25.

58 *Ibid.*, at 24.

*Board v Director General of Conservation*⁵⁹ with respect to tourism and whale watching. This test allows the Courts to restrict the interpretation of Māori Treaty and aboriginal rights through their limited perception of Māori intention.

Dr Alex Frame commented on the *Te Ika Whenua* decision that:⁶⁰

“it will not comfort those who seek certainty in law to learn that Māori customary rights are of an indeterminate nature and of an extent dependent on the Court of Appeal’s view of what was in the mind of the Māori chiefs and Governor Hobson at Waitangi in 1840”.

It is also interesting to note that neither Treaty of Waitangi party (Māori nor British) contemplated hydroelectric development in 1840 but the latter party has a contemporary right to the development of hydroelectricity while the former seems to be locked into “an historical diorama in a museum.”

In a manner similar to the *Van der Peet* test in Canada, the Court of Appeal in *Te Ika Whenua* fossilised Māori Treaty and aboriginal rights to that which was contemplated by Māori in 1840. Accordingly, some people object to Māori seeking updated and modern Treaty and aboriginal rights, such as Don Brash who opined “some people are trying to wrench the Treaty out of its 1840 context”.⁶¹ Such a narrow view prohibits the inevitable evolution and development of culture and aboriginal rights.

One is inclined to ask why is it that of the parties to the Treaty of Waitangi, Māori are not allowed to develop their rights while the other party can. It appears that one possible answer could be based on a theory of the “purity of development”. There is an ability for indigenous peoples to develop but if any development integrates with the knowledge, technology or processes of another culture or nation, then it is irreparably removed from indigenous development.⁶² Such an approach is duplicitous at best given that western society is permitted the amalgamation and even exploitation of other (including indigenous) knowledge and technologies without similar detriment to their own rights.⁶³

VII. NEW ZEALAND UPDATE

A. *Foreshore and Seabed Act 2004*

A relatively recent example of the freezing of Māori aboriginal and Treaty rights to 1840, undermining the right of Māori “aboriginality” to develop, is the vexed and politically charged area of the foreshore and seabed. The Foreshore and Seabed Act 2004 extinguished Māori tikanga and common law aboriginal rights in the foreshore and seabed and replaced them with full Crown

⁵⁹ *Ngāi Tahu Trust Board v Director General of Conservation* [1995] 3 NZLR 533 at 561. See also Waitangi Tribunal Report, *The Radio Spectrum Management and Development Final Report* (Wai 776, GP Publications, Wellington, 1999) at 59.

⁶⁰ A Frame *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* (Te Mātāhauariki Institute, The University of Waikato Press, Hamilton, 2001) at 7.

⁶¹ D Brash “Nationhood” (Unpublished National Party Address, Orewa Rotary Club, Auckland, 27 January 2004) at 2.

⁶² See R Boast *Rangahaua Whanui National Theme Report* (Waitangi Tribunal Reports, GP Publications, Wellington, 1996).

⁶³ Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011).

title, which Moana Jackson declared was in effect a modern day raupatu (confiscation) that clearly breached Articles II and III of the Treaty of Waitangi and standard common law rules.⁶⁴

It came as no surprise that to establish customary aboriginal rights, Māori claimant groups had to establish that their rights and title in the foreshore and seabed existed prior to 1840 and continue uninterrupted up to the present day, particularly in s 39 of the Act. A customary rights order was defined in the s 5 interpretation section of the Act as a public foreshore and seabed customary rights order made by either the Māori Land Court under s 50; or the High Court under s 74.

Under ss 50 and 51, Māori groups could apply to the Māori Land Court, and any other group of New Zealanders could apply to the High Court, for a customary rights order to recognise a particular activity, use or practice carried out in an area of the coastal marine area. These were non-territorial customary rights that related to an activity and not ownership.

Section 49 of the Act required the use, activity or practice being claimed as a right to be “integral” to tikanga Māori and to have existed continually since 1840. This integral and continuing test appeared to be the test set out by Lamer CJ in *Van der Peet*.⁶⁵ Kent McNeil analysed the Foreshore and Seabed Act 2004 with Canadian jurisprudence and criticised it on the basis that the Foreshore and Seabed Act adopted:⁶⁶

...two of the most doctrinally flawed and heavily criticised aspects of the law on indigenous land rights in Canada. Namely, the integral to the distinctive culture test and the requirement of substantial maintenance and the continuation with the land in accordance with traditional laws and customs.

The Ministerial Review of the Foreshore and Seabed Act noted that this “integral” requirement most likely derived from the Supreme Court of Canada’s decision in *Van der Peet*.⁶⁷ The review panel questioned how high should the traditional activity threshold be for this “integral test” and then cited Lamer CJ referring to high levels of centrality, significance and distinctiveness:⁶⁸

To satisfy the integral to a distinctive culture test the aboriginal claimant group must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central or significant part of the society’s distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.

Commentators have argued that Chief Justice Lamer’s threshold test is too high.⁶⁹ For example, is taking whitebait something that made Māori society what it was? It depends on what the traditional “activity” was. Maybe whitebaiting did not make Māori society what it was per se but the general “activity” of fishing certainly did. Still, given that neither customary rights orders were issued, nor was there any body of precedent on the interpretation of this aspect of the Act, and the

64 M Jackson “An Analysis of the Foreshore and Seabed Bill” (Māori Law Commission, Wellington, May 2004) at 1.

65 *R v Van der Peet*, above n 21.

66 K McNeil “Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed” in C Charters and A Erueti, (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 97. See also G Christie “Aboriginal Rights, Aboriginal Culture, Aboriginal Protection” (1998) 36 *Osgoode Hall LJ* 447; and G Christie “Development Case Law: The Future of Consultation and Accommodation” (2006) 39 *UBC Law Rev* 139.

67 E Duric, R Boast and H O’Regan *Pakia ki Uta, Pakia ki Tai: Report of the Ministerial Review Panel of the Foreshore and Seabed Act 2004* (New Zealand Government, Wellington, Vol 1, 2010) at 129.

68 *R v Van der Peet*, above n 21, at [55].

69 R Boast *Foreshore and Seabed* (Lexis-Nexis, Wellington, 2005) at 175.

recent repeal of Foreshore and Seabed Act 2004, made the challenges around the integral activity threshold in New Zealand difficult to ascertain.

In its recent review of the Foreshore and Seabed Act 2004, however, the current New Zealand Government noted that it “believed it inappropriate to use a test based entirely on another country’s legal experience”.⁷⁰ Although it is well accepted and prudent to address the development of legal principles and precedents in other countries when developing domestic law, it was inappropriate with the enactment of the Foreshore and Seabed Act 2004. Given that the frozen aboriginal rights *Van der Peet* test is flawed in Canada, what makes it any better in New Zealand?

Furthermore, Chief Justice Elias affirmed in *Attorney-General v Ngāti Apa*⁷¹ that the common law in New Zealand is different to other common law countries:⁷²

But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances.

Chief Justice Elias continued:⁷³

Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.

The common law of New Zealand is not the same as the common law of England or Canada because it reflects local circumstances. One such local circumstance that makes the New Zealand legal system distinct is the acknowledgement of its first law, tikanga Māori customary laws.

With respect, the legislature should have refrained from defining Māori Treaty and aboriginal “rights” according to what Canadian judges believe aboriginal peoples’ “rights” to be in Canada. The legislature adopted the flawed Canadian common law “integral and continuing test” from *Van der Peet* and codified it. In doing so, while this test is open for subsequent Canadian courts to adjust, the judiciary in New Zealand is robbed somewhat of this potential flexibility. In addition, the “integral and continuing test” is flawed given that it freezes indigenous peoples’ rights in a “historic diorama in a museum” thus inhibiting its scope for adaptation and development in the 21st century.

B. *Marine and Coastal (Takutai Moana) Act 2011*

The Marine and Coastal (Takutai Moana) Act 2011 (the Act) repeals the Foreshore and Seabed Act 2004 and introduces a new framework for recognising and protecting customary rights in the marine and coastal area. This recognition will include the right to go to the High Court (or to negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi (tribes) and hapū (sub-tribes) have a longstanding and exclusive history of use and occupation.

A glimmer of hope emerged in the Act where it acknowledges in s. 51 that customary rights develop and evolve over time which is a significant concession. Sections 51 states:

70 New Zealand Government *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* (New Zealand Government, Wellington, March 2010) at 33.

71 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 577.

72 *Ibid.*, at 652, [17].

73 *Ibid.*, at 660, [49].

51 Meaning of protected customary rights

(1) A protected customary right is a right that—

(a) has been exercised since 1840; and

(b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or *evolves over time*; and

(c) is not extinguished as a matter of law [emphasis added].

Section 51 appears to remove the former *Van der Peet* integral component test which is a positive development in the author's view. However, optimism needs to be balanced with caution.

Retaining the requirement, in s 58 of the Act, for the custom to have been continually practised in a substantially uninterrupted manner since 1840, severely restricts and continues to freeze Māori customary rights, notwithstanding s 51 acknowledging that aboriginal rights evolve. The activity must be carried on in the marine and coastal area; it must have been continually exercised since 1840; it cannot be prohibited by any enactment or rule of law; and has to be unextinguished, which is a high threshold. Commenting on these provisions in the Hansard debates, Catherine Delahunty cautioned:⁷⁴

In my limited experience, a limited list of hapū—perhaps Te Tairāwhiti—may be able to pass this test, but I ask who else and where? And even within that rohe ... I can think of numerous examples where mana whenua hapū simply could not pass that test, as a result of colonisation.

Hone Harawira added:⁷⁵

This Bill should be called the Foreshore and Seabed Act Revisited; because Minister Finlayson's comment that "Māori will have to show that they held exclusive use and occupation of the area since 1840, without substantial interruption, and that the area in question was held in accordance with tikanga" is exactly the same as in 2004. ... the research [shows] that 98% of Māori will NOT be able to prove unbroken tenure, [which] confirms the Prime Minister's view that Māori don't stand a Māori's chance in parliament of getting their land back.

Similarly, Annette Sykes concluded:⁷⁶

When the Prime Minister announced this proposal ... he confirmed his view that very few Iwi [tribes] would be able to meet the criteria for seeking customary title⁷⁷... they will let us on the playing field, but set the goal so high that effectively it remains unachievable, and if required, change the goal posts to ensure the protection of majoritarian principles that will ensure their right to govern.

Customary rights should not require lengthy litigation due to difficult evidentiary requirements to prove such a "continuous practice since 1840" because the imposition is not likely to come into conflict with others' rights. The authors of the Ministerial Review of the Foreshore and Seabed Act 2004 even noted that politicians give "collecting hangi stones from the beach" as an example of a potential content of a customary right⁷⁸ which appears to freeze Māori Treaty and aboriginal

74 "Marine and Coastal Area (Takutai Moana) Bill" (15 March 2011) 670 NZPD 17280.

75 Hone Harawira, "Verbal Submission on the Marine and Coastal Areas (Takutai Moana) Bill, 14 December 2010". Online on the Hone Harawira website: <hone.co.nz/2010/12/14/verbal-submission-to-the-Māori-affairs-select-committee-on-the-marine-and-coastal-areas-bill/>.

76 A Sykes "The Tide is Turning: Foreshore and Seabed Presentation" (Unpublished, 9th Annual Māori Legal Forum, Wellington Town Hall, 21 July 2010) at 7.

77 See "Foreshore and seabed legislation to be repealed" at <www.stuff.co.nz> November 2010.

78 Ministerial Review Panel: Foreshore and Seabed Act 2004 (30 June 2009) at 129.

rights to the marine and coastal area to an 1840 activity, and hinders the appropriate development of these rights for Māori in 21st century New Zealand.

The New Zealand legislature then, appears to have stated clearly that only those Māori customary practices in the coastal and marine area that were able to survive colonisation, as opposed to those practices that were developed in response to it, are deemed sufficiently to be “Māori” as a result of the above threshold tests.

VIII. WAITANGI TRIBUNAL ESPOUSES THE INDIGENOUS RIGHT TO DEVELOPMENT

The Waitangi Tribunal offered some hope when it discussed the notion of the “right to development” in the 1988 Muriwhenua Fishing Report. The Waitangi Tribunal is a tribunal of inquiry with mostly non-binding recommendatory powers, but it is a forum for affirming traditional Māori customary law, and a domestic source of law in terms of it being a determining body that reaffirms normative law within Māori society.

Accordingly, the Tribunal noted in the Muriwhenua Fishing Report that traditional Māori fishing technology was advanced and access to new technology and markets were the *quid pro quo* for European settlement.⁷⁹ The Tribunal then noted that there is nothing in either tradition, custom, the Treaty of Waitangi or nature to justify the view that Māori fishing technology had to be frozen.⁸⁰

Māori no longer fish from canoes but nor do non-Māori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other. ... The Treaty offered a better life for both parties. A rule that limits Māori to their old skills forecloses upon their future.⁸¹

Hence the Tribunal identified that freezing Māori traditional fishing rights to 1840 would concomitantly limit non-Māori to their catch capabilities at 1840.⁸² The Tribunal justified its stance by referring to the international right to development. The Tribunal asserted:⁸³

That all people have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly. This includes the full development of their resources. Professor Danilo Turk, a leading drafter of the declaration considered:

In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.

79 Waitangi Tribunal *Muriwhenua Fishing Report* (Department of Justice, Wellington, 1988) [hereinafter *Muriwhenua*]; and Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report* (Department of Justice, Wellington, 1992). In *Muriwhenua*, the Tribunal’s main findings of fact were that there was “a commercial component in pre-European tribal fisheries through ‘gift exchange’” and that gift exchange “was capable of adaptation” and indeed “adapted and developed to trade in Western terms”. (*Muriwhenua*, at 200).

80 *Muriwhenua*, above n 79, at 223. The right of Māori to develop their rights through the international right to development was also referred to in subsequent Waitangi Tribunal Reports including the *Radio Spectrum Management and Development Report* (Wai 776, Wellington, 1999); the *Ahu Moana Aquaculture and Marine Farming Report* (Wai 953, Wellington, 2002); the *Petroleum Report* (Wai 796, Wellington, 2003); and the recent “Indigenous Flora and Fauna and Cultural Intellectual Property Claim” report entitled *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011).

81 *Muriwhenua*, above n 79, at 223.

82 *Ibid*, above n 79.

83 *Ibid*, at 23–24.

The International Symposium of Experts on Rights of Peoples and Solidarity Rights (UNESCO, San Marino, 1982) considered:

The right to development is one of the most fundamental rights to which peoples are entitled, for its realisation is the source of respect for most of the fundamental rights and freedoms of peoples (UNESCO SS-82/WS/61 Art 38).

It was added:

Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. This right to authentic development is, in fact, three pronged: economic, social and cultural (Art. 40).

Hence, traditional Māori fishing and all other traditional aboriginal and Treaty rights (including, inter alia, to land and the coastal and marine areas) should not be frozen in time to 1840.

IX. UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2007

Public international law (customary and conventional) is increasingly becoming a source of widely held norms that form the backdrop against which domestic law can be assessed. The United Nations Declaration on the Rights of Indigenous Peoples is one such instrument that was adopted by the United Nations General Assembly during its 62nd session at UN Headquarters in New York City on 13 September 2007. While as a General Assembly Declaration it is not a legally binding instrument under international law, it does represent the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions. The UN describes it as setting:⁸⁴

... an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalisation.

In terms of the present analyses on the right of indigenous peoples to develop their treaty and aboriginal rights, the Preamble of the Declaration states:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

It would appear that the Declaration supports the right of indigenous peoples to develop their rights in the preamble. The main ambit for advocating the right of indigenous peoples to contemporaneously develop their treaty and aboriginal rights in the articles is mostly under the umbrella of the inherent right of indigenous peoples to self-determination. In this respect, the relevant articles include Articles 3, 23, 31, 34 and 45 (refer to Appendix 1).

84 "Indigenous Peoples, Indigenous Voices: Frequently Asked Questions on the Declaration on the Rights of Indigenous Peoples" (Unpublished document on the UN website about the Declaration on the Rights of Indigenous Peoples 2007) <www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

The UN Declaration on the Rights of Indigenous Peoples adds valuable context to our analysis by reiterating the self-determination right of indigenous peoples to develop their treaty and aboriginal rights and to not freeze them in some bygone era in a historic straight jacket. Article 45 is the second to last article which provides scope for indigenous peoples' future rights to be claimed and developed which is thesis of this article – the indigenous right to develop past and present indigenous rights, and to develop future ones.

X. SOME FORMATIVE CONCLUSIONS

Māori self-determination and development are, inter alia, about Māori having the capacity, right, space and responsibility to make fundamental choices that affect their identities, practices, customs and communities, and the rights that accrue to these communities, in a past, present and future context, not having these limited and frozen by legal verdict in a “historical diorama in a museum”.

However a contemporary legal and political challenge that hinders Māori self-determination and development is the fossilisation and restriction of Māori Treaty and aboriginal rights to a bygone era as determined by the judicial tests in the *Van der Peet* and *Te Ika Whenua* decisions. This fossilisation of Māori rights decided not what Māori had a right to do but what they actually did at a frozen point in time. Thus, the *Van der Peet* and *Te Ika Whenua* decisions conflict with the Māori self-determination right to preserve and develop their laws, institutions and rights, and the processes eliciting the content and scope of those traditional laws, institutions and rights today and in the future.

The recently repealed Foreshore and Seabed Act 2004 and the new Marine and Coastal Area (Takutai Moana) Act 2011 appear to continue to perpetuate the fossilising of Māori marine and coastal rights into an 1840 “hunter-gatherer” exercise of those rights. The latter Act does provide some scope for Māori customary rights to evolve, but this area is yet to be tested. Moreover, the historic truism that everything in Aotearoa New Zealand belonged to Māori becomes a hard fact to prove when scrutinised by the imposed customary threshold tests of both statutes regarding the marine and coastal area. These tests appear to freeze already severely depleted Māori Treaty and aboriginal rights within a historic strait-jacket thereby prohibiting the contemporary development of these rights.

The law appears then to be allowing colonial history to dictate what is and what is not able to be recognised as a contemporary Māori right. Only the practices that were able to survive colonisation, as opposed to those that were created in response to it, are deemed sufficiently “Māori” that they thereby convert into contemporary Māori rights. The result of such laws and policies is an epistemological and hermeneutic redefinition and misappropriation of Māori culture and identity and the fossilising of those rights that accrue to that culture and identity.

The Waitangi Tribunal and international law, through the international right to development, and the preamble and at least four articles of the UN Declaration on the Rights of Indigenous Peoples support this right of Māori to develop their cultures, identities and commensurate rights in a modern and future context.

Ultimately, what is required is an appropriate balancing and acknowledgment that Māori Treaty and aboriginal rights should not be locked and limited into a bygone era but must have the legal and political authority, space and capacity to develop in terms of scope and pace with mainstream

cultures. Māori therefore seek to adapt these frozen rights according to 21st century Māori self-determination priorities, aspirations and needs, not those of the past.

APPENDIX: UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2007

Article 3

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

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.

Article 31

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?

BY SIMON CONNELL*

I. WHY ASK “WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?”

Traditionally, “justice” in criminal sentencing has been concerned with allowing society to respond to the offender’s criminal wrongdoing by providing punishment, deterrence and denunciation. Corrective justice, the notion that a person who wrongfully harms someone else should put that harm right, has traditionally been associated with compensation and the civil law. Compensation has increasingly become a function of the criminal law in New Zealand, bringing with it the philosophical baggage of corrective justice.

A key part of the traditional notion of “justice” in criminal sentencing is that the offender’s penalty should be proportional to their wrongdoing. This is reflected in the “totality principle”: that the totality of the offender’s penalty should reflect the totality of their wrongdoing.¹ For corrective justice to be done, the offender² must provide compensation to the victim that makes up for the harm that has been caused, not compensation that is proportional to the offender’s wrongdoing. However, a morally repugnant act can result in minimal loss, while a far less blameworthy act can result in catastrophic loss. As the Royal Commission of Inquiry into Personal Injury in New Zealand³ puts it: “[r]eprehensible conduct can be followed by feather blows, while a moment’s inadvertence could call down the heavens.” So, in cases where the offender’s wrongdoing is not proportional to the harm caused, we may not be able to achieve both corrective justice and traditional criminal law notions of justice. If compensation is now part of our criminal law, a sentencing court needs a rule to determine how to take into account these competing ideas of a just outcome between victim and offender – an answer to the question “what is the place of corrective justice in criminal justice?”.

Until relatively recently, the answer has been reasonably clear: compensation in the criminal law is secondary to the pursuit of “justice” in the traditional criminal law sense. Although corrective justice may have a role in the criminal law, it is a limited one. The civil law, not the criminal law, was the place for a victim of wrongful harm to pursue full compensation. However, the Sen-

* LLB (Otago), LLM (Otago).

- 1 For a recent re-statement of the principle see *R v Xie* [2007] 2 NZLR 240 (CA) at [18]: “the total sentence must represent the overall criminality of the offending and the offender.”
- 2 This paper typically refers to the parties as “offender and victim” since the context is corrective justice in the criminal law. In a civil case, the parties would of course be “plaintiff and defendant”. Conceptually speaking, the parties could also be described as, for example, “doer and sufferer of injustice”, see Ernest Weinrib “Corrective Justice in a Nutshell” (2002) 52 UTLJ 349 at 349–351.
- 3 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967) at 49.

tencing Act 2002 has given compensation a new prominence. This paper sets out the major developments in compensation in the criminal law up to and including the Sentencing Act 2002 and then discusses how the courts have addressed the new place of corrective justice in the criminal law – in particular in the area of employer prosecutions under the Health and Safety in Employment Act 1992, where the offender tends to have the means to pay reparation and a fine. This article is intended to describe the role of corrective justice in criminal justice in New Zealand rather than argue what it ought to be.

II. COMPENSATION IN THE CRIMINAL LAW

Although traditionally the criminal law has been associated with punishment and deterrence while the civil law has been associated with compensation, there has always been a degree of overlap. Fines may punish offenders but also compensate the state. Awards of exemplary damages allow the civil law to pursue punishment and deterrence independent of compensation,⁴ and various statutes have allowed for compensation through the criminal law. As Richardson J observed in *Taylor v Beere*,⁵ compensation and punishment have never been kept in water-tight compartments. As well as overlap in terms of the functions of punishment, deterrence and compensation, the civil and criminal law also overlap in terms of the types of wrongs addressed. The criminal law can be seen as addressing wrongs against the state, and the civil law wrongs against the person. There are some wrongs against the state that are not wrongs against the person, for example drug offences, and there are some wrongs against the person that are not wrongs against the state, for example breaches of contract. However, criminal acts that cause harm to person or property can be wrongs against the state as well as an individual, and could potentially receive a criminal and civil law response. Compensation in the criminal law allows criminal justice and corrective justice to be pursued without the need for separate proceedings.

There are two main ways in which Parliament has given the criminal law a compensatory function. The first is the introduction of sentences that require a payment of compensation by the offender to the victim. The second is statutory schemes that operate through the criminal law to facilitate payments of compensation to victims of crime from a centralised fund.⁶ The focus of this paper is the former, since payments of compensation by the offender to the victim serve corrective justice by having the wrongdoer put right the harm they have caused. Payments from a centralised fund occur outside the nexus between offender and victim so provide compensation but not corrective justice. Historically, the criminal law had a limited (and little-used) provision

4 For a recent discussion of the function of exemplary damages by the Supreme Court see *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149, in particular at [19] per Elias CJ, at [58] per Blanchard J, at [94]–[95] per Tipping J, at [194] per McGrath J, and at [254] per Wilson J.

5 *Taylor v Beere* [1982] 1 NZLR 81 (CA) at 90–91 “Even today tort law cannot be fitted neatly into a single compartment. In part this is because it serves various social purposes. It is not simply a compensation device or a loss distribution mechanism. It is a hybrid of private law and public interest issues and concerns.” Also noted that: “Nor in policy terms is there legislative support for the rigid separation of the enforcement processes in crime and tort. On the contrary, there are various statutes which authorise the criminal Courts to compensate in various ways the victim of the offending.”

6 In particular, the schemes established by the Criminal Injuries Compensation Act 1963 and the Sentencing (Offender Levy) Amendment Act 2009. For a contemporaneous description of the former see BJ Cameron “The New Zealand Criminal Compensation Act, 1963” (1965) 16 UTLJ 177.

to order offenders to pay compensation for loss of or damage to property.⁷ In the latter part of the twentieth century, two new such measures were introduced: fine diversion awards and reparation. Fine diversion awards allowed for up to one half of a fine imposed on an offender to be paid to the victim “by way of compensation”, but only in limited circumstances,⁸ and were later abolished.⁹

A. *The Introduction of Reparation*

The sentence of reparation was introduced in s 22 of the Criminal Justice Act 1985. A sentence of reparation means that the offender is ordered to make a payment to the victim either as a lump sum or over time. Unlike fine diversion awards, which were parasitic on a sentence of a fine, reparation is a sentence unto itself.

Section 11 of the Criminal Justice Act 1985 created a presumption in favour of a sentence of reparation. A court was required to impose a sentence of reparation unless it was satisfied that it would be inappropriate to do so. The ability of the offender to pay reparation was a relevant factor in determining whether the sentence was appropriate and, if so, how payment should be made. The Act provided machinery to assist the courts in determining whether reparation was appropriate, and encouraged co-operation between doer and sufferer of harm. Section 22(3) allowed a sentencing court to order a report on matters such as the quantum of damage suffered and the ability of the offender to pay. Section 23 required a probation officer or other person preparing such a report to seek agreement between the offender and victim on the value of the damage, and how much reparation the offender should pay. Section 12 required the Court to take into account as a mitigating factor “any offer of compensation made by or on behalf of the offender to the victim”. In conjunction with the power to impose a sentence of reparation, s 12 allowed an offer of amends made by the offender to be crystallised into an enforceable sentence.

Reparation was initially only available for damage to property, but the Criminal Justice Amendment Act 1987 gave a sentencing court the power to award reparation for “emotional harm”. The 1987 Amendment Act also provided for the preparation of victim impact statements to ensure that the sentencing judge was informed about any harm caused to the victim.

Hammond J discussed the meaning of “emotional harm” in *Sargeant v Police*:¹⁰

The Act is silent as to what is meant by “emotional harm”. The term could obviously span a range of phenomena. At the lowest end of the scale, it could mean simply “mental anguish” occasioned to a victim by a crime; at the other end of the scale, the particular harm might be manifested in identifiable, long term, clinical conditions such as traumatic stress, or even psychotic conditions.

Hammond J considered that taking a restrictive view on the meaning of “emotional harm” would go against the restitutionary purpose of reparation and that a sentencing judge’s task was to “quantify the grief, the bereavement, the anxiety, and the mental pain and suffering.”¹¹

The introduction of fine diversion awards and reparation gave corrective justice an increased role in criminal justice. However, corrective justice was secondary to traditional criminal justice:

7 For example Crimes Act 1961, s 403.

8 Fine diversion awards were only available to victims of crime who had suffered “bodily harm” and only when the act or omission that constituted the offence was unprovoked. The fact that fine diversion awards were only available when a sentencing Judge considered a fine was appropriate was a limiting factor in itself.

9 Fine diversion awards were introduced by the Criminal Justice Amendment Act 1975, re-enacted in the Criminal Justice Act 1985 and removed by the Sentencing Act 2002.

10 *Sargeant v Police* (1997) CRNZ 454 (HC) at 7.

11 *Ibid* at 8.

fine diversion awards were only available when application of traditional principles of criminal justice arrived at a sentence of a fine, and reparation was not available if such a sentence would be inappropriate in terms of traditional criminal justice.

B. The Sentencing Act 2002

The Sentencing Act 2002 was a response to public dissatisfaction with the criminal justice system. A citizens' initiated referendum¹² held at the same time as the 1999 general election asked:

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

Ninety-two per cent voted "Yes" to the referendum, with an 83 per cent turnout.¹³ The referendum question contained at least two different propositions – greater emphasis on the needs of victims, and harsher sentences for serious violent offences – so it is difficult to draw any firm conclusions on the views of voters on the two propositions separately.¹⁴ Despite this, one can conclude that there was some public appetite for changes to the criminal justice system.

The legislature must have taken the results of the referendum as supportive for both propositions generally, since the main legislative response – the Sentencing Act 2002, which replaced the Criminal Justice Act 1985 as primary sentencing legislation – changed the role of the victim in criminal sentencing and made changes to sentencing of violent offenders.

The purposes of the Sentencing Act 2002, included "to provide for the interests of victims of crime",¹⁵ which made compensation for victims of crime one of the main functions of sentencing law.

The Sentencing Act 2002 removed fine diversion orders and strengthened the sentence of reparation. The presumption in favour of reparation in the Criminal Justice Act 1985 was replaced with an even stronger presumption in favour of reparation. Under s 12(1):

If a court is lawfully entitled under Part 2 to impose a sentence of reparation, it must impose it unless it is satisfied that the sentence would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.

Further, a Court that does not impose a sentence of reparation is required under s 12(3) to give reasons for not doing so.

As well as strengthening the presumption in favour of reparation, the Sentencing Act 2002 also increased the types of losses for which reparation could be ordered. Reparation under the Criminal Justice Act 1985 had been available for emotional harm, and loss or damage to property.

12 The Citizens Initiated Referenda Act 1993 allows for a non-binding referendum to be held if proponents submit a petition to Parliament signed by 10 per cent of all registered electors, collected within 12 months.

13 Electoral Commission "1999 General Election – Return of Citizens Initiated Referenda Poll Votes – Reform of the Criminal Justice System" (1999) Electoral Commission website <electionresults.org.nz/electionresults_1999/e9/html/e9_partXIV.html>. The election itself had a turnout of 85 per cent.

14 What is the proper approach of a voter who supports some of the propositions put forward in the questions and opposes others? The author voted "No" in the referendum in question because of a discomfort with the notion of sentences of "hard labour" rather than an opposition to greater emphasis on the needs of victim per se. This – perhaps contrarian – approach to voting was in the minority.

15 Sentencing Act 2002, s 3.

Section 32 of the Sentencing Act 2002 extended awards of reparation to “loss or damage consequential on any emotional or physical harm or loss of, or damage to, property¹⁶.”

The Sentencing Act 2002 recognised reparation as an important mitigating factor in sentencing, allowing a sentencing Court to take into account a wide variety of ways in which an offender might seek to put right the harm caused to the victim.¹⁷

III. THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE FOLLOWING THE SENTENCING ACT 2002

The Sentencing Act 2002 was a turning point in the development of the compensatory function of the criminal law in New Zealand. Although the criminal law did facilitate offender-to-victim payments prior to the Sentencing Act 2002, the 2002 Act made clearer provision for reparation to be the sentence of choice, and arguably made compensating the victim the first priority of a sentencing judge. Allowing for consequential damage substantially widened the scope of what reparation could compensate for, making reparation closer to civil damages. This means that the courts have had to re-consider the question “what is the place of corrective justice in criminal justice?” in light of the new Act.

A. *Fines and Reparation Serve Different Purposes*

Police v Ferrier,¹⁸ a High Court decision handed down shortly after the Sentencing Act 2002 came into force, addressed the place of compensation in the criminal law.

16 Reparation for physical injury was excluded because New Zealand’s accident compensation scheme (Accident Compensation Act 2001) provides compensation for physical injury. However, the Sentencing and Parole Reform Bill, which eventually became the Sentencing Act 2002, initially provided for reparation for physical injury until the overlap with the ACC scheme was identified. Section 32(5) of the Sentencing Act 2002 addresses the overlap, and provides that “the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which the court believes that a person has entitlements under the [ACC scheme].” The interpretation of section 32(5) was addressed by the Supreme Court in *Davies v Police* [2008] NZSC 4, [2009] 3 NZLR 189.

17 Section 10(1) of the Sentencing Act 2002 requires a sentencing Court to take into account:

- (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim;
- (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur;
- (c) the response of the offender or the offender’s family, whanau, or family group to the offending;
- (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
 - (i) make compensation to any victim of the offending or family, whanau, or family group of the victim; or
 - (ii) apologise to any victim of the offending or family, whanau, or family group of the victim; or
 - (iii) otherwise make good the harm that has occurred;
- (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

That said, although reparation can be a mitigating factor, this does not guarantee it will be given much weight. The weight attached to reparation as a mitigating factor will depend on other factors relating to the offender and offending, and whether or not the reparation has actually been paid. See *Otufangavalu v R* [2010] NZCA 585.

18 *Police v Ferrier* HC Auckland CRI 2003-404-000195, 18 November 2003.

Mr Ferrier was convicted of careless driving causing death – a case of a moment’s inadvertence calling down the heavens.¹⁹ The Crown sought reparation of around \$18,500 for the family of the deceased. The District Court was concerned that awarding the full amount of compensation would be a punishment out of proportion with the wrongdoing, using the maximum fine payable of \$4,500 as a kind of benchmark for the appropriate level of punishment for the offending in question. The District Court awarded reparation of \$5,000 and gave the totality principle of sentencing as a justification.

Harrison J stressed that fines and reparation are conceptually different and serve different purposes:²⁰

A fine is essentially punitive, it is a pecuniary penalty imposed by and for the state. By contrast, an order for reparation is compensatory in nature, designed to recompense an individual or her family for financial loss or emotional harm suffered as a result of another’s offending.

In other words, a fine serves traditional criminal justice and reparation serves corrective justice. Since in this case traditional criminal justice is served by a financial penalty of around \$4,500 and corrective justice is served by a payment to the victim’s family²¹ of around four times that, how ought a court to resolve the conflict? The District Court’s answer was essentially that traditional criminal justice should take precedence. The High Court disagreed, finding that there was no place to apply the totality principle and the full order of reparation fell “squarely within Parliament’s clear prescription to compensate victims and their families in cases such as this”²²

Ferrier illustrates starkly the new role for corrective justice in the criminal law following the Sentencing Act 2002. Historically, imposing a punishment on an offender that was out of proportion with their moral wrongdoing for the purpose of compensating a victim would be unthinkable – but in *Ferrier* the Court ordered precisely that. In *Read v Police*,²³ a further High Court decision that followed shortly after *Ferrier*, William Young J also found that there was nothing in the Sentencing Act to confine reparation to the maximum fine applicable under the circumstances.

B. Financial Capacity of the Offender a Limiting Factor

While the Sentencing Act 2002 gives compensation a much greater prominence, the financial capacity of the offender still limits the availability of the sentence of reparation. If an offender has insufficient means to pay, s 35 of the Sentencing Act 2002 allows the court to sentence the offender to pay reparation for less than the total loss inflicted on the victim, or pay reparation by instalments. Under s 12(1), the presumption in favour of reparation is lifted if reparation would result in undue hardship for the offender. Professor Hall in *Sentencing Law and Practice*²⁴ reads these provisions together as suggesting that “if there is no ability to make reparation, then it is not correct in principle to order reparation, no matter how appropriate that might otherwise be”. The

19 See above n 3 and accompanying text.

20 *Ferrier*, above n 18 at [15].

21 “Victim” under s 6 of the Sentencing Act 2002 includes a member of the immediate family of a person who dies as a result of an offence. Thus, reparation can be paid to the family of the deceased as victims themselves without relying on the deceased’s estate making any sort of claim. In terms of corrective justice, it could be argued that while the offender might be obliged to put right harm caused to the primary victim, the obligation does not extend to compensating the *family* of the deceased, but this line of thought will not be explored further here.

22 *Ferrier*, above n 18, at [17].

23 *Read v Police* HC Christchurch CRI-2003-409-000-70, 10 December 2003 at [48].

24 Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004) at 416.

Court Appeal has found that reparation “must be set at a level which makes it realistic given the financial circumstances of the person against whom it was made”.²⁵

A decision by a sentencing court not to award reparation does not prejudice the victim’s ability to pursue a civil claim and under s 38(2) a sentence of partial reparation does not affect the right of the victim to recover any remaining loss by civil proceedings. So, the financial capacity of the offender limits the place of corrective justice in criminal justice, without prejudicing the victim’s ability to seek corrective justice from the civil law if they so choose.²⁶

Arguably, a reparation order that will not be paid serves neither corrective justice nor traditional criminal justice: such an order will not be a particularly effective punishment or deterrent, and the victim’s loss is not made right. Accordingly, it makes sense to impose a sentence other than reparation – a sentence that will at least provide punishment and deterrence and satisfy traditional criminal justice, instead of providing no justice at all.

There is one type of offending where the offender’s ability to pay is not usually an issue: prosecutions of employers for breaches of the Health and Safety in Employment Act 1992.²⁷ Employers typically have the means to pay reparation, and can insure against it: the Act expressly prohibits insurance against fines²⁸ thereby impliedly approving insurance against reparation. Thus, it is in the context of reparation for employee injuries that the courts have had to address further questions about the place of corrective justice in criminal justice.

C. *Punishment and Deterrence Still Matter*

The High Court addressed the relationship between reparation and a fine in *Department of Labour v Areva T & D New Zealand Ltd*,²⁹ an appeal on sentencing from the District Court. The prosecution of Areva followed the death by electrocution of an employee of the company. Prior to sentencing Areva paid \$138,000 to the family of the deceased employee, \$100,000 of which was covered under a liability insurance policy. The District Court convicted and discharged Areva without a fine, on the basis that the company had “done enough” by compensating the family of the deceased.³⁰

Priestly J considered that a conviction and discharge did not sufficiently serve the purposes of deterrence and denunciation, especially considering that the legislature had just increased the maximum penalties fivefold.³¹

Areva can be seen as the reverse scenario of *Ferrier*: by the time of sentencing, corrective justice had already been satisfied by the payments that the employer had made to the deceased’s family. The High Court in *Areva* disagreed with the view expressed in *Ferrier* that the totality principle had no application in the context of the Sentencing Act 2002, and referred to the totality

25 *R v Bailey* CA306/03, 10 May 2004 at [25], followed in *R v Donaldson* CA227/06, 2 October 2006 at [43].

26 Of course, the offender’s financial capacity is a practical limit on the victim’s prospects of actually recovering damages under civil proceedings.

27 The Health and Safety in Employment Act 1992 imposes various obligations on employers, in particular (at s 6) a duty to take “all practicable steps to ensure the safety of employees while at work”. Under s 50 it is a strict liability offence to fail to comply with the requirements of the Act.

28 Health and Safety in Employment Act 1992, s 56I, added by the Health and Safety in Employment Act Amendment Act 2002.

29 *Department of Labour v Areva T & D New Zealand Ltd* HC Rotorua CRI-2005-463-42, 9 November 2005.

30 *Ibid* at [20] sets out the relevant parts of the District Court’s reasoning.

31 Health and Safety in Employment Amendment Act 2002.

principle as a justification for imposing a fine so that the total penalty reflected the employer's wrongdoing.

Areva makes it clear that criminal justice has retained its traditional objectives of punishment and deterrence. While corrective justice has a place in criminal justice, it co-exists (somewhat uneasily) with traditional criminal justice, and has certainly not displaced it entirely.

D. The Insurance Context

Around seventy per cent of the payment to the deceased's family in *Areva* was paid under an insurance policy. Allowing liability insurance for reparation facilitates compensation and serves the interests of victims of crime. However, liability insurance means that an offender can pass the cost of reparation on to their insurer, reducing the punitive and deterrent effect of the sentence. The High Court in *Areva* did not address this point explicitly, but it was discussed in more detail in *Department of Labour v Street Smart*.³²

Like *Areva*, *Street Smart* was an appeal by the Department of Labour of a District Court sentencing decision. The prosecution in *Street Smart* followed the death of the thirteen year old son³³ of an employee of Street Smart, a rubbish collection company. The boy had been riding in the cab with his father, and died after attempting to assist the runners. He tried to jump onto a step on the truck after grabbing a rubbish bag, was unable to maintain his grip on the handrail, fell, and was run over. The subsequent investigation revealed that the truck did not provide a safe platform for the runners to stand on.

The District Court approached sentencing by taking a starting point of a fine of \$175,000, and then adjusting for mitigating factors by deducting \$60,000 for reparation³⁴ and \$60,000 for an early guilty plea. This reduced the fine to \$55,000 – around thirty per cent of the starting point. In theory, this made the total penalty³⁵ to the employer \$105,000 but the reparation was in fact paid by the employer's insurer.

This practice of deducting reparation from the fine on a dollar-by-dollar basis in health and safety cases had by this point become standard practice in the District Court.³⁶ As the High Court realised, this approach is flawed: deducting reparation from the fine on a dollar-by-dollar basis only makes sense if a dollar of reparation provides the same level of punishment and deterrence as a fine of a dollar – which is not the case if reparation is paid by the insurer. The High Court in *Street Smart* thought that “[t]he fact that the respondent's insurance company will meet the reparation payment is a relevant matter to be taken into account when determining the total appropriate sentence”.³⁷

32 *Department of Labour v Street Smart* (2008) 5 NZELR 603 (HC).

33 The Health and Safety in Employment Act 1992 duty breached was the duty in s 15 to “take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person”.

34 The sum had been agreed to by the employer and the parents of the deceased at a restorative justice conference.

35 Reparation plus the fine.

36 See Anna Clark “Reparation and Sentencing” (2008) NZLJ 437–438 at 437 “It was generally accepted that the offender could expect a dollar-for-dollar reduction from the starting point of a fine.”

37 *Street Smart*, above n 32, at [61].

As in *Areva*, the High Court in *Street Smart* found that the totality approach to sentencing was still appropriate,³⁸ and stressed that for the punitive and deterrent objectives of criminal justice to be achieved “penalties must bite and not be at a ‘license fee’ level”.³⁹

The different views expressed on the totality principle in *Areva* and *Street Smart* compared to *Ferrier* may suggest a difference of view on the place of corrective justice in criminal justice. The High Court in *Areva* and *Street Smart* sought to ensure that the criminal law’s role in providing compensation does not limit or undermine the criminal law’s role in punishing and deterring wrongdoing. The High Court in *Ferrier* sought to ensure that the criminal law’s role in providing compensation is not limited or undermined by the criminal law’s role in punishment and deterrence. This perhaps suggests a difference of view as to whether corrective justice is subservient to traditional criminal justice or vice versa. However, it is not clear whether the High Court in *Areva* and *Street Smart* intended that the totality principle of sentence should trump compensating the victim in cases like *Ferrier* where the offender’s wrongdoing is minor but the damage caused is major. The High Court had an opportunity to clarify this point in *Department of Labour v Hanham & Philp Contractors Ltd*.⁴⁰

E. A Full Bench of the High Court on Reparation and Fines

The *Hanham* case was the judgment of a full bench of the High Court,⁴¹ convened to hear three Health and Safety in Employment Act 1992 sentencing appeals and to address the proper sentencing methodology in such cases.

The High Court in *Hanham* stressed that reparation and fines served distinct purposes:⁴²

Reparation is compensatory in nature and is designed to recompense an individual or family for loss, harm or damage resulting from the offending. On the other hand, a fine is essentially punitive in nature, involving the imposition of a pecuniary penalty imposed by and for the state. A fine is intended to serve the statutory purposes of denunciation, deterrence and accountability. Each requires separate attention in the sentencing process.

The High Court thought that these distinct purposes were best addressed by a three-step process:⁴³

1. Fix reparation, which includes considering what losses the offending caused and taking into account the financial capacity of the offender;
2. Fix the amount of the fine, by:⁴⁴
 - a. fixing a starting point on the basis of the culpability of the offending; then
 - b. adjusting the fine upwards or downwards from the starting point based on aggravating or mitigating circumstances relating to the offender (which includes reparation, although not on a dollar-by-dollar basis⁴⁵).

38 Ibid at [44].

39 Ibid at [59].

40 *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) “*Hanham*”.

41 Randerson and Panckhurst JJ.

42 *Hanham*, above n 40, at [33].

43 Ibid at [80].

44 The approach to fines set out in step 2 is the methodology established by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372.

45 Reparation in this sense includes payments of compensation, or offers to make such payments, occurring prior to sentencing and later crystallised into a sentence of reparation.

3. Assess whether the overall burden of the sentence (reparation plus the fine) is proportionate and appropriate.

This process has several noteworthy features:

First, reparation features in all three steps, reflecting the complex relationship between corrective justice and traditional criminal justice:

1. Reparation is an end in itself in step 1;
2. The provision of compensation to the victim can be a mitigating factor that serves to reduce the fine in step 2.b;⁴⁶ and
3. Reparation forms part of the total sentence, which is then compared to the totality of the wrongdoing in step 3.

Second, steps 1 and 2 resemble the approach taken in civil proceedings where a court initially awards compensatory damages to provide appropriate compensation and then awards punitive damages on top of that to punish and deter. Here, a court first awards reparation to compensate and then imposes a fine on top of that to punish and deter. However, the court must then go on to step 3. The circumstances in which a court would revise its sentencing in step 3 are not clear. The point of step 2 seems to be to arrive at a fine that is appropriate for the offender and the offending, taking into account any reparation, which seems to be the point of step 3. The High Court describes step 3 as involving:⁴⁷

[Consideration] of the total imposition on the offender of reparation and fine. The total imposed must be proportionate to the circumstances of the offending and the offender. This assessment is to be made against the background of the statutory purposes and principles of sentencing already discussed.

At first glance “the total imposed must be proportionate...” might imply a wholehearted endorsement of the totality principle. This might suggest that in a factual scenario like *Ferrier*, the total sentence should perhaps be reduced so that the penalty is not out of proportion with the wrongdoing, implying that *Ferrier* may have been incorrectly decided. However, the assessment in step 3 must be done against the background of the purposes of the statute, which includes providing for the interests of victims of crime. So step 3 does not necessarily imply that the totality principle trumps compensation.

Step 3 is perhaps a hedge: the High Court is allowing for the possibility of some circumstance where steps 1 and 2 would result in an inappropriate sentence. This kind of “never say never” thinking might allow future courts discretion to deal with extraordinary cases, but it does so at the expense of certainty in ordinary cases – and the extraordinary may never occur.⁴⁸

46 The High Court in *Hanham*, above n 40, considered at [69] that a discount of up to ten to fifteen per cent was appropriate to recognise the order for reparation. The High Court thought at [74] that “some modest allowance may be justified to recognise the employer’s responsible approach in securing insurance cover to provide for injured employees” but saw this as sufficiently allowed for in that ten to fifteen per cent.

47 *Hanham*, above n 40, at [78].

48 “Never say never” thinking also swayed the majority of the Privy Council in *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721 to reject a bright line rule that restricted exemplary damages to advertent wrongdoing. Lord Nicholls gave the argument for “never say never” thinking at [26]: “if experience teaches us anything, it is that sooner or later the unexpected and exceptional event is bound to happen” and thought that “never say never” was a “sound judicial admonition”.

IV. WHAT IS THE PLACE OF CORRECTIVE JUSTICE IN CRIMINAL JUSTICE?

Although this discussion must necessarily conclude that the place of corrective justice in criminal justice as the law in New Zealand currently stands is not certain, it is nevertheless clear that it has changed significantly. While historically, corrective justice was only a secondary consideration in criminal justice if it was a consideration at all, compensation is now one of the main aims of sentencing in New Zealand. Yet corrective justice has not taken over criminal justice. The traditional objectives of criminal justice still matter, and the pursuit of corrective justice within the criminal law is limited by the financial capacity of the offender and to some extent by the totality principle. The new place of corrective justice in criminal justice reflects that society is now demanding that the criminal law does more than simply respond to the offender's wrongdoing. Society demands corrective justice for the victim as well as criminal justice for the offender: justice in the round.

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CHARITABLE TRUSTS AND POLITICAL ACTIVITY: TIME FOR A CHANGE?

BY JULIET CHEVALIER-WATTS*

For many decades case law and, more recently, statute has determined that a trust will be denied charitable status if its purposes are political. This appears, prima facie, to be a straightforward principle, however jurisprudence suggests that this principle is fraught with difficulties, not only for the judiciary, but also in terms of its justiciability. This paper considers the complex relationship between charity and political activity, and in light of recent decisions coming from the New Zealand Charities Commission and Australia's and New Zealand's High Courts, questions whether it is time for the Charities Commission and the courts to adopt a more liberal approach when applying the principles to reflect contemporary socio-political times.

The ethos of charity is an ancient one, with the oldest active charity on record in the United Kingdom established in AD597,¹ but it took many more centuries before a system of charity law was established. This system of regulation effectively began with the enactment of the Statute of Charitable Uses Act 1601. The preamble of this Act sets out various purposes that are deemed to be charitable, including: the relief of the poor, the aged and the impotent, and whilst the body of the Act has long since been repealed, the preamble lives on in modern day charitable law, and is applied and interpreted by the judiciary, the New Zealand Charities Commission and the Charity Commission of England and Wales. The Charitable Uses Act 1601 may have provided the foundations for the system of regulating charities but it was the seminal case of *Commissioners for the Special Purposes of Income Tax v Pemsel*,² and specifically Lord MacNaghten, who set out the four heads of charity under which all charitable trusts must fall; these heads are still the very foundation of charitable trust law in contemporary times. The four heads of charity are:

- the relief of poverty;
- the advancement of religion;
- the advancement of education; and
- any other purposes beneficial to the community not falling under any preceding heads.

These heads, as set out by Lord MacNaghten, have now been codified in s 5(1) of the Charities Act 2005, but even if a trust falls under one of these heads, there are still further tests that must be satisfied before a trust will be construed as achieving charitable status under the Charities Act 2005. Section 5(2) of the Act also requires that the purpose must be for the public benefit, in other words "[t]his means that the purpose must be directed at benefitting the public or a sufficient sec-

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1 Gareth Morgan "The Spirit of Charity" (paper presented at Professorial Lecture, Sheffield Hallam University, England, April 2008) at 5.

2 *Commissioners for the Special Purposes of Income Tax v Pemsel* (1891) AC 531.

tion of the public.”³ Additionally, the purposes must be charitable and s 5(3) of the Act notes that any non-charitable purposes must be ancillary to the charitable purpose or purposes.

The case of *Bowman v Secular Society*⁴ determined that political purposes cannot be charitable where Lord Parker of Waddington observed that:⁵

...a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

Notwithstanding the observations of Lord Parker of Waddington, however, it is clear that politics and charities have had a long-standing, albeit turbulent, relationship. Dunn notes that:⁶

...the Charitable Purposes Act 1601 was born out of a charged political environment and the purposes contained within it were unified by their association with the financial obligations of, or contributions to, a parish government’s purse strings.

Even after the enactment of that Act, the close relationship between State concerns and charitable purposes remained, so where the State may have failed in some respect, charity fulfilled that need as a consequence of that failing. How much charitable input was required varied depending on the Government and their policies at the time,⁷ but relief of poor, advancement of education, and the advancement of religion have always been at the forefront of government policies, regardless of the party in power at the time, thus reflecting the close affinity between politics and charity.

“Regardless however of the implicit affiliation between charity and politics”,⁸ any organisation wishing to obtain or retain its charitable status under the Charities Act 2005 must avoid having political purposes and avoid engaging in political activity. Prima facie, this appears to be a straightforward requirement and one that would be easy to fulfil, however, case law and academic commentary suggest that this is far from the truth, and recent decisions emanating from the New Zealand Charities Commission and Australia’s Federal and High Court only serve to highlight the challenges confronting the judiciary and statutory bodies when faced with organisations connected with political activity in some fashion.

Before considering the original proposition, it is worthwhile detailing the jurisprudence to date to contextualise the issues demarcating those bodies with overt political activity from those bodies whose political activity is ancillary to their charitable purposes.

Political purposes were defined by Justice Kennedy in *Re Wilkinson (Deceased)*⁹ as being:¹⁰

Any purpose with the object of influencing the Legislature is a political purpose, and similarly, in my view, a purpose that the central executive authority be induced to act in a particular way in foreign relations or that the people be induced to accept a particular view or opinion as to how the central executive shall act in the foreign relations of this country is, in the broadest sense, a political purpose[.]

3 Registration Decision: Greenpeace of New Zealand Incorporated, Charities Commission, 15 April 2010 at [12].

4 *Bowman v Secular Society* [1917] AC 406.

5 *Ibid.*, at 442.

6 Alison Dunn “Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process” (2008) MLR 71(2) at 251.

7 *Ibid.*

8 Juliet Chevalier-Watts “Politics and Charity” [2009] NZLJ March at 54.

9 *Re Wilkinson (Deceased) Perpetual Trustee Estate and Agency Company of New Zealand, Limited v League of Nations Union of New Zealand* [1941] NZLR 1065.

10 *Ibid.*, at 1077.

This reflects the authority of *Bowman v Secular Society*, as cited earlier in the paper, that political purposes cannot be construed as being charitable, and such views were noted in the 1800s in the English Constitution.¹¹

The case of *Bowman* was applied in *McGovern v Attorney-General*,¹² where the Court was tasked with considering whether the purposes of a trust established by Amnesty International met the criteria for charitable status.

The case of *McGovern* would have been fraught with difficulties for the Court, not least because of the public expectation that an organisation as well known and respected as Amnesty International would automatically be construed as being charitable, but as Justice Slade observed: “the mere fact that an organisation may have philanthropic purposes of an excellent character does not itself entitle it to acceptance as a charity in law.”¹³ In order to clarify this viewpoint, his Honour took time to set out his observations clearly with regard to the thorny issue of political activity, which was a central focus for the Court with regard to this case. Slade J confirmed that “[t] here is no doubt whatever that a trust of which a principle object is to alter the law of this country cannot be regarded as charitable”¹⁴ but “the mere fact that trustees may be at liberty to employ political means in furthering the non-political purposes of a trust does not necessarily render it non-charitable.”¹⁵ His Honour helpfully set out a summary of trusts that would be deemed trusts for political purposes and thus rendering them non-charitable, founding them principally on the *Bowman* case and *National Anti-Vivisection Society v Inland Revenue Commissioners*:¹⁶

Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in the laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities of particular decisions of governmental authorities in a foreign country.¹⁷

As noted earlier in the paper, trust purposes must be exclusively charitable because otherwise there would be no means of determining what part of the trust property was designated for charitable purposes and what part would be for non-charitable purposes, thus uncertainty would render the trust invalid.¹⁸ However, trust purposes that are not charitable will not automatically render the whole trust invalid, including purposes with political connections, so long as those non-charitable activities are merely subsidiary or ancillary to the charitable purpose, but if those non-charitable activities form part of the trust purpose, then the whole trust will be deprived of charitable status.¹⁹ Although, Justice Slade pertinently observed that this “distinction is perhaps easier to state than to apply in practice”.²⁰ This then is the nub of the issue for not only *McGovern*, but also for subse-

11 See *Thornton v Howe* 1862 WL 6423; *De Themmines v De Bonneval* (1825) 38 ER 1035.

12 *McGovern v Attorney-General* [1982] 1 Ch 321.

13 *Ibid.*, at 329.

14 *Ibid.*, at 335.

15 *Ibid.*, at 340, emphasis removed.

16 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

17 *McGovern v Attorney-General* above n 12, at 340.

18 *Ibid.*

19 *Ibid.*, at 341.

20 *Ibid.*

quent cases where the distinction between political ancillary purposes and political activities that form part of the trust purpose has been one that has elicited much judicial opinion and vexation.

The reason that a court is unwilling to find a trust to be charitable if it seeks to change the law is because:²¹

...the Court will ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.

Justice Slade, in the same case, also made reference to the fact that changes to the law by the judiciary may actually have injurious consequences, thus it should be for Parliament and not the judiciary to decide such matters, and further, it is essential for there to be public confidence in the political impartiality of the judiciary for the continuation of the rule of law.²² With such words of caution therefore it is perhaps surprising that there are strong views advocating for changes in the law in this respect, but nonetheless more recent cases do appear to support the notion that a purpose directed to changing the law should be charitable, as reflected in the case of *Public Trustee v Attorney-General of New South Wales*.²³ Justice Santow observed that “[p]ersuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance.”²⁴ However, I do not think that his Honour meant to suggest entirely that all charitable trusts with political purposes should be construed as charitable because his Honour was quick to note also that “[m]uch will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end.”²⁵ Therefore even though Santow J is supporting a more flexible approach, in reality, I would suggest that what is actually being advocated by his Honour is that the courts must consider the question of degree of the political purpose of a trust, and where the political purposes outweigh the charitable purposes, then charitable status will be denied. Although in the recent English case of *Hancett-Stamford v Attorney General*,²⁶ Justice Lewison is unequivocal in his view that “whatever the rationale, there is no doubt that the principle remains that a trust, one of whose purposes is to change the law, cannot be charitable.”²⁷ However, regardless of continued rhetoric and support for a more liberal judicial approach, this question of degree has been considered in some detail by the Charities Commission of New Zealand in very recent times, and their approach would be unlikely to find favour with the liberalist advocates. It is to these decisions that this paper now turns to provide an understanding of the contemporary standing in New Zealand.

On 15 April 2010, the Charities Commission of New Zealand released its registration decision in relation to Greenpeace of New Zealand Incorporated. The Charities Commission was established by the Charities Act 2005, and all existing charities, and those seeking charitable status, are required to apply for registration by the Charities Commission under the Act for tax exemption

21 Ibid, at 336-337.

22 Ibid, at 337, per Santow J citing *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, per Lord Diplock at 157.

23 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600.

24 Ibid, at 621.

25 Ibid.

26 *Hancett-Stamford v Attorney General and others* [2009] Ch 173.

27 Ibid, at 180.

purposes.²⁸ The Commission, after thorough scrutiny and application of the relevant statutory and common law requirements, is at liberty to register, deregister or to decline registration of such entities.

In the Greenpeace application, the Applicant applied to the Charities Commission for registration as a charitable entity. In January 2009, the Commission sent a notice that may lead to declining the registration for a number of reasons, and asked for further information, inter alia, on how the Applicant sought to promote disarmament and peace. On receiving the Applicant's response, the Commission determined that Clause 2.2 of the Applicant's objects, that of the promotion of disarmament and peace, did not show any intention to relieve poverty, or advance education or to advance religion, thus it should be considered under the fourth *Pemsel* head of "any other matter beneficial to the community." For any purpose to qualify under this head, it must firstly be beneficial to the community, and secondly, fall within the spirit and intendment of the Statute of Elizabeth. The Commission gave great consideration to the issue of promoting world peace and its political alliance. In referring to the case of *Re Collier (deceased)*,²⁹ the Commission noted that a gift for the promotion of world peace was not charitable because it was a political purpose, but the Commission observed that this application of the political purpose principle in *Re Collier* was not as clear-cut as may be presumed.³⁰ In *Re Collier*, the Court determined that it was the manner in which the promotion of world peace was to be exercised that was at issue, not the actual principle of world peace itself because the testatrix wished to encourage soldiers to lay down their arms as a means of promoting world peace. This act was not supported by military law, thus pursued an unlawful end that would have required a change in law to be achieved.³¹ So as the Commission rightly stated: "it was not the bequest for the promotion of world peace itself that was held to be political, but rather that purpose viewed in light of the testatrix's message that it is soldiers who are persons who can 'stop the fighting.'"³²

This may appear to be mere semantics, but I fully endorse the Commission's and the judiciary's apparent linguistic gymnastics in determining the extent of a body's political objects because by observing the manner and the means of the political influence, I submit that as the law stands, it is robust and flexible enough for the courts to construe whether or not an object is overtly political without the need to change fundamentally the current law. Thus "if the promotion of disarmament and peace is done in a way that is considered political, for example, by requiring a change of law or government policy in New Zealand or abroad, it will not be charitable"³³ but this does not rule out the promotion of peace in a purely educational manner, for instance, through the advancement of education. As noted in the case of *Southwood v Attorney-General*:³⁴

There is nothing controversial in the proposition that a purpose may be educational even though it starts with the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military techniques for resolving international disputes[.]

Indeed, the desirability of peace as a general object is not likely to be construed as overtly political and "[t]here is no objection on public benefit grounds to an educational programme which begins

28 Juliet Chevalier-Watts "Economic Development and Charitable Status" [2010] NZLJ at 266.

29 *Re Collier (deceased)* [1998] 1 NZLR 81.

30 Greenpeace of New Zealand Incorporated [2010] above n 3, at [39]–[40].

31 *Re Collier* above n 29, at 91.

32 Greenpeace of New Zealand Incorporated above n 3, at [41].

33 *Ibid*, at [43].

34 *Southwood v Attorney-General* [2000] WTLR 1199 at [27].

from the premise that peace is generally preferable to war.”³⁵ However, the difficulty comes when determining the most appropriate way of securing peace and avoiding war, and as Chadwick LJ rightly asserts:³⁶

The court is in no position to determine that promotion of the one view rather than the other is for the public benefit. Not only does the court have no material on which to make that choice; to attempt to do so would be to usurp the role of government.

Thus a distinction is readily drawn between the public benefit of educating on political matters and the issue of promoting changes in law through political advocacy.

In applying this to the case at hand, the Charities Commission turned to the methods by which Greenpeace seeks to promote disarmament and peace. The Applicant submitted that it campaigns to bring an end to the testing, production and use of nuclear weapons and weapons of mass destruction, and further submits that not all forms of achieving disarmament will be political, for instance, writing letters and organising protest rallies. The Commission acknowledged that 187 countries have signed up to the Nuclear Non-Proliferation Treaty, whose objective is to, *inter alia*, achieve complete disarmament. Nonetheless, the Commission also acknowledged that for international disarmament to occur, all those countries that do have nuclear weapons and/or nuclear weapon programmes would have to change their national laws in order to comply with Greenpeace’s requirements, thus in the Commission’s view, the Applicant’s objective of disarmament has a political purpose and cannot be construed as charitable.³⁷ This conclusion is an unambiguous application of current law, and reflects the authority of the authorised body to observe the manner and the means of the political purpose, and in doing so, confirms that the law is clear on this issue and certainly, on the matter of Greenpeace and political activity, does not require clarification or change.

The Commission further considered whether Clause 2.7 of the Applicant’s constitution could be construed as ancillary. This clause states:³⁸

Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society and support the enforcement or implementation through political or judicial processes as necessary.

In including the words “which further the objects of the Society”, this may indicate, *prima facie*, purposes that are ancillary to the Applicant’s other purposes. If this is the case, then even if the ancillary purposes are non-charitable, this will not automatically defeat an applicant’s charitable status application. As stated earlier in the paper, it is this issue of whether such purposes are truly ancillary, or whether they form such an integral part of a body’s purposes that they no longer achieve ancillary status that has brought about academic and judicial concern. So in applying this principle, the Commission looked to the activities of the Applicant at the time of the application, as required under s 18 of the Charities Act 2005. On review of the activities, the Commission concluded that the focus on political activity is of such magnitude in order to effect change that they fall outside the ambit of ancillary purposes, thus rendering them non-charitable.

So whilst on the face of it and in layman’s terms, it may appear counter-intuitive for Greenpeace to have been denied charitable status under the Charities Act 2005, there is little reason to

35 *Ibid*, at [29].

36 *Ibid*.

37 Greenpeace of New Zealand Incorporated above n 3, at [47]–[50].

38 *Ibid*, at [51].

doubt that the law is not robust or clear enough to provide certainty and unambiguity. The question however arises as to whether such a decision is justiciable, taking into consideration the clearly valuable and valued work undertaken by Greenpeace. In response, however, to such a criticism, firstly I would echo the views noted earlier in the paper given by Justice Slade where he notes: “the mere fact that an organisation may have philanthropic purposes of an excellent character does not itself entitle it to acceptance as a charity in law”,³⁹ for all the earlier cited reasons, and secondly, I support the view that it is not for the judiciary or the Charities Commission to determine whether a change in law is for the public benefit; that is a Parliamentary matter, which needs to remain entrenched to avoid issues relating to judicial independence and any undermining of democratic principles. The Registration Decision of Greenpeace of New Zealand Incorporated appeared to be without vexation and undertook the application of well established principles without being required to perform legal linguistic contortions. As such, the original proposition may not have as much validity as perhaps considered. The story however does not end here, because at the time of writing, Greenpeace of New Zealand Incorporated’s appeal to the High Court of New Zealand was heard and Justice Heath released his judgment, to which I will turn to conclude this paper.

The month following the Charities Commission’s issuing of the Registration Decision of Greenpeace, the Commission issued another Registration Decision, also declining an organisation charitable status under the Charities Act 2005. This time it was Sensible Sentencing Group Trust (SSGT), an organisation nationally renowned for its philanthropic and community work, thus raising more questions as to the application of established case law, and its appropriateness, in relation to charitable trusts and political activity.

The task for the Commission was to establish whether the Clauses in the SSGT’s constitution firstly met the criteria of one or more of the four *Pemsel* heads. The advancement of religion was immediately ruled out, so the Commission turned its attention to the first head, that of relief of poverty. Relief of poverty is broadly defined, and does not mean that a beneficiary has to be destitute financially in order to receive the benefit, and as such can include “anyone who does not have access to the normal things of life which most people take for granted.”⁴⁰ The SSGT submitted that it relieved poverty, inter alia, by assisting victims of serious, violent and sexual crimes and advising said victims about their available protection. The Commission acknowledged that these purposes are likely to amount to relief of poverty. This element of the decision clearly caused no issue in relation to political activity, however, in its assessment of whether the SSGT’s purposes fell under the head of advancement of education, the matter of political purposes arose, and the Commission gave great consideration to this thorny issue.

For a purpose to qualify under the head of advancement of education, it must provide some form of education and ensure that that learning is advanced in some fashion. Justice Hammond, in *Re Collier (deceased)*,⁴¹ set out the test:⁴²

It must confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research. Second, propaganda or cause under the guise of education will not suffice. Third the work must reach some minimum standard.

39 *McGovern v Attorney-General* above n 12, at 329.

40 Sensible Sentencing Group Trust [2010] Registration Decision: Charities Commission, 16 May at [17].

41 *Re Collier (deceased)* [1998] 1 NZLR 81.

42 *Ibid.*, at 91–92.

As a result, the Commission determined that the SSGT's purposes, as set out in Clause 1 of their constitution, constituted advancement of education because they, inter alia, educated the public as to the plight of victims of crime and educated the victims themselves with regards to advocacy.⁴³ However, this was not the end of the matter. The Commission had to consider another element of Clause 1, whereby the SSGT asserted that it made submissions on behalf of victims of serious, violent and sexual crimes. In order to assess this remaining purpose, the Commission reviewed the SSGT's mission statement, its goals and its long term objectives, as set out on its website. Much of the information set out by SSGT refers consistently to lobbying for legislative change, advocating for a particular point of view in relation to legislation, government departments and members of Parliament, and successes as a result of political lobbying.⁴⁴ On the face of it, such activity may be construed as overt political activity, however, the Commission correctly turned its attention to considering if indeed such activity had political purpose, or whether it could still be construed as educational. The Commission observed that a "distinction must be made between propagating a view that can be characterised as political and the desire 'to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose certain views.'"⁴⁵ Therefore just because an educational programme may effect a change in the law, this does not preclude it from being charitable, but that programme must avoid promoting a singular political notion without also proffering an alternative view.

There is little here to doubt that the law is transparent on this matter thus the next step is to consider whether the educational purpose that is being advanced by the body is generally educational, albeit addressing some legislative or policy change, or whether its advocacy favours a particular political point of view. In applying this principle to the instant case, the Commission acknowledged that educating the public in relation to the plight of victims of serious crime and providing advocacy support may be charitable under advancement of education. However, "the applicant's mission statement, goals, and long term objective, and information set out on ... the website ... indicates that ... the activities extend much further than merely assisting victims"⁴⁶ and indeed extends to advocating particular political views in relation to sentencing and penal policy. As a result, the Commission determined that because one of the Applicant's main purposes is to advocate for a change in law, this was politically motivated and therefore could not advance education. I would assert that there is little contention with regard to this issue of political activity and charitable purpose and fully support the notion that for a purpose to be educational, any political views should continue to be neutral otherwise a charitable trust risks supporting and promoting biased views, which cannot be construed as having a public benefit.

The Charities Commission also considered specifically the principle of public benefit and, once again, Justice Santow's opinion in the case of *Public Trustee v Attorney-General* was at the forefront of the Commission's considerations. His Honour observed that "an organisation whose main purpose is directed to altering the law or government policy, as distinct possibly from an organisation to encourage law reform generally, cannot be saved from being political by appeal to the public interest."⁴⁷

43 Sensible Sentencing Group Trust above n 40, at [23].

44 Ibid, at [25]–[28].

45 Ibid, at [32] citing *Re Bushnell (deceased)* [1975] 1 All ER at 729.

46 Ibid, at [38].

47 *Public Trustee v Attorney-General of New South Wales* above n 23, at 619.

The Charities Commission noted that even though Justice Santow supports a more liberal view of political activity and charitable purpose, his Honour still supports the notion that those partisan political views which advocate a change in the law cannot be construed as charitable.⁴⁸ Therefore the Commission reaffirmed that the root of the issue is the question of degree of the activities directed at political change. In considering the question of degree of the SSGT's political activities, the Commission concluded that the Applicant's mission statement, its goals, its long term objectives, the letters of support from the public and general information provided by the SSGT all strongly indicate that the main purpose of the Applicant is to promote a particular point of view on sentencing and policy, which tips the balance of political purpose against having public benefit under charitable law. As a result, with regard to the matter of public benefit, the Commission concluded that the Applicant's main purpose, due to its political bias, could not be construed as having public benefit, thus failing to meet the criteria of charitable purpose.⁴⁹

However, I think it also pertinent to note that as a result of the Registration Decision, the SSGT brought back into use the Red Raincoat Trust that was not being utilised at the time of the application to the Charities Commission.⁵⁰ The Red Raincoat Trust was successfully registered by the Charities Commission and its purpose is to provide aid and rehabilitation to those affected by homicide. The earmarking of this particular trust and reinstating it after the SSGT was denied charitable status could be construed as a double edged sword. On the one hand, the utilisation of an alternative trust by the SSGT implies an undermining of the value of the SSGT overall because it could be seen as it being forced to exploit an alternative trust to achieve charitable status in some fashion. On the other hand, the Registration Decision shows that the law is functioning adequately and is ensuring that charitable trusts do have clear public benefit. As a result, the fact that the SSGT was required make use of a different trust that did comply fully with the requirements of the Charities Act 2005 reflects the importance given to acquiring charitable status for organisations.

In issuing this Registration Decision, the Charities Commission has done little to affect the current jurisprudence in relation to political activity and charitable purpose, nonetheless, I would submit that this Decision is very valuable in a number of respects. Firstly the Decision entrenches the jurisprudence, which provides jurisprudential certainty; a valuable commodity for such a potentially contentious area of law. Secondly, although the Decision supports the judicial status quo, it also outlines more progressive legal notions in relation to political activity and charitable purpose. This suggests that there is some flexibility in the current law, and it shows how the courts can exercise a certain amount of discretion when balancing the issues of political activity and charitable purpose. The Commission utilised this balancing principle without issue apparently and I submit that it set out its reasoning eloquently and objectively, thus suggesting that the original proposition has limited foundations. This leads on to the third point of value, that as a result of this transparent and confident reasoning, I would advance that there is little requirement to amend or change the law.

However, the very recent case of *Aid/Watch Inc v Federal Commissioner of Taxation*⁵¹ heard in the High Court of Australia has thrown doubt on the certainty of the established principle of political activity and charitable purpose. Aid/Watch Incorporated is an independent organisation

48 Sensible Sentencing Group Trust above n 40, at [57].

49 Ibid, at [59]–[65].

50 Email from Garth McVicar to Juliet Chevalier-Watts regarding the Red Raincoat Trust (8 March 2011).

51 *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42.

concerned with promoting and campaigning for effective national and international aid policies. In October 2006, the Commissioner of Taxation revoked Aid/Watch's charitable status for the purposes of, inter alia, income tax, but in 2008, the Administrative Appeals Tribunal reversed that decision on the basis that Aid/Watch was a charitable organisation, notwithstanding its commitment to political activity advocating for legislative and government policy change. However, the Full Court of the Federal Court of Australia allowed an appeal by the Commissioner of Taxation and held that Aid/Watch was not a charitable institution because its main purpose was political. In December 2010, the High Court of Australia, by a majority, restored the decision of the Administrative Appeals Tribunal and held that Aid/Watch was a charitable institution.⁵²

The Court acknowledged that any trusts with a "principal purpose to procure a reversal of government policy, or of particular administrative decisions of government authorities, is proscribed as a trust for 'political purposes'"⁵³ and "[s]uch trusts, even if otherwise within the spirit and intentment of the preamble to the Elizabethan statute, can never be regarded as being for the public benefit in the sense required for a charitable trust."⁵⁴ Although the Court may have acknowledged such a principle, its observations following that statement reflect a lack of ease with regard to the immutability of that established principle. It was noted that those propositions were adopted by Justice Slade in the case of *McGovern*, but that *McGovern* was followed somewhat reluctantly by the Court in the case of *Re Collier*,⁵⁵ and whilst it appears to be firmly established that political activity will defeat a charitable trust, the Court in the present case then provided early examples of charitable purposes being connected with politics⁵⁶ observing that in the case of *Farewell v Farewell*,⁵⁷ a Government should be influenced by public opinion, and by calls to amend the law, and that this should not be construed as negatively manipulating the law.

With the seed of doubt cast as to the mutability of the principle of political activity and charitable trusts, the Court in the instant case outlined the liberal approach adopted by the United States where a trust may be charitable although the purpose of that trust is to seek a change in the law; that the mere fact that the purpose of a trust seeks to bring about a specific change of law does not prevent that purpose from being charitable; and developing and disseminating information advocating, inter alia, a particular political view of view may be charitable.⁵⁸ The question then for the Court in *Aid/Watch* was "[w]hat then is the standing in Australia of the line of English authority which stems from *Bowman*."⁵⁹

The Court immediately then took the opportunity to entrench the notion that Lord Parker, in the case of *Bowman*, did not direct his remarks to the Australian system of government, because that system of government was established and is maintained by their Constitution, and noted that Lord Parker's observations have received limited attention from the High Court of Australia.⁶⁰ The High Court then took some time to explore the matter of the Constitution and how that matter

52 *Aid/Watch Inc* *ibid*, Case Summaries [2010] High Court of Australia <www.austlii.edu.au/ezproxy.waikato.ac.nz/au/other/HCASum/2010/41.html>

53 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [28].

54 *Ibid*.

55 *Ibid*, at [29]–[31].

56 *Ibid*, at [32] referring to *In re Scowcroft* [1898] 2 Ch 638 and *Farewell v Farewell* (1892) 22 OR 573.

57 *Farewell v Farewell*, *ibid*, at 579–581.

58 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [38].

59 *Ibid*, at [40].

60 *Ibid*, at [41].

may influence the issue of political activity and charitable purpose. In Australia, the Constitution mandates a system of government that revolves around its electors, the legislators and the executive, and the law itself establishes a system for amendment of the Constitution whereby the proposed law to effect the amendment is submitted to the electors. Thus the Australian Constitution informs the development of the common law and allows agitation of political and legislative change, which is purported to contribute to public welfare. Additionally, a court administering charitable trusts will not be called upon to determine the merits of a specific course of legislative or political activity or avenue⁶¹ thus there will be no biased view point of the court, it will merely be the court administering on a matter for which the Constitution allows, and which contributes to the public welfare by addressing matters of political nature.

On that basis, the Appellant submitted “that the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid has two characteristics indicative of its charitable status.”⁶² The first being that its very activities would contribute to the public welfare under the fourth *Pemsel* head, and the second being that the purposes and activities of Aid/Watch are not disqualified under the Australian system of government.⁶³ On that basis the High Court ruled that because of the lawful means of public debate as prescribed by the Constitution “the efficiency of foreign aid directed to the relief of poverty”⁶⁴ is by itself a purpose beneficial to the community as required under the fourth head of *Pemsel*. Furthermore, and prima facie of great significance with regard to the issue of political purpose, the High Court confirmed that “in Australia there is no general doctrine which excludes from charitable purposes “political objects”.”⁶⁵

What is of note therefore is that in the *Aid/Watch* case, the High Court makes no reference to the issue of non-charitable objects being ancillary, rather, it appears to be broadening the established notion generally that political objects may not defeat a charitable trust, even if they form a more than ancillary role within the charitable trust. This decision therefore of the High Court is unsettling one.

I have set out arguments within this paper that support the notion that the established law is transparent and flexible enough to be relevant in a contemporary society and as such I would dispute the need for a more liberal approach with regard to political activity and charitable purpose, yet this most recent High Court decision suggests that, at least in Australia, the courts are willing, and indeed determined, to adopt a very liberal approach, thus undermining the established status quo, without any clarification on the relevance of the issue of ancillary, which has always played a key role in the decision of any court or the Charities Commission to date.

This decision is likely to be of great significance in Australia and will open up the possibility of a number of organisations now obtaining charitable status where once the law would have determined that their overt political activity should defeat their charitable status as the public benefit could not be determined. The question must be asked therefore how much of an impact such a decision will have on the Charities Commission and court decisions within New Zealand.

During the writing of this paper, the case of *Draco Foundation (NZ) Charitable Trust v The Charities Commission*⁶⁶ was heard in the High Court and thus New Zealand did not have to wait

61 Ibid, at [43]–[45].

62 Ibid, at [46].

63 Ibid, at [46].

64 Ibid, at [47].

65 Ibid, at [48].

66 *Draco Foundation (NZ) Charitable Trust v The Charities Commission* HC WN CIV 2010-1275 [3 February 2011].

long to answer this question. The *Draco Foundation* case arose as a result of the denial of registration by the Charities Commission of the Draco Foundation Trust. The High Court had to consider the purported political activities of the Appellant in the instant case and the Appellant raised the *Aid/Watch* case in argument in order to pursue “its ‘political’ agenda through its advocacy on the website and elsewhere without running into the proposition that it did not have exclusively charitable purpose.”⁶⁷ Prior to this case being heard, my view was that New Zealand may not feel obliged to adopt such a liberal approach for three reasons. Firstly, New Zealand will only regard Australian decisions as persuasive as opposed to being bound by the courts. Secondly, the High Court in the case of *Aid/Watch* made it clear that the Australian Constitution allows for such political agitation, and such agitation can be construed as having tangible public benefit; New Zealand does not have such a Constitution, thus may regard the High Court’s decision as only pertinent to Australia. Thirdly, that New Zealand does have a general doctrine that excludes overt political purposes from being charitable objects.

Two of my own views find support in the judgment of Justice Young in the case of *Draco*. His Honour noted that “the difficulty for the appellant in such an approach is that contrary to the law of Australia New Zealand does have, as part of its law, a general doctrine which excludes from charitable purposes, political objects.”⁶⁸ As a result, Young J agreed with the decision of the Charities Commission that *Bowman* remains good law in New Zealand and thus the courts are obliged to follow that line of reasoning. He also opined that there may be other reasons as to why *Aid/Watch* has limited applicability to the instant case. Firstly, that *Aid/Watch* may actually only apply to charitable purposes that involve the relief of poverty, and secondly that the *Aid/Watch* case was reliant on Australian constitutional principles, which are obviously not applicable in New Zealand. However, he also noted that because *Bowman* was good law in New Zealand, it was not necessary to assess in any detail the strength of those arguments. The *Draco* decision therefore provided the first denial in New Zealand of the liberalist approach being adopted in Australia, which I fully endorse because the more conservative New Zealand approach fully supports the ethos of public benefit, without which a charity has no basis. However, my concern was that the *Aid/Watch* decision could still prove influential in New Zealand, and whilst Justice Young made it clear that on this occasion, it was inapplicable, this was only the first opportunity for it to be considered in the High Court of New Zealand.

However, as noted earlier in the paper, Justice Heath delivered his judgment on the appeal from Greenpeace of New Zealand Incorporated, and his Honour’s findings do much to calm the turbulent waters in the wake of the *Aid/Watch* decision, although I do note that his Honour has reservations about the applicability of current conservative views.

Justice Heath assessed the scope of charitable purpose, referring in detail to the cases of *Re Collier* and *Molloy v Commissioner of Inland Revenue*,⁶⁹ all of which have been bound by the case of *Bowman*, and acknowledged that he too is bound by the principles relating to political activity as set out in *Bowman*.⁷⁰ However, his Honour noted “to be balanced against that body of case law is the recent judgment of the High Court of Australia in *Aid/Watch*.”⁷¹ Justice Heath set out the views of the majority, as addressed earlier in the paper, and he also took the time to consider the

67 Ibid, at [56].

68 Ibid, at [58].

69 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).

70 *Greenpeace of New Zealand Incorporated* HC WN CIV 2010-485-829 [6 May 2011] at [44]–[52].

71 Ibid, at [53].

dissenting views of Heydon and Kiefel JJ. Justice Heydon adopted Justice Hammond's view in *Re Collier*, taking the view that the intention of Aid/Watch was to persuade people of a particular view with no attempt to provide a balanced alternative view from which "knowledge could be accumulated and independent decisions made."⁷² As a result, Heydon J was critical of the majority's view because it supported "those who encourage energetic action to achieve a particular political goal"⁷³ which traditionally has ensured that an object will not meet the requirements of charitable purpose. Justice Kiefel was not, in principle, opposed to the view "that the political nature of an organisation's main purpose should disqualify it from charitable status",⁷⁴ but the issue for her Honour was that Aid/Watch targeted the policies and practices of inter-governmental institutions, the Government and its allies, as opposed to encouraging balanced debate.⁷⁵ These views of the minority are, in my humble opinion, the correct approach because they support the doctrine that excludes political objects from charitable purposes, and the decision in *Aid/Watch* undermines that principle. Justice Heath in the case of *Greenpeace* offers no view on the dissenters' opinions. What his Honour does do however is to acknowledge his learned colleague's view, Justice Young, in the recent *Draco* case.

Justice Heath noted Young J's reasons as to why the majority view in *Aid/Watch* ought not to be applied in New Zealand, as set out earlier in the paper,⁷⁶ however, his Honour opined that although he too is bound by the "full extent of the *Bowman* line of authority"⁷⁷ he does so with a degree of reluctance because, in his view, "there is much to be said for the majority judgment in *Aid/Watch*".⁷⁸ He noted that he does not share the concerns of Justice Young that the political system of Australia would bring a different decision because New Zealand has a mixed member proportional system of parliamentary election, select committees ensure policies are debated non-prejudicially and the New Zealand Bill of Rights Act supports freedom of thought, conscience, religion and freedom of expression.⁷⁹ How these matters, however, relate exactly to the issue of political activity and charitable purpose, his Honour does not elaborate and instead leaves such matters for the Court of Appeal or Supreme Court. Perhaps the significance of the references to the Constitution and human rights can be understood if one considers the views expressed by Justice Santow in *Public Trustee v Attorney General*. His Honour observes the dicta of Justice Dixon in *Royal North Shore Hospital of Sydney v Attorney General*⁸⁰ where Justice Dixon dealt "with the critical distinction between charitable and political objects in terms more discriminating"⁸¹ than that which had been considered previously. Justice Santow opines that his learned colleague's approach in the *Royal North Shore Hospital* case "leaves some room for looking more closely at whether, in a particular case, an object seeking to supplement the law is necessarily inconsistent with it."⁸² In his Honour's view, at least in Australia, this suggests that a trust may be charitable

72 *Ibid.*, at [56].

73 *Ibid.*

74 *Ibid.*, at [57].

75 *Aid/Watch Inc v Federal Commissioner of Taxation* above n 51, at [69].

76 *Greenpeace of New Zealand Incorporated* above n 70, at [58].

77 *Ibid.*, at [59].

78 *Ibid.*

79 *Ibid.*

80 *Royal North Shore Hospital of Sydney v Attorney General* (NSW) (1938) 60 CLR 396 (HCA).

81 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600 at [19].

82 *Ibid.*

where its object is to introduce a new law that is “consistent with the way the law is tending.”⁸³ Therefore, in applying these views, it is possible to understand how the High Court in the case of *Aid/Watch* was able to side step established English cases to ensure that decisions may be human rights compliant. It is possible therefore that the New Zealand Bill of Rights might have a similar application in similar circumstances.

I respectfully submit, however, that the majority decision judgment in *Aid/Watch* is not appropriate in New Zealand for the very reasons set out by the dissenting judges in that case and I cannot share Justice Heath’s view that “there is much to be said for the majority judgment in *Aid/Watch*.”⁸⁴

Overall, however, Justice Heath is clear in his judgment that the Charities Commission did not err in its decision in finding the Greenpeace’s purpose of promoting disarmament and peace as non-charitable because it “fall[s] foul of the admonition against political lobbying about the way in which disarmament should occur[.]”⁸⁵ Thus the next question for his Honour was whether this political activity was ancillary or independent of the entity.

In answering this, Justice Heath approved Justice France’s approach in the case of *Re Grand Lodge of Antient Free and Accepted Masons in New Zealand*⁸⁶ where his Honour in that case determined that a qualitative and quantitative assessment is required to determine if the non-charitable purpose is ancillary.⁸⁷ Justice Heath defined quantitative assessment as “one designed to measure the extent to which one purpose might have a greater or lesser significance than another.”⁸⁸ A qualitative assessment however “helps to determine whether the function is capable of standing alone or is one that is merely incidental to a primary purpose.”⁸⁹ On applying the latter assessment, his Honour confirmed that Greenpeace’s political advocacy is independent from its purposes and those purposes are not necessary to educate members of the public on the issues of relevance to Greenpeace, thus causing that purpose to fail under charitable law.⁹⁰

On the matter of quantitative assessment, his Honour confirmed that this is an exercise of judgment on the facts because “it is the way in which the philosophy is championed that must be measured against the relevant charitable purpose to determine whether, as a matter of degree, it is merely ancillary.”⁹¹ In exercising his judgment on this matter Heath J noted that the extent to which the entity relied on its political activities to further its very causes confirms that these political activities are more than just ancillary to its purposes,⁹² thus falling foul of the charitable purpose requirements. As a result, his Honour confirmed that the Charities Commission was correct in its findings. Overall, I submit that this judgment was necessary to entrench the *Bowman* line of authority, and so quash any suggestion that New Zealand may adopt the more liberal Australian approach, although it is a little disquieting that his Honour finds merit in the contentious majority views in the *Aid/Watch* case.

83 Ibid.

84 Ibid.

85 Ibid, at [64].

86 *Re Grand Lodge of Antient Free and Accepted Masons in New Zealand* [2011] 1 NZLR 277 (HC) at [49]–[51].

87 For further discussion on this approach refer to Juliet Chevalier-Watts “Freemasonry and Charity” [2011] NZLJ 52.

88 *Greenpeace of New Zealand Incorporated* above n 70, at [68].

89 Ibid.

90 Ibid, at [74].

91 Ibid, at [73].

92 Ibid.

In light of my submissions, and the very recent cases of *Draco* and *Greenpeace*, I support the view that New Zealand should resist the urge to deviate from the more conservative, albeit established, approach, which I suggest offers certainty and consistency, and respects the requirement of public benefit, without which charitable law has no basis, thus allaying any issues associated with justiciability.

REFORM OF THE CIVIL JUSTICE SYSTEM: THE NEW MEANING OF JUSTICE AND THE MITIGATION OF ADVERSARIAL LITIGATION CULTURE

BY LES ARTHUR*

ABSTRACT

Reforms to the civil justice system, which are intended to promote access to justice, have remodelled the meaning of civil justice in two fundamental ways. First, the justice delivered by court based adjudication must balance the accuracy of the decision with affordability and timeliness. In this respect it is necessary for case management principles to eschew the procedural indulgence associated with the merits of the case approach to civil procedure. Case management is underpinned by the importance of the public value of adjudication. Second, notwithstanding the social importance of adjudication, settlement is now institutionally entrenched as the primary form of dispute resolution. Negotiated justice is not antagonistic to adjudication or the civil justice system. Indeed negotiated justice resulting in settlement that reflects the legal rights of the parties is dependent on quality adjudication to “refresh” the common law. It will be argued with particular reference to the Civil Procedure Act 2010 (Vic) and the reforms to civil procedure in England and Wales, that mitigation of an adversarial disputing culture, which emphasises the partisan interests of the parties, is necessary to achieve the overarching objective of enhancing access to consensual and court imposed justice.

I. INTRODUCTION

Improving access to justice is often expressed as the overarching objective of modern reforms to the civil justice system. The fundamental problem faced by policy makers in promoting access to justice is that because public funds are limited the notion of justice must also be limited if access to justice is to be enhanced. This inherent compromise is illustrated by the overarching purpose of the Civil Procedure Act 2010 (Vic) which “is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute”.¹ A typical approach of reforms intended to promote access to court based adjudication² is to require the judiciary to manage the tensions inherent in

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1 Civil Procedure Act 2010 (Vic), s 7(1).

2 Civil Procedure Rules 1998 (UK), r 1.4 Court’s Duty to Manage Cases.

the objective of delivering quality judgments within a reasonable time at a reasonable cost.³ An important broad principle of case management is that in some circumstances, the public interest in timeliness and affordability of adjudication outweighs the private interest of the particular parties in presenting an arguable case to the court.

The procedural indulgence associated with the “merits of the case”⁴ approach to litigation is incompatible with the efficient use of judicial resources and fails to take into account other parties waiting in the litigation. The development of case management principles based on the public interest in efficient litigation recognises that adjudication is a critical public service and the importance of accessibility will sometimes transcend the private interests of the parties. The evolution of case management principles guided by the public interest in efficient use of limited judicial resources and the rejection of the merits of the case judicial philosophy is discussed by reference to two leading cases. The decision of the High Court of Australia in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR, illustrates the principle that when considering a late application by a party to amend its pleadings the Court must take into account the public interest in the efficient administration of justice and not simply the achievement of justice between the parties.⁵

Perhaps a more difficult question for case management is how the objective of delivering affordable, timely justice is reconciled with a summary judgment application to strike out a “hope-

3 Although the focus of the article is on the United Kingdom and Australian case management reforms, recent changes to the New Zealand District and High Court Rules in 2009 also reflect this trend. In particular, District Court Rule 1.3 and High Court Rule 1.2 which both state “The objective of the rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application”. See also Rod Joyce et al *The New District Court Process – A Radical Change* (NZLS, Wellington, 2009) at 1. “The core philosophy of the new rules puts access to justice ahead of competing considerations. ... The new Rules take settlement as the basic objective, the process being designed to enhance the prospects of settlement at an early stage. ... Explicit objectives include equal treatment of parties, saving expense, recognition of the need for proportionality in connection with the importance of the case, the complexity of the case, the amount of money involved and the financial positions of the parties. ... [They] are intended to enhance access to justice, both by reducing the cost of getting a dispute to the point at which meaningful settlement negotiations can occur, and by making that process accessible to lay litigants.” The impact of these reforms on New Zealand jurisprudence is beyond the scope of this article and will be addressed in more detail in the future.

4 Adrian Zuckerman “Court Adjudication of Civil Disputes: A Public Service to be Delivered With Proportionate Resources, Within a Reasonable Time and at Reasonable Cost” (2006) <www.aija.org.au> at 7.

5 See also, *John Bevan-Smith v Reed Publishing (NZ) Limited and Alan Smith* [2006] 18 PRNZ 310. This was an appeal from a High Court decision to decline adjourning a trial, where Priestly J stated that “As a matter of principle I am not prepared to grant an adjournment. The common denominator to the various problems the plaintiff faces is quite simply inadequate or last minute preparation. ... The interests of justice cannot permit a last minute adjournment of this nature to succeed merely because of preparation difficulties.” at [15]. The Court of Appeal dismissed the appeal and noted that “Case management is fundamental to the efficient administration of justice, a concept which in this case embraces the interests of not only the appellant but also the respondents and, as well, the interests of other litigants waiting to have their cases heard. But case management is, for all this, merely a means to an end ...” at [34]. The Court went on to say that they thought the High Court had “struck an inappropriate balance between case management principles and ... a fair trial ..” at [36]. Nonetheless, they dismissed the appeal, as they considered that “the appellant’s rights [had] not been irretrievably compromised” and Priestly J had been flexible in regard to trial arrangements, at [37].

less case". The *Three Rivers* litigation,⁶ which one writer has described as a "colossal wreck",⁷ illustrates diverging judicial opinion on the relationship between case management principles and the right of a party to invoke interlocutory procedures to seek evidence in support of a "hopeless case". The principled tapering of civil procedure to take into account resource constraints and the public interest in the timely delivery of judgments, is essentially to achieve the overarching objective of enhancing access to the determination of proceedings by the Court. There is also little doubt that the objectives of case management require the co-operation of lawyers to assist the Court with the prompt resolution of disputes.

Indeed the mitigation of adversarial legal culture is a fundamental objective of both the Victoria and Woolf reforms.⁸ A second, and perhaps more fundamental, reshaping of civil justice is that civil justice reforms explicitly encourage the private, early settlement of disputes. Again the Civil Procedure Act 2010 (Vic) provides a clear example of the importance of settlement in achieving the overarching objective of promoting access to justice. Section 7(2) states that the overarching purpose that is outlined in s 7(1) may be achieved by "the determination of the proceeding by the court",⁹ "agreement between the parties",¹⁰ or by "any appropriate dispute resolution process agreed to by the parties; or ordered by the court".¹¹

This institutional recognition that settlement is now formally incorporated into the architecture of civil justice raises controversial questions about the relationship between adjudication and negotiated justice.¹² Further, if the diversion of disputes from the Court to private settlement is "just about settlement rather than just settlement".¹³ The integrity of settlement as the primary process for resolving disputes in the civil justice system is undermined. The argument presented in this paper is that the relationship between adjudication and settlement is complementary. Settlement is not anti adjudication and indeed the quality of settlement will often depend on the development of the common law. This is because parties will often bargain in the "shadow of the law"¹⁴ and accordingly settlement will be based on predicted legal rights.

6 *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558 (QB); *Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 15 (CA); *Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16 [2001] 2 All ER 513.

7 Zuckerman above n 4, at 12.

8 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996) which led to what are known as the Woolf reforms to civil justice, introduced in England and Wales on 26 April 1999 and referred to as the Civil Procedure Rules 1998 No 3132 (L 17) (UK); Ministry of Justice (UK) *Civil Procedure Rules: Practice Direction Protocols* <www.justice.gov.uk>; The reforms recommended in the Australian State of Victoria, Victorian Law Reform Commission *Civil Justice Review: Report* (2008) <www.lawreform.vic.gov.au> which led to the Civil Procedures Bill 2010 (Vic).

9 Civil Procedure Act 2010 (Vic), s 7(2)(a).

10 *Ibid*, s 7(2)(b).

11 *Ibid*, s 7(2)(c)(i) and (ii).

12 See Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2009); Owen M Fiss "Against Settlement" (1983) 93(6) *Yale Law Journal* 1085.

13 *Ibid*, at 117.

14 A phrase originally used by Robert H Mnookin and Lewis Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88(5) *Yale J Int'l Law J* at 950.

A key element in promoting early settlement without undue formality in exchanging information critical to settlement negotiations is pre action protocols.¹⁵ While it seems reasonably clear that pre action protocols have contributed to a dramatic reduction in cases filed in England and Wales,¹⁶ the effect of the protocols on the objective of reducing the cost of resolving disputes is more problematic.¹⁷ As with the efficient delivery of adjudication it will be suggested that a co-operative, rather than adversarial approach by lawyers and their clients to the exchange of information is necessary to achieve the overarching objective.

II. THE ROLE OF CASE MANAGEMENT IN RESHAPING THE MEANING OF CIVIL JUSTICE

The purpose of case management, which refers to judicial rather than party control of civil proceedings, is to ensure that “a civil proceeding is managed and conducted in accordance with the overarching purpose”.¹⁸ This means that the determination of the proceeding by the Court must balance the “just” resolution of the dispute with timeliness and cost effectiveness.¹⁹ In light of this objective it seems clear that in some circumstances justice between the parties will be compromised to satisfy the broader social interest in the delivery of affordable justice within a reasonable time. Practical examples of the possible compromise to justice for individual parties explicitly arise when the court is required to exercise its discretion whether or not to grant procedural amendments. While the permissive approach to procedural amendments associated with the “merits of the case”²⁰ approach focuses on the right of a party to advance an arguable case, this approach is largely oblivious to the overarching objective of modern law reforms. Perhaps a more controversial test for the judicial philosophy expressed by the objective of case management is the appropriate allocation of judicial resources to a “hopeless case”. Before considering these practical questions in more detail it is useful to discuss the public value of adjudication and why party-driven proceedings are inimical to public interest in the efficient delivery of quality court-based adjudication.

A fundamental objective of civil justice reforms is to improve access to court-based adjudication.²¹ While it is important that citizens have effective access to the courts for the vindication of legal rights, quality adjudication also fulfils a valuable public function that transcends the partisan interests of the parties. The social purpose of adjudication is partly that it provides “a framework in which business can be done and investment can be protected, thus supporting economic activity and development.”²² The importance of adjudication to the resolution of commercial disputes is also discussed by Heydon J in *Aon*:²³

15 Civil Procedure Rules 1998 (UK), r 1.1(1); Civil Procedure Act 2010 (Vic), s 7; Civil Dispute Resolution Act 2011 (Cth). In New Zealand the process is managed through the exchange of information capsules in the Court as required by the District Court Rules 2.14–2.17.

16 John Peysner and Mary Seneviratne *The Management of Civil Cases: the Courts and the Post Woolf Landscape* (Department for Constitutional Affairs, London, 2005) at 8 and 35.

17 Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 41.

18 See Civil Procedure Act 2010 (Vic), s 47(1) and Civil Procedure Rules 1998 (UK), r 1.2(1) Overriding Objective.

19 Civil Procedure Act 2010 (Vic), s 7(1).

20 Zuckerman above n 4, at 7.

21 Civil Procedure Act 2010 (Vic), s 7(1); Civil Procedure Rules 1998 (UK), r 1.1.

22 Genn, above n 12, at 17.

23 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [137].

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. ... The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

More broadly as observed by Jolowicz “the broad social goals of civil justice are to demonstrate the effectiveness of the law and to allow judges to perform their function of clarifying, developing and applying the law”.²⁴ The public value of adjudication in this respect is obviously not limited to commerce, as this reasoning applies to all jurisdictions including family and criminal law. Recognition of the public value of adjudication assists with development of case management principles, which consider the social purpose of adjudication in balancing the partisan interests of the parties with the interests of the broader community in the efficient use of judicial resources. These wider interests in the public value of adjudication are not a prominent feature of the “merits of the case” approach to adjudication.

The importance attributed to achieving justice between the parties, which is at the heart of the merits of the case approach and consequent procedural indulgence, is illustrated by the statement of Bowen LJ in his dissenting judgment in *Cropper v Smith* (1884) 26 Ch D 700, who stated:²⁵

I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party.

This focus on interparty justice is reinforced by his Lordship’s view that “I have found in my experience that there is one panacea which heals every sore in litigation and that is costs.”²⁶

A more recent case that explicitly rejects the proposition that case management should oust justice between the parties is *State of Queensland v JL Holdings* (1997) 189 CLR 146 where the Court stated that:²⁷

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice and no principle of case management can be allowed to supplant that aim.

Importantly the Court later said:²⁸

... Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out of raising an arguable defence, thus precluding the determination of an issue between the parties.

These statements bluntly pose the fundamental question: in what circumstances ought the partisan interests of the parties be outflanked by the public interest in the efficient administration of justice? A useful starting point for this discussion is the assumption made by policy makers that party driven litigation, motivated by the partisan interests of the parties is often an impediment to

24 JA Jolowicz *On Civil Procedure* (Cambridge University Press, Cambridge, 2000) at 71, cited in Genn, above n 12, at 18.

25 *Cropper v Smith* (1884) 26 Ch D 700 at 710.

26 *Ibid*, at 711.

27 *State of Queensland v JL Holdings* (1997) 189 CLR 146 at 154.

28 *Ibid*, at 155.

the purpose of civil procedure; discovery of the true facts. The impact of unrestrained adversarial conduct on the efficient administration of justice is described by Davies.²⁹

The adversarial imperative is the compulsion which litigants and especially their lawyers have to see the other side as the enemy who must be defeated; the ‘no stone unturned mentality’ is a compulsion to take every step which could conceivably advance the prospects of victory or reduce the risk of defeat. Both, in turn increase the labour intensiveness and consequently the cost and delay of dispute resolution and, especially as between parties of unequal means, render it unfair.

In Lord Woolf’s view effective control of civil proceedings by the Court was necessary to prevent the tactical use of pre-trial procedures “...to intimidate the weaker party and produce a resolution of the case which is either unfair or is achieved at a grossly disproportionate cost or after unreasonable delay”.³⁰

A fundamental purpose of case management is to improve the efficiency of adjudication by mitigating the adversarial litigation culture described by Geoffrey Davies and Lord Woolf. The role of the judiciary in mitigating adversarial culture, which focuses on the partisan interests of the parties, is starkly illustrated by provisions that direct judges to encourage the parties “to cooperate with each other in the conduct of the civil proceedings”³¹ “to settle the whole or part of the civil proceedings”³² and “to use appropriate dispute resolution”.³³

An innovative feature of the Civil Procedure 2010 (Vic) Act is that the bundle of specific overarching obligations that help shape the meaning of “co-operation” apply to lawyers and the parties.³⁴ The bundle of duties imposed on the parties and their lawyers include the “obligation to act honestly”,³⁵ “cooperate in the conduct of civil proceedings”,³⁶ “disclose existence of documents”,³⁷ “narrow the issues in dispute”,³⁸ “to ensure costs are reasonable and proportionate”,³⁹ “minimise delay”,⁴⁰ and “use reasonable endeavours to resolve the dispute.”⁴¹ These duties mesh with and are intended to reinforce the purpose of active case management, which is to ensure that proceedings, if necessary, are conducted in accordance with the overarching purpose.⁴²

The overall intention of the overarching obligations is to bolster the lawyer’s paramount duty to the Court.⁴³ The duty of the Court to facilitate the efficient administration of justice relies in

29 Geoffrey L Davies “Fairness in a Predominantly Adversarial System” in Helen Stacey and Michael Lavarch (eds) *Beyond the Adversarial System* (Federation Press, Sydney, 1999) 102 at 111.

30 Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor’s Dept, London, 1995) at Ch 5.

31 Civil Procedure Act 2010 (Vic), s 47(3)(d)(i).

32 Ibid, s 47(3)(d)(ii).

33 Ibid, s 47(3)(d)(iii) r 1.4 (2) (a) active case management includes “encouraging the parties to cooperate with each other in the conduct of proceedings”.

34 Ibid, s 10 defines the participants. Section 12 provides that subject to the paramount duty of the court the overarching obligations prevail over any legal or contractual obligation to the extent that the obligations are inconsistent).

35 Ibid, s 17.

36 Ibid, s 20.

37 Civil Procedure Act 2010 (Vic), s 26.

38 Ibid, s 23.

39 Ibid, s 24.

40 Ibid, s 25.

41 Ibid, s 22.

42 Ibid, s 7. See also Peysner and Seneviratne above n 16, at 12–13 where they discuss the culture of co-operation.

43 *Rondel v Worsley* [1969] 1 AC 191 sets out the common law position.

large measure on the mitigation of the adversarial litigation culture that flourished under the merits of the case approach to the conduct of litigation. For the reasons outlined above, court based adjudication is an essential public good that transcends the partisan interests of the parties to a particular dispute. The objective of case management is to deliver prompt, affordable justice. This objective is incompatible with trial tactics that result in the waste of public resources and the loss of public confidence in courts to deliver timely decisions. If a party engages in conduct that is contrary to the public interest in the efficient administration of justice, in order to promote partisan interests, case management principles require the Court to adopt a firm approach in determining applications to vacate trials.

The impact of case management principles on the adversarial conduct of litigation is illustrated by the reasoning of the High Court of Australia in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR. In *Aon* the High Court of Australia was required to decide the scope of case management rules⁴⁴ to the plaintiff's application for an adjournment of a trial to make substantial amendments to its statement of claim. The application was made at the start of a four week trial and resulted from the plaintiff, the Australian National University (ANU), settling with its insurers and then seeking to make substantial amendments to its statement of claim against its insurance brokers *Aon*. The trial Court and the Supreme Court of the Australian Capital Territory reasoned, following the decision of the High Court of Australia in *State of Queensland v JL Holdings* (1997) 189 CLR 146, that the adjournment should be allowed.

JL Holdings stood as authority for the proposition that case management did not oust justice as between the parties, as the paramount consideration in whether or not to grant a procedural amendment. This reasoning was emphatically rejected by Gummow, Hayne, Crennan, Kiefel and Bell, who stated that:⁴⁵

Rule 21(2)(b) indicates that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and other litigants.

An award of indemnity costs to compensate the defendants, which was unanimously agreed by the Supreme Court,⁴⁶ obviously has no bearing on the wasted time of the court and public confidence in the efficient administration of justice. A critical element in the decision was that there was no satisfactory explanation as to why ANU sought the amendment. While there was no suggestion that ANU's amendment "... involved any nefarious, illegitimate, tricky or improper element,"⁴⁷ nevertheless the Court observed that the amendment "... raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so".⁴⁸

As discussed above, the idea of overriding obligations, introduced particularly by the Civil Procedure Act 2010 (Vic), reinforces the idea that lawyers have a positive duty to assist the Court with efficient and fair resolution of disputes. Strategic manoeuvres that are compatible with an unrestrained adversarial ethos focusing on the partisan interests of parties do not always fit com-

44 Court Procedure Rules 2006 (ACT) 21(2) "Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving (a) the just resolution of the real issues in the proceedings; and (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties."

45 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [93].

46 *Ibid*, at [3].

47 *Ibid*, at 179.

48 *Ibid*, at [4] per French CJ.

fortably with the overarching objective of the fair and timely resolution of disputes by the Court.⁴⁹ The social importance of timely adjudication is discussed by Heydon J who observed that:⁵⁰

... While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is seen as especially desirable for commercial litigation. ... Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest.

III. PROCEDURAL INDULGENCE IN THE CONTEXT OF A HOPELESS CASE: *THREE RIVERS* LITIGATION

A more vexed question for the remodelled notion of justice is the allocation of judicial and party resources in circumstances where a party is determined to pursue a “hopeless case”. A spectacular example of such a case is the *Three Rivers* litigation.⁵¹ The trial Court allowed a summary judgment application to strike out the proceedings because it:⁵²

... reached the conclusion that the BCCI depositors had no realistic prospect of establishing that the Bank of England officials knowingly acted unlawfully with the intention of or foresight of damaging them and therefore gave summary judgment in favour of the bank.

The decision was affirmed by the Court of Appeal, and subsequently overturned by the House of Lords. A majority of their Lordships emphasised the importance of justice between the parties. Lord Hutton stated:⁵³

... I think that justice requires that the plaintiffs, after discovery and interrogation should have the opportunity to cross examine the Bank’s witnesses. ... The fact that a plaintiff does not have direct evidence as to the belief or foresight or motives of the defendant is not in itself a reason to strike out the action.

Arguably, a firmer grasp of the procedural philosophy that underpins case management objectives is apparent in the minority decision of Lord Hobbhouse who said:⁵⁴

... cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only an appropriate share of the court’s resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party’s conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.

As Zuckerman commented, ultimately the plaintiff’s day in court:⁵⁵

... proved a futile exercise. It collapsed on day 256. The cost to the defendants alone are thought to be in the region of 80 million pounds. The costs in terms of judicial time are incalculable.

49 Mediation commenced on the first day appointed for trial. Partial settlement of ANU’s claims was reached two days later.

50 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR at [137].

51 *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558 (QB), cited in Zuckerman, above n 4, at 12.

Three Rivers DC v Bank of England (No 3) [2000] 2 WLR 15 (CA), Auld LJ dissenting.

Three Rivers DC v Bank of England (No 3) (Summary Judgment) [2001] UKHL 16; [2001] 2 All ER 513.

52 Zuckerman, above n 4, at 12.

53 *Three Rivers DC v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16; [2001] 2 All ER 513, at [147]-[148].

54 *Ibid.*, at [153].

55 Zuckerman, above n 4, at 12.

Importantly this case was about the amount of procedural indulgence permissible to establish a credible factual foundation on which to base a cause of action. The case did not involve a novel or contentious point of law. In the view of the majority of judges who heard the summary judgment application, the plaintiffs had no realistic prospect of establishing the facts necessary to succeed within the existing law. If a realistic prospect of establishing the necessary facts had been denied the plaintiffs on efficiency grounds alone, the plaintiffs could claim that access to justice had been denied. As with procedural amendments, the question of justice between the parties in the context of a hopeless case must now be balanced with a broader view of the administration of justice that takes into account the reality that public resources are limited.

Unlike the *Aon* litigation there is no suggestion that judicial or party resources were wasted by the tactical manoeuvrings of either party. That said, it is possible that the specific positive obligations outlined in the Civil Procedure Act 2010 (Vic), particularly in relation to the disclosure of the existence of critical documents,⁵⁶ the duty to ensure costs are reasonable and proportionate,⁵⁷ and the duty to narrow the issues in dispute,⁵⁸ may have helped to prevent the incalculable waste of judicial time.

IV. SETTLEMENT AS AN INTEGRAL PART OF CIVIL JUSTICE SYSTEM

The first part of this paper has contended that the overarching objectives of civil justice reforms require the development of case management principles that are required to balance justice between the parties with the broader purpose of promoting a wider view of access to justice. In the context of courtbased adjudication, access to justice includes the public interest in timely delivery of judgments at reasonable cost. This approach recognises that the public value of adjudication is undermined to the extent that parties are unwilling or unable to consider adjudication because of cost and or delay. Perhaps a more fundamental challenge to the notion of civil justice comes from the institutional emphasis on the desirability of private settlement as the primary mode of dispute resolution.

Given the public value of adjudication described above, deep questions arise concerning the nature of the relationship between adjudication and settlement in modern civil justice systems. Can settlement be legitimately regarded as a form of civil justice? Does settlement undermine the public value of adjudication? Should settlement processes be encouraged or compelled? How should we decide which cases should not settle? These are important questions. The view taken in this paper is that adjudication and settlement are complementary rather than antagonistic processes in so far as quality settlement often depends on the development of common law by judges. Historically, settlement has been the traditional process of resolving disputes.⁵⁹

The purpose of the reforms discussed in this paper is to promote just settlement without the delay and cost associated with settlement reached after expensive and time-consuming interlocutory procedures. It will be suggested that the effectiveness of pre-action protocols that are a criti-

56 Civil Procedure Act 2010 (Vic), s 26.

57 *Ibid.*, s 24.

58 *Ibid.*, s 23.

59 See LM Friedman “The day Before the Trials Vanished” (2004) 1(3) *Journal of Empirical Legal Studies* 689 at 689, where he stated that “[the] trial was never the norm, never the model way of resolving issues and solving problems in the legal system”.

cal element in the just settlement of disputes is undermined by adversarial practices that focus on partisan interests of clients, rather than the just resolution of the dispute.

V. SETTLEMENT AS THE PRIMARY MODE OF DISPUTE RESOLUTION: PRE-LITIGATION REQUIREMENTS

The importance of settlement in achieving the overarching objective of modern law reforms is made clear by the requirement that parties comply with extensive pre-litigation protocols. The basic features of pre-action protocols are outlined in s 34 of the Civil Procedure Act 2010 (Vic). In line with the Woolf reforms in England and Wales⁶⁰ and Australian federal legislation,⁶¹ parties are expected to take reasonable steps to resolve the dispute without the need for civil proceedings in a court. Reasonable steps include the exchange of information and documents critical to the resolution of the dispute. Parties are also required to consider options for resolving the dispute “including but not limited to resolution through genuine and reasonable negotiations or appropriate dispute resolution.”⁶² Cost sanctions can be imposed by the Court if the parties commence proceedings without complying with the pre-litigation procedures.⁶³

If the question of the success of pre-action protocols is measured simply in terms of diverting cases away from the Court, the protocols in England and Wales have been an unqualified success. The conclusion of the UK Civil Procedure White Book that the protocols have been a success “without a doubt”⁶⁴ is largely based on statistics that indicate that new litigation, post civil procedure reform, has reduced by 80 per cent in the High Court and 25 per cent in the County Court.⁶⁵ A more nuanced approach to the effectiveness of pre-action protocols points to the front loading of costs and in some cases increasing the costs of litigation.⁶⁶ What is clear is that pre-action protocols seek to encourage a sea change in the content and form of pre-issue negotiations. Requiring the parties to act reasonably in exchanging information⁶⁷ and to engage in genuine and reasonable negotiations is far removed from traditional adversarial bargaining strategies. Unregulated pre-

60 Pre-action protocols were implemented under the new Civil Procedure Rules 1998 which govern practice and procedure in the civil division of the Court of Appeal, the High Court and the County Courts.

61 Civil Dispute Resolution Act 2011 (Cth).

62 Civil Procedure Act 2010 (Vic), s 34(2)(b).

63 Ibid, Part 3.2.

64 Lord Justice Waller and IR Scott (eds) *Civil Procedure: The White Book Service 2009* (Sweet & Maxwell, London, 2009) at 2306–2307. Cited in Michael Legg and Dorne Boniface “Pre-action Protocols” (paper presented to Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, Australia, (May 2010) <www.aija.org.au> at 5.

65 Ibid.

66 Genn, above n 12, at 56; Michael Zander “The Woolf Reforms: What’s the Verdict?” in Deirdre Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford University Press, Oxford, 2010) at 418; See also Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (TSO, London, 2009) at 345, in which he found that generally there was a high degree of unanimity that specific protocols (which apply to personal injury claims, judicial review cases, defamation claims, professional negligence cases, clinical disputes, disease and illness claims and housing disrepair cases) served a useful purpose, but that the Practice Direction that operated as the default position for disputes not subject to a specific protocol should be abandoned.

67 Civil Procedure Rules 1998 (UK), r 4.1.

action dialogue was often characterised by tactical gamesmanship⁶⁸ involving exaggerated claims with scant regard to the available evidence.⁶⁹

Aside from the contentious and important question of whether pre-action protocols reduce the cost of dispute resolution, the diversion of cases away from court-based adjudication raises fundamental jurisprudential questions about whether or not settlement should be regarded as a legitimate objective of the civil justice system⁷⁰ and further, the nature of the relationship between adjudication and settlement. In relation to the first question, it is clear from the overarching objectives referred to above⁷¹ that settlement must be “just”. If the matter is resolved by the Court “just” means the application of the correct law to the judicially determined facts. The application of the substantive law is also important when parties negotiate a settlement based on predicted legal rights. Pre-action protocols are intended to assist parties to bargain in “the shadow of the law”⁷² by requiring the disclosure and exchange of information critical to the resolution of the dispute.

While it is not clear how many cases diverted from the courts have settled in the “shadow of the law,” research indicates that parties who engage in collaborative law⁷³ mainly settle on the basis of anticipated legal entitlements.⁷⁴ Obviously, if the facts remain contested or a party wishes to argue a novel point of law, settlement is not normally appropriate. It is also possible that a legally correct settlement will not satisfy the interests of the parties if they are involved in a personal or business relationship or require a settlement that is beyond the reach of the “limited remedial imagination of the law”.⁷⁵ A voluntary negotiated settlement of a dispute within a framework of a party’s predicted legal rights seems to be a “just” resolution. The private nature of settlement does not of itself detract from the fairness of the settlement. More problematic is the mandatory referral by the Court of cases to alternative dispute resolution.⁷⁶

In England and Wales active case management includes “encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the

68 Dick Greenslade “A Fresh Approach: Uniform Rules of Court” in Adrian Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Oxford, Clarendon Press, 1995) at 19–120.

69 For a detailed account of negotiating strategies that support the philosophy of pre-action protocols see Robert Mnookin, Scott Peppet and Andrew Tulumello *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Belknap Press, Massachusetts, 2004).

70 Fiss, above n 12.

71 Kornhauser, above n 14.

72 Ibid.

73 Where parties agree in advance that lawyers participate primarily for settlement purposes and cannot represent either party in litigation. See Pauline H Tesler *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (ABA, Chicago, 2001).

74 See *Custody, Access and Child/Spousal Support: A Pilot Project* (Ellis Research Associates, Department of Justice, Ottawa, 1995) <www.justice.gc.ca> cited in Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008).

75 Carrie Menkel Meadow “The Trouble with the Adversary System in a Multicultural World” (1967) 38 *Wm & Mary L Rev* 5, at 25.

76 Civil Procedure Act 2010 (Vic), s 66. In England, active case management includes “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating their use of such procedure”. Civil Procedure Rules 1998 (UK), r 1.4(2)(a). See also the Court’s comment in *Halsey v Milton Keynes General NHS Trust* FCA [2004] 4 All ER 920 at [10]. “If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.” See also the Australian decision in *Australian Competition & Consumer Commission v Lusk Pty Ltd* [2001] FCA 600.

use of such procedure.⁷⁷ In *Halsey v Milton Keynes*⁷⁸ the English Court of Appeal held that the Court had no power to order mediation. Further, the Court would decide whether a party's refusal to attend mediation was unreasonable on the facts.⁷⁹

In most cases ADR is synonymous with mediation. The problem is particularly acute if the focus of the mediation "... is just about settlement rather than just settlement".⁸⁰ Quite aside from questions relating to the voluntary nature of mediation or a citizen's constitutional right to a trial, which is delayed rather than pre-empted by compulsory mediation, it seems wrong in principle to undermine the public value of adjudication by compulsory reference to ADR. Although Lord Woolf acknowledged the benefits of mediation he did not propose that mediation should be compulsory, stating that:⁸¹

I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the Civil Courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole.

This point serves to reinforce the importance of adjudication and hence promote meaningful access to adjudication in the ways described in the first part of this paper.

That said, adjudication, even if efficiently managed by case management principles, is likely to be more expensive and more time consuming than settlement. The purpose of pre-action protocols is to promote early settlement in accordance with predicted legal rights. If settlement is not achieved, pre-action protocols contribute to promoting efficient adjudication by narrowing down the issues in dispute.

VI. COMPLEMENTARY RELATIONSHIP BETWEEN ADJUDICATION AND SETTLEMENT

Modern reforms to the civil justice system clearly contemplate that the just resolution of disputes can be achieved by either court-based adjudication or settlement. This paper has suggested that settlement is not in itself antagonistic to adjudication providing the public value of adjudication is not eroded by compulsory court-directed mediation.⁸² Compulsory attendance at mediation, particularly if the focus of the mediation is resolution of a civil dispute without regard for legal rights, does indeed rightly provoke Dame Hazel Genn's memorable question "ADR and civil justice:

77 Civil Procedure Rules 1998, r 2(a).

78 *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920.

79 Civil Procedure Rules 1998, r 1.4(2); Part 4.4 provides that, in relation to costs, the Court can take into account whether the parties have tried ADR. Cf *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1479 (Ch) where the successful defendant was denied costs because they had not agreed to mediation. Also Lord Justice Clarke's speech – at the mediation conference 2001 – Court has jurisdiction to order mediation. Cited in Genn, above n 12, at 102.

80 Genn, above n 12, at 117.

81 Lord Woolf, *Interim Report* above n 28, at ch 4 [4].

82 In New Zealand the District and High Court Rules provide for mediation as a means of dispute resolution providing the parties agree to it. See District Court Rules 2009 Court, r 1.7 and the Judicature Act 2008 Schedule 2 Part 7, Sub 8 7.79(5).

what's justice got to do with it?"⁸³ This position is in stark contrast with pre-litigation requirements that compel parties to disclose critical information necessary to allow legal representatives to evaluate legal merits in light of factual background to the dispute. Even if the case does not settle, the exchange of documents is intended "to clarify and narrow the issues in dispute in the event that civil proceedings are commenced".⁸⁴ One English District Judge noted that pre-action protocols have had a positive impact on the efficient conduct of proceedings in so far as:⁸⁵

...the legal profession generally are looking much earlier at the files before proceedings, [and] directing their minds to all those aspects that they formerly tended to leave way into the case, and very often close to the end of it.

Justice Dyson observed in the *Burrells Wharf* case⁸⁶ that the benefit of disclosure before proceedings are issued saves costs by closely defining the issues at an early stage and assists to dispose fairly of anticipated litigation.⁸⁷ Pre-action protocols have attracted a number of critics who claim that they result in the front loading of costs⁸⁸ and the potential for satellite litigation.⁸⁹

VII. CONCLUSION

In an eloquent criticism of the role of the court and counsel in the conduct of the *Aon* litigation Justice Heydon remarked that:⁹⁰

The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.

Reforms to civil justice have proceeded on the assumption that unrestrained adversarial litigation culture is a structural impediment to the efficient functioning of the civil justice system. Case management principles that clearly define the objectives of court-based adjudication signal the determination of policy makers "to change the whole culture, the ethos applying in the field of civil litigation."⁹¹ The purpose of changing litigation culture, which is illustrated by the injunction that judges encourage the parties to co-operate in the conduct of litigation, is intimately connected with reshaping the traditional idea of what constitutes civil justice. The focus of judicial justice is

83 Genn, above n at 12, at 78. As with negotiated settlements the position is quite different if properly represented parties chose to ignore legal rights to foster personal or business relationships. In New Zealand it is noteworthy that family mediations concerning child care issues must recognise that the best interests of the child are paramount statutory provision. The pilot mediation scheme in Auckland is voluntary and mediators are drawn from a panel of senior barristers.

84 Civil Procedure Act 2010 (Vic), s 34(1)(b).

85 Peysner and Seneviratne, above n 16, at 11–12.

86 *Burrells Wharf Freehold Ltd v Galliard Homes Ltd* [1999] 2 EGLR 81.

87 *Ibid*, at 83.

88 Zander, above n 17.

89 Legg and Boniface, above n 64, at 22.

90 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR, at [156].

91 The Lord Chief Justice, announcing the general Practice Direction of 24 January 1995 (1995) 1 WLR 262. Cited in Simon Roberts and Michael Palmer *Dispute Processes: ADR and the Primary Forms of Decision-making* (Cambridge University Press, Cambridge, 2005).

no longer exclusively on the partisan interests of the parties. The efficient administration of justice now explicitly requires the judiciary to balance the interests of the parties with the overriding public interest in meaningful access to the Courts. Given the public interest in prompt adjudication the view that “costs are a panacea”⁹² is no longer appropriate. This consideration applies particularly in circumstances where the delay arises from parties seeking a tactical advantage.

The effectiveness of case management in achieving overarching objectives is largely dependent on acceptance by the judiciary and lawyers that the public value adjudication and the corresponding public interest in the efficient use of judicial resources is incompatible with an unrestrained adversarial culture. Culture change is also at the core of the effectiveness of early settlement initiatives. Settlement is now institutionally entrenched as the primary mode of dispute resolution. It has been argued in this paper that “negotiated justice” is not necessarily anti-adjudication. Providing settlement is based on the predicted legal rights of the parties, unless the parties choose to incorporate non-legal interests into the agreement. There is no principled reason why settlement should not be considered a legitimate aim of the civil justice system. Even if the dispute is not resolved by the informal exchange of information required by pre-action protocols, the disclosure of information should assist the court with the early identification of the issues and thereby assist with the efficient management and disposal of the case. Perhaps more testing than the question of the legitimacy of the primary role of settlement in resolving civil disputes, are questions relating to the cost effectiveness of pre-action protocols. The front loading of costs and the possibility of satellite litigation have been identified as concerns that completely undermine the purpose of pre-action protocols. It is possible that technical amendments, including tailoring the requirements of protocols to particular causes of action, may increase their effectiveness. Ultimately, however, the effectiveness of pre-action protocols is largely dependent on lawyers and parties abandoning traditional adversarial negotiations and embracing the broader philosophy of rules that encourage the early, just and proportionate resolution of disputes with minimal legal formality.

92 *Cropper v Smith* (1884) 26 Ch D 700 at 711.

LEGAL POSITIVISM IN THE PRE-CONSTITUTIONAL ERA OF LATE NINETEENTH-CENTURY IRAN

BY SADEQ BIGDELI*

I. INTRODUCTION

The Iranian constitutional movement (1906–1911) occurred at a time when revolution was in the air in a number of peripheral nations. In that period of the early twentieth century, a series of uprisings occurred in the third world countries including the Indian nationalist movement of 1905–1908 against the British, the Maji Maji uprising in Tanganyika in 1905–1907 against German rule, the Bambata (Zulu) Rebellion of 1906 in South Africa against the British, the Young Turks Revolution of 1908, the Mexican Revolution of 1910 and the Chinese Revolution of 1911–1912.¹ While the essence of the Indian and African movements was anti-colonial, pro-democracy ideas were dominant in the latter three (Ottoman Empire, Mexico and China) alongside the Russian (1905), Iranian (1906) and the Portuguese (1910) movements/revolutions.² A satirical Iranian journal (*Journal of Despotism*) at the time remarkably referred to these democratic movements around the world as “siblings”.³

In Iran, the so-called tobacco movement of 1890–1891, which is recognised as a precursor of the constitutional movement, did carry a spirit of anti-colonialism. It resulted in the annulment of the monarch’s concession to a British citizen regarding production, sales and marketing of tobacco in Iran.⁴ The Iranian constitutional movement of 1906, however, centered on a national quest for positivist rule of law – an inclination that was largely due to the intellectual efforts of the so-called enlightened thinkers of the late nineteenth-century Iran. This handful of intellectuals was influenced by the liberal positivist discourse of nineteenth-century Europe. On the one hand, due to the natural appeal of liberal philosophy for those living under tyranny, the pioneers of the constitutional movement in Iran were undoubtedly inspired by the enlightenment principles embodied in the United States Declaration of Independence and the [French] Declaration of the Rights of Man and of the Citizen. The *Resaleye Yek Kalameh* (The Book of One Word), written in 1870, is

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1 Janet Afary *The Iranian Constitutional Revolution, 1906-1911* (Columbia University Press, New York, 1996) at 37.

2 Charles Kurzman *Democracy Denied, 1905-1915: Intellectuals and the Fate of Democracy* (Harvard University Press, Cambridge, 2008) at 5.

3 *Ibid.*, at 6.

4 For a brief account of the tobacco movement see Nikki Keddie *Roots of Revolution: An Interpretation of History of Modern Iran* (Yale University Press, New Haven, 1981) at 67. For the role of merchants in the tobacco movement see Afary, above n 1, at 29.

an example in point where the author has made the first theoretical attempt in history to trace the principles of the Declaration of the Rights of Man and of the Citizen in the *Quran*.⁵

Yet, on the other hand, legal positivism was dominant in the consciousness of prominent Iranian intelligentsia. This was not only because of the emergence of this political and legal philosophy throughout the nineteenth century, but also because of what legal positivism had to offer to the lawless society of Iran at the time. This claim goes hand in hand with the understandings of British positivists in early twentieth century who noted that “positivism” played “so great a part” in the democratic movements across the world.⁶

The paper seeks to trace elements of legal positivism in a chapter of Iranian intellectual history during the years preceding the constitutional movement. Mirza Malkum Khan (1833–1908) and Talebov (1832–1910) are among the most influential thinkers of the pre-constitutional era who have specifically written on modern law concepts and whose ideas reflect the positivist line of thinking. While Mirza Malkum Khan is widely acknowledged among historians as a liberal positivist, Talebov is depicted as a rather socially oriented intellectual.⁷ Without denying other strands of thought, including Marxism in Talebov’s writings, this paper contests this view by highlighting his classical positivist writings. In demonstrating this point, the principle methodology used throughout this paper is to present traces of legal positivist ideas primarily through translations of block quotes selected from both authors’ own writings. Commentaries of prominent Iranian historians have also been drawn upon to provide context. Most of the translations provided in this paper are presented for the first time. In particular, in the case of Talebov, some of the translated texts provided in this paper have remained unexplored even in the Farsi literature.

II. MIRZA MALKUM KHAN: A HARD-CORE LEGAL POSITIVIST

Mirza Malkum Khan (Malkum)⁸ is cited as the most influential figure among his peers in Iran’s pre-constitutional era.⁹ His personal character and his political career are both clouded with enormous controversy, attracting admiration as well as hostile accounts. There is no doubt, however, that his ideas, including most notably the quest for the rule of law, form an indispensable part of modern Iranian legal thought. Malkum’s thoughts had a significant influence on the legal consciousness of the Iranian early constitutionalists.

5 See Mirza Yousef Khan Mostashar al-Dowleh *Yek Kalameh (the Book of One Word)* (first pub. 1870), in Mohammad Sadeq Feiz (ed) (Sabah, Tehran, 2003).

6 Kurzman, above n 2, at 6.

7 Fereydoon Adamiyat *Fekre Azadi va Moqadameye Nehzate Mashrootiyat* (The Idea of Liberty and the Interlude of the Constitutional Movement) (Sokhan, Tehran, 1961) at 98.

8 For a short biography see Farzin Vahdat *God and Juggernaut: Iran’s Intellectual Encounter with Modernity* (Syracuse University Press, New York, 2002) at 30, 94–98.

9 Fereydoon Adamiyat *Ideologiyeh Nehzate Mashrootiyat* (The Ideology of Constitutional Movement) (Roshangaran, Tehran, 1971); Fereydoon Adamiyat *Andishehaye Miraza Aqa Khan Kermani* (The Thoughts of Mirza Agha Khan Kermani) (Payam, Tehran, 1978); Hasan Ghazi-Moradi *Nazariyeh Pardaze Nosaziye Siyasi dar Sadre Mashrooteh* (The Theoretician of Political Modernization in Early Era of the Constitutional Revolution) (Tehran, 2008); Hamid Algar *Mirza Malkum Khan; A Study in the History of Iranian Modernism* (University of California Press, Berkeley, 1973); Homa Nategh *Ma va Mirza Malkum Khanhaye Ma* (We and our Mirza Malkum Khan) (Tehran, 1975); Mashallah Ajoudani *Mashrouteye Irani va pishzaminehay nazariye-ye Velayate Faqih* (Iranian Constitutional Monarchy and the Backgrounds for the Theory of the Guardianship of Islamic Jurists) (Fasle Ketab, London, 1997); Abdol-hari Haeri *Tashayo’ va Mashroutiyat Dar Iran* (Shi’ism and Constitutional Monarchy in Iran) (Amir Kabir, Tehran, 1981).

Mirza Malkhum Khan Nazem al-Dowleh (1833–1908) was born into an Armenian family in Esfahan. He was sent to Paris to study engineering where he developed an interest in the works of Saint-Simon and Comte. He converted to Islam upon his arrival and created a campaign (through a secret association based on the Freemasonry model called *Faramoush-Khane* (oblivion houses)) to persuade Naser al-Din Shah to initiate modernisation reforms, mainly based on the Ottoman model of *Tanzimat* (re-organisation). The Shah eventually became suspicious of his activities and exiled him to Baghdad, and from there to Istanbul. Through mediation of Shah's ambassador to Istanbul (Moshir ad-Dowleh), the young Malkum returned to Iran. After a period of ups and downs in his political career, and as a result of his friendship with Moshir ad-Dowleh who had become Iran's chancellor, in around 1873 Malkum was sent to London as Iran's ambassador. At the outset, Malkum was commended due to his success and was even awarded a royal title (prince). Later, however, after the Shah failed to live up to his promises made during his London visit, to grant Malkum certain trade concessions, they fell apart. Malkum was discharged from all his duties and put on trial. After being humiliated, he rebelled against Naser al-Din Shah and moved ahead with the publication of his influential London-based newspaper "the *Qanun*" (law) in the 1890s. The *Qanun* was published between 1890 (coinciding with the Iranian anti-colonial tobacco movement) and 1898 (eight years before the constitutional revolution). There was little doubt that it had a significant role in Iran's awakening and the nation's quest for the rule of law. After the assassination of Naser ad-Din Shah and the coronation of his successor Mozafar ad-Din Shah, Malkum was again appointed as ambassador, this time in Rome, a position he held for ten years. He passed away in Switzerland in 1908, at the age of 77, and his body was cremated as he had requested.

In terms of political philosophy, it is hardly contested that Malkum was a vehement positivist. In particular, Auguste Comte, whose books he read while he was in Paris, had a great influence on Malkum's thinking.¹⁰ Later, in London, as Iran's ambassador, he became fascinated by John Stewart Mill and translated parts of *On Liberty*¹¹ into Persian. Malkum was also a staunch believer in liberal economics. Key to his reform ideas was full respect for individual property, private entrepreneurship and free trade. In the same vein, in Malkum's writings the role of a government in the economy is restricted to the provision of security and infrastructure so that private investment could be attracted and flourish.¹² As will be seen, Malkum's thinking goes hand in hand with JS Mill's political philosophy discourse. Malkum notes:¹³

Almost every branch of science has left a trace in Iran except for political economy that is a modern science and is completely ignored here...

Also that:¹⁴

Political economy is the most inclusive field of science and if its principles were to be adopted in Iran, tax income would increase to twenty million [units of currency] in less than two years with no subjugation or violation of Sharia.

10 Adamiyat, above n 7, at 98.

11 John Stuart Mill *On Liberty* (Longman, Roberts and Green, London, 1859).

12 Fereshteh Nourani *Malkhum Khan Nazem al-Doleh* (Jiibec, Tehran, 1973) at 82.

13 Malkum's letter to the Foreign Ministry in Adamiyat, above n 7, at 114 (Idiomatic translation).

14 Hojatollah Asil *Resalehay Mirza Malkum Khan Nazem al-Dowleh* (The Essays of Mirza Malkum Khan Nazem al-Dowle) (Nci, Tehran, 2002).

One difficulty with putting Malkum in a box is that he frequently adjusted his approach to political circumstances for over more than fifty years of his active life. Ghazi-Moradi explains how Malkum oscillated between advocating top-down and bottom-up policy approaches in accordance with his relationship with in Iran's political apparatus.¹⁵ Others have explained his change of approach to be driven solely by his personal interests.¹⁶ It seems however, as a politician, so long as he was part of the government apparatus, he strived to influence the Shah's mind through proposing top-down reforms. He wrote *Daftar-e-Tanzimat* (On Re-organisation) in 1860 to encourage Naser ad-Din Shah to adopt such reforms. When he fell out of favour completely with Naser ad-Din Shah, he took an opposite approach by publishing the *Qanun*, advocating his ideas at the grass roots level and criticising (though mostly indirectly) the Shah's governance. After Naser ad-Din Shah's assassination and Mozafar ad-Din Shah's coronation, Malkum returned to politics and hence top-down reform became appealing once again. During this period, Malkum wrote *Nedaye-Edalat* (Voice of Justice) for the newly-crowned Shah after he took his new position as an ambassador to Rome.

A. "Government According to Law"

There is little doubt that Malkum was a firm believer in a Westernisation project throughout his career. The foundations of Malkum's ideas on government are laid out in *Daftar-e-Tanzimat* (On Re-organisation), *Majlis-e-Tanzimat* (The Assembly of Re-organisation); and *Daftar-e-Qanun* (the Book of Law).¹⁷ All three books, which were written in the period approximately between 1860–1862, fully represent Malkum's legal reform ideas in the pre-*Qanun* era. In these books, Malkum openly describes his project as "the adoption of Western civilization absent any Iranian intervention" by which he intends "a total submission to European civilization"¹⁸ in all aspects of life in a complete one-size-fits-all fashion. The foundation of Malkum's Westernisation project emanates from his belief that the dissemination of Western civilisation across the world would not only be inevitable, but also desirable for the prosperity and evolution of human collectivity.¹⁹ On the basis of that idea, Malkum viewed Iran's transformation as inevitable and the adoption of Western civilization as imperative:²⁰

Iran's ministers assume that three thousand years of Iranian history would [simply] avert all trouble. European sciences are flooding the nations around the world and the more we give way to them, the better we can benefit from them.

Earlier in his career, the younger Malkum seemed to believe that the basic principles of European organisations could be borrowed in the same fashion that technology, such as the telegraph, first entered Tehran. He analogised any struggle to reinvent European principles of governance to an empty effort of reinventing the telegraph.²¹ His explanation for such propositions is worth quoting:²²

15 Ghazi-Moradi, above n 9.

16 Nategh, above n 9; Algar, above n 9.

17 Asil, above n 14.

18 Adamiyat, above n 7, at 114.

19 Ibid.

20 Malkum *Resaleye Dastgahe Divan* (The Essay on the Bureaucratic State) in Asil, above n 14.

21 Malkum *Daftar-e-Tanzimat* in Asil, above n 14, at 30.

22 Malkum *Resaleye Dastgahe Divan* (The Essay on Bureaucratic State) Translated by Vahdat, above n 8, at 32.

The government of Iran, in facing the encroachment of European hegemony, is no different from the Ottoman government... The point is that the surge of the European power has made the survival of barbarian governments impossible. From now on, all governments on earth must be organized in the same fashion as European governments, or they will be conquered and subjugated by them.

Malkum could also be considered as the founder of the idea of the establishment of the modern rule of law in Iran. It is striking that rule of law concerns loom larger in Malkum's mind than his Westernisation project throughout his career. In *Daftar-e- Tanzimat* where he elaborates on the notion of government, lawmaking and law enforcement, Malkum divides governments into two: republic and monarchy, the latter being subdivided into absolute and moderate monarchy. Moderate monarchy, in Malkum's terminology, mainly refers to the British and the French systems of governance at the time. He does not, however, see the system of moderate monarchy "where people are the lawmakers and the kings are the executor of the law" as suitable for Iran. Rather, he follows the Ottoman model of *Majles Tanzimat* (Re-organization Assembly. His own words are unequivocal, "the law should reflect the emperor's will and guarantee the public interest".²³

Despite Malkum's advocacy for absolute monarchy, due to pragmatic concerns, he strived to uphold a notion of "government according to law" as opposed to "government according to the will of the sovereign". This is well reflected in the *Daftar-e-Qanun* where he defines the law as "any decision, which is issued in accordance with a specific arrangement by the legal apparatus".²⁴ He goes on to distinguish monarchic decrees, which may have been all well and good, but could not be called the "law" of the land – the law must necessarily be an outcome of a legal apparatus. Malkum does not seem to be concerned with the notion of representative democracy, or the issue of legitimacy of the government in any form, in any of his writings before the (1890–1899) period.

It was only after 1890 that Malkum, in one issue after another, gradually departed from the idea of absolute monarchy to the one of constitutional monarchy. The establishment of the *Qanun* in London was basically a result of Malkum's reaction to his dismissal from all his governmental duties after the dispute over the cancellation of his lottery concessions. Malkum, in grounding the *Qanun* (especially from the fourth issue onward) on the notion of "human conduct" is clearly influenced by Auguste Comte's *Religion of Humanity*.

Ghazi-Moradi presents a chronological narrative of the development of Malkum's agenda during the eight years of the *Qanun*. To restructure Ghazi-Moradi's construction briefly, in the first issue of the *Qanun*, Malkum presents a more balanced definition of law: "law consists of the solicitation of the power of a group of people in order to secure the rights of the public".²⁵ The obscure language used above seems to be akin to JS Mills' idea of disproportionate democracy, in which educated and more responsible persons would be made more influential by giving them more votes than the uneducated.²⁶ In the same issue Malkum reiterates his rule of law ideas paying, however, tribute to Sharia:²⁷

Our claim is not to adopt Parisian, Russian or Indian laws. The principles of all the good laws are everywhere the same, the best of which are laid out in Allah's Sharia. Nonetheless, due to the lack of enforcement of these laws we have suffered too much and we desire the rule of law to the extent that we could

23 Malkum *Resaleye Dastgahe Divan* Translated by Vahdat, above n 8, at 36.

24 *Daftar-e-Qanun* in Asil, above n 14.

25 *Qanun*, No 1 in Homa Nategh *Rooznameye Qanune Mirza Malkum Khan* (Amir Kabir, Tehran, 1976).

26 John Stuart Mill *Stanford Encyclopedia of Philosophy* (2002, revised 2007), available at <<http://plato.stanford.edu/entries/mill/>>.

27 *Qanun*, No 1, above n 25.

settle on any law even if it comes from Turkmenistan. That is because the most mundane laws are better than lawlessness.

In the third issue he still “encourages” the Shah to look up to the Russian Tsar:²⁸

The utmost power is vested in the Russian Tsar. Yet, he is not able to mete out punishment on anyone without the order of the [judicial] bureaucracy. No one has placed any limitations on the Tsar’s power. The Tsar himself owing to his education and enlightened knowledge has willingly made the enactment of laws and observations thereof, the basis of his splendor. The Tsar has made himself, more than anyone else, obedient to the law because obeying the law has given him dominance over twenty “lawless” kings.

He criticises the “inefficiency” of the existing *Majlis-e-Shora-e-Melli* (Consultative Assembly) – a Qajar institution – and introduces, for the first time, the idea of a “National Consultative Assembly”. Such a national assembly would consist of a minimum of 100 eminent *Mojtaheds* (Islamic jurists) as well as well-known scholars and prominent intellectuals.

In the twelfth issue, Malkum finally denounces despotism. In the twenty-third issue, he even adopts a revolutionary tone:²⁹

The world history has shown us that the awakening of governments has to begin with the awakening of nations. We have thus far struggled to make our voice heard to the government officials. Enough is enough! This is the time to bring our complaints to our own nation. [*Idiomatic translation*]

In the twenty fourth issue, Malkum elaborates on the three separated branches of government for the first time. He then notes that “the root cause of all our problems ... is that in our country, there has been no trace of the third condition of the [rule of] law, i.e. ensuring the enforcement of the law.”³⁰

The *Qanun* was widely circulated across Iran through secret associations called *Majma-e-Adamiyat* (Humanity Leagues) whose articles of association and structural organisation were written by Malkum himself. These Leagues were institutionally modelled after European masonry lodges although the existence of any real connection between them and the European freemasonry is contested. The issue 25 of the *Qanun* is presented as a translation of a classified report of a foreign country’s ambassador regarding these associations. In this story, which may or may not be fabricated, the ambassador is astonished at these associations in Iranian society. The Ambassador notes that Iranian Humanity Leagues “have grounded the totality of the world’s advancement on Islamic principles ... instead of emulating the Europeans, they seek to extract all the principles of progress from Islam itself.”³¹ After elaborating on the complex organisational structure of the Leagues throughout the country, this Ambassador coins the idea of bicameral legislative bodies (one elected by the people and the second consisting of the elite) from the perspective of the Humanity Leagues. This is the first time that Malkum pursued a version of popular sovereignty in his vision for an Iranian parliamentary system.

After Naser al-Din Shah’s assassination and upon the coronation of his more open-minded successor, Mozafar ad-Din Shah, Malkum restored confidence in a top-down reform.³² In this late period of his political career, he dedicated a book titled *Nedaye-Edalat* (Voice of Justice) to the new Shah and later became ambassador to Rome. While Malkum remained faithful to legal positivism until the end of his career, he started to emphasise the importance of “rights”. In his

28 Malkum *Resaleye Dastgahe Divan* Translated by Vahdat, above n 8, at 33, modified by author.

29 *Qanun* No 23, above n 25.

30 *Qanun* No 24, above n 25.

31 *Qanun* No 25, above n 25.

32 Ghazi-Moradi, above n 9, at 183.

book, *Serat al-Mostaghim* (The Straight Path), Malkum maintains that individual rights are based on four pillars: security (including financial and personal security); [free] will or liberty (including personal freedom, freedom of expression, etc.); equality (including equality before law); and merit-based status, where knowledge should be the sole criterion for government recruitment.³³ On the limits of personal freedom, he reiterates that “there are no rights and duties in the world without delimitations and the limit of freedom is that no one should encroach on any one’s rights.”³⁴ Yet, Malkum does not hesitate to suggest that the rule of law is as important (and perhaps more important) than the content of the law, as he reiterates:³⁵

Law consists of words without souls. If we adopt the most perfect laws existing in the world but fail to enforce them for a hundred years to come, there is no benefit to having such laws.

He also proposes the basic rule of law principle of no punishment without law.³⁶

B. *On Classical Economics*

Legal ideas are understood to have a dynamic, dialectical or constitutive relationship to economic activity.³⁷ In this vein, liberal economics may be seen as a corollary of legal positivism as a subset of nineteenth-century classical legal thought.³⁸ In this section, Malkum’s positivism is contrasted with his economic views to demonstrate his intellectual consistency. Malkum’s essay, *Osoule Taraqi* (The Principles of Progress),³⁹ appears to be the first treatise (a 40-page booklet) written in Farsi on basic economic theory. Written in approximately 1883, the booklet is probably Malkum’s most scholarly writing absent the use of academic language. In *The Principles of Progress*, Malkum presents real-life examples of basic economic concepts in a way understandable to the nineteenth-century Iranian elite. He stresses the notion of wealth maximisation as a fundamental means to European progress. The booklet includes a series of legal and economic policy recommendations for Iran’s development, including monetary policy, banking and finance (he proposed the establishment of a national bank), providing concessions to foreign companies to attract investment, public education as a means of economic growth, securing individual and property rights, setting up a modern police force, upholding the rule of law as a means of economic development, government investment in infrastructure, enhancing the competitiveness of the Iranian economy, abolishing internal customs duties, and the full scale liberalisation of trade and the financial market.⁴⁰ Malkum also envisages the principles of taxation, the law of provincial regulatory assemblies and ways to reduce poverty by building transportation infrastructure by which to enhance commodity exports.⁴¹

Malkum further stresses market competition as a means to push prices down. In an analysis of factors of production, he notes that Iranian economy, being rich in land and labour, suffers

33 Malkum *Serat al-Mostaghim* (The Straight Path) in Asil, above n 14.

34 Malkum *Nedaye Edalat* (The Voice of Justice) in Asil, above n 14.

35 See Malkum *Divan Khane* (The Law of Judicial Institutions) in Asil, above n 14.

36 *Ibid.*

37 Duncan Kennedy “Three Globalizations of Law and Legal Thought: 1850-2000” in *The New Law and Economic Development* David M Trubek and Alvaro Santos (eds) (Cambridge University Press, New York, 2006) at 19.

38 *Ibid.*

39 *Osoule Taraqi* (The Principles of Progress) in Asil, above n 14.

40 *Ibid.*, at 195.

41 Adamiyat, above n 7, at 144.

mainly from a shortage of capital, the analogy being blood for economic veins. Malkum was not an economist by education and should not be expected to have expounded on such concepts as Adam Smith's "invisible hand"⁴² or David Ricardo's "free trade". He repeatedly suggests that these could only be studied at schools. In segments of the booklet however, he attempts to explain an overly simplified version of Ricardo's comparative advantage theory.⁴³ On free trade, Malkum follows Ricardo's footsteps when he postulates a direct relationship between trade openness and wealth maximisation. He thinks that the problem with Iranian people is that they do not understand that trade is not a zero-sum game.⁴⁴ He notes:⁴⁵

In order for Iran's development with respect to its trade relationships [with the world] to become parallel with and to have a share in the world's prosperity, it is imperative to open all the ports and rivers. There should be no fear from foreign trade. All foreigners should be issued permits and encouraged to bring their money in and out of the country to the maximum extent possible.

Malkum further contends that the Asian elite do not comprehend the objective of European's colonialism which is solely to gain *trade* benefits. He reiterates that the British Treasury does not receive a penny from the Indians in the form of taxes.⁴⁶ A few pages later, he completes his views on colonialism by making a distinction between Western occupations for trade purposes (e.g. British occupation of Bangladesh) and those for political reasons (British occupation of Afghanistan).⁴⁷ Although Malkum's pro-colonialism may also be motivated by personal interest,⁴⁸ one should also note that it was simply beyond classical economics, let alone his own knowledge and expertise, to fully grasp the ramifications of such blunt advocacy for full liberalisation. Even a century after Malkum's death, when the pitfalls of hasty trade liberalisation for third-world economies were acknowledged in economics theories such as declining terms of trade for primary products – known as Prebisch-Singer theory – neoliberal economics of the 1980s and 1990s, reflected in the so-called Washington Consensus, drew heavily on classical theories of the nineteenth century.⁴⁹ In sum, Malkum Khan is the first Iranian who raised fundamental questions of modern economics and proposed a comprehensive economic development reform plan. In a letter to the foreign ministry where he laid out a detailed development plan similar to that described above, Naser ad-Din Shah's dismissive words read: "These are not comprehensible [here] in Iran".

III. GENEALOGY OF TALEBOV'S LEGAL THOUGHT

Talebov's role in the formation of modern Iranian legal thought can hardly be overstated. His positivist legal writings, however, have remained unexplored in the literature on Iranian constitutional revolution. Adamiyat, a pre-eminent Iranian historian, stresses Talebov's natural law and

42 Adam Smith *The Wealth of Nations* (W Strahan and T Cadell, London, 1776).

43 David Ricardo *On the Principles of Political Economy and Taxation* (John Murray, London, 1817).

44 Malkum *Osoule Taraqi* (The Principles of Progress; idiomatic translation) in Asil, above n 14, at 191.

45 *Ibid.*, at 191.

46 *Ibid.*, at 189.

47 *Ibid.*, at 199.

48 Cf Javad Tabatabaei *Nazariye-e-Hokumat-e-Qanun-dar Iran* (A Theory of the Rule of Law in Iran) (Sotoudeh, Tehran, 2008).

49 For more on the history of development economics see James M Cypher, James L Dietz *The Process of Economic Development* (Rutledge, New York, 2009).

socialist orientation and downplays traces of legal positivism in his thinking.⁵⁰ Indeed, Talebov was the first Iranian who advocated a systemic plan for dismantling the semi-feudal structure of Iran.⁵¹ Yet, without denying other strands of thought in Talebov's writings, including socialism,⁵² the thesis here is that nineteenth-century legal positivism was dominant in Talebov's consciousness. For instance, Talebov believed that an owner's "will" is essential for dispensing with property rights unless it clashes with the right of government to build a railroad or a tunnel through that property, in which case the owner is only entitled to compensation.⁵³ Talebov's classical view on "the will theory"⁵⁴ clearly sets him apart from outright Marxism.⁵⁵ A number of examples in support of this line of argument will be provided below.

Abd al-Rahim Talebov (1832–1910) was born into a middle-class family of artisans in Tabriz located in northwest Iran.⁵⁶ At the age of sixteen he left Iran for Tbilisi to study in modern schools of the Caucasus where he later became a successful businessman.⁵⁷ According to Afshar, Russian was the only foreign language Talebov knew,⁵⁸ through which he had access to French and English literature.⁵⁹ The philosophers whose ideas Talebov cites include Bentham, Voltaire, Rousseau, Renan, Kant and Nietzsche.⁶⁰ Talebov wrote his 11 books after the age of 55,⁶¹ all of which had a direct impact on Iran's constitutional movement.⁶² Talebov's books demonstrate his fascination with science as he dealt with basics of physics, chemistry and biology. He drew interesting analogies between molecular physics, spheres of liberty and rights in law. This, according to Roscoe Pound, is typical among the positivists of the nineteenth century whose books were full of analogies between science and law as an indication of their scientific approach to law.⁶³ The second generation of positivists was particularly influenced by Darwinian evolutionary thought.⁶⁴ Talebov was also a firm believer in the evolutionary theories of biology from which he also drew analogies to explain "the struggle for existence", following in Hobbes' footsteps, as a natural basis, for wars throughout history.⁶⁵ He also promoted the idea of social Darwinism in his writings.⁶⁶

50 Fereydoon Adamiyat *Andishayeh Talebuf Tabrizi* (The Thoughts of Talebof Tabrizi) (Payam, Tehran, 1976) at 32. For argument in favour of Talebov's positivism see Vahdat, above n 8, at 48–54.

51 Vahdat, above n 8, at 32.

52 Adamiyat traces Marxism in Talebov's writings; see Homa Nategh "Ostadam Fereydoone Adamiyat" <www.homanategh.net/uploads/2/3/2/8/2328777/ostadam.pdf>.

53 Adamiyat, above n 50, at 37.

54 Duncan Kennedy *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Forum'* (2000) 100 Colum L Rev 94, 106–108, 115–116.

55 For "the will theory" as a flagship idea of nineteenth century classical legal thought see Kennedy, above n 38, at 25–26.

56 *Ibid.*, at 1.

57 *Ibid.*

58 Iraj Afshar *Abd al-Rahim Taliuhuf Tabrizi: Azadi va Siasat* (Liberty and Politics) (Sahar, Tehran, 1978) at 14.

59 Adamiyat, above n 50, at 3.

60 Adamiyat, above n 50, at 8.

61 *Ibid.*, at 3. Also see Afshar, above n 58, at 14.

62 Vahdat, above n 8, at 48.

63 Roscoe Pound *The End of Law as Developed in Juristic Thought* (1917) 30 Harv L Rev 222.

64 *Ibid.*

65 Talebov *Masaal al-Hayat* (The Questions of Life) (Jibi, Tehran, 1967) at 56–61. Adamiyat criticises his Hobbesian views; see Adamiyat, above n 50, at 20.

66 Adamiyat, above n 50.

One of Talebov's most interesting books, *Ketab-e-Ahmad* (The Book of Ahmad) comes in three volumes. It is written in the style of a novel – clearly modelled on Rousseau's *Emile*⁶⁷ – to communicate with a wider range of readership. Malkum praises Talebov's accessible language by citing an Iranian poem: "In dealing with kids, speak children's language".⁶⁸

A. 'Liberty' and "Rights"

Talebov, on different occasions, straightforwardly defined freedom as a "natural right", which could not be impeded or diminished otherwise. In *The Path of the Blessed*, Talebov makes a reference to Ernest Renan, his contemporary French philosopher, stating that humanity is based on a "natural" system of "equality, fraternity and liberty".⁶⁹ Talebov conceptualises freedom in absolute terms:⁷⁰

The words *Huriyat* in Arabic, *Azadi* in Persian, or *Uzdenlek* in Turkish [liberty], constitute a "natural" freedom; [that is] human beings, by nature, are born free and have autonomy over all their words and deeds. Except for their commander, that is their [own] "will", there shall be no impediments in their deeds and words. God has not created any force external to man to impede him and no one has the power to manipulate our liberty, let alone give it or take it away from us.⁷¹

Yet, Talebov approaches the question of liberty through the lens of "delimiting spheres of personal inviolability" in much the same way as the father of utilitarianism, Jeremy Bentham did. For Bentham the law "provides the basic framework of social interaction by delimiting spheres of personal inviolability within which individuals can form and pursue their own conceptions of well-being".⁷² The notion of power absolute within a sphere is a flagship idea of nineteenth-century European legal thought.⁷³ For instance, Spencer advances the idea of "the function of law in maintaining the limits within which the freedom of each is to find the widest possible development".⁷⁴ Similarly, Friedrich Carl von Savigny, the father of the Historical School, opines: "If free beings are to co-exist ... invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity".⁷⁵ In this vein, Talebov constantly attempts to delineate spheres within which individuals have absolute freedom. He notes:⁷⁶

In the same way molecules, on the one hand, have absolute freedom (with no restriction and qualification) and on the other hand their freedom is nonetheless limited to the laws of connectivity, man's freedom is subject to Sharia and custom.

67 Jean-Jacques Rousseau *Emile, or, On Education* translated by Allan Bloom (Basic Books, New York, 1979). For analogy between the two see Adamiyat, above n 50. See also Vahdat, above n 8, at 48.

68 Cited in Ghazi-Moradi, above n 9, at 180.

69 Talebov *Masa'el al-Mohsenin* (The Path of the Blessed) (Jibi, Tehran, 1968) at 140–141.

70 Talebov *Izahat Dar Khosouse Azadi* (Reflections on Liberty) in Afshar, above n 58, at 88.

71 Ibid.

72 Paul Kelly *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford University Press, Oxford, 1990).

73 Kennedy, above n 38.

74 Herbert Spencer *First Principles* (D Appleton and Company, New York, 1898) at 223.

75 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Liberty Classics, Indianapolis, 1982).

76 Talebov, above n 70, at 96.

Further, in his division of freedom into the three categories of freedom of self, belief and expression, Talebov consistently takes a similar approach:⁷⁷

Freedom of self implies that no one can unlawfully imprison anyone or enter his property. Moreover, everyone is free as regards their conduct for which no one shall hold them liable unless such acts result in someone's harm or loss [of property].

In a similar vein, Talebov cites defamation as a legitimate example of a limit to freedom of expression. The freedom of belief, in Talebov's view, could be restricted only if it led to anarchy or disturbed the peace among the people without clarifying what that might imply.⁷⁸ On the basis of the above, Talebov defines the law in natural law terms as follows:⁷⁹

[A] systemic articulation of civil and political rights and restrictions [responsibilities] governing the affairs of individuals and society [as a whole], through which every person would be secure in property and life and equitably responsible for wrong acts.

Yet, in another essay he endorses the views of “those recent scholars” who opined that rights could only be considered law “if they are sanctioned by government force”.⁸⁰ The following quote where Talebov cites and expounds the utilitarianism of Jeremy Bentham is most revealing:⁸¹

Bentham, an acclaimed philosopher, opines that humanity is by nature controlled by two prevailing powers: pleasure and pain. It is only under these two [qualities] that we could know what should be done, since good and evil or cause and deeds [effect] are undoubtedly determined by these two faculties.

After laying out this introduction, the [primary] conclusion we reach is that wherever there is no law, there is no principle of utility; and where there is no principle of utility, there is no civilisation; lack of civilisation brings fear; and wherever there is fear there is no prosperity. Hence the lack of law equals the lack of prosperity.

B. Talebov on Constitutional Law

In *Masa'el al-Hayat* (The Questions of Life: the second volume of the *Ketabe – Ahmad*), Talebov draws comparisons among various constitutional architectures of the world. He finds that all constitutional monarchies are in principle founded on a system of a “delimitation of rights”.⁸² His particular interest in the Constitution of the Empire of Japan of 1890 (“Meiji Constitution”) is such that he annexes a full Persian translation of that constitution at the end of his book. He notes:⁸³

If we provide a brief on each of the [above-mentioned] constitutional laws, the reader will note that they are all similar despite difference in details. [Those differences however,] do not negate the main principle of constitutionality of the government with the exception of the Japanese constitutional law, ... in which some crucial rights are declared as prerogatives of the emperor of Japan.

He goes on to justify the Japanese system based on the fact that it is “related to the people and circumstances of Japan”.⁸⁴ By doing so, he indirectly encourages the Iranian monarch to embrace

⁷⁷ Talebov, above n 70, at 97.

⁷⁸ Ibid.

⁷⁹ Talebov, above n 70, at 94. Vahdat's translation revised (see above n 8).

⁸⁰ Ibid, at 85.

⁸¹ Talebov *Ketabe Ahmad* (The Book of Ahmad) (Jibi, Tehran, 1967) at 126, 127.

⁸² Talebov, above n 70, at 102.

⁸³ Ibid.

⁸⁴ Talebov, above n 70, at 102.

constitutional governance by pointing out that “if the kings of other Asian countries [including Iran] take an initiative and follow the footsteps of Japan’s Mikado, they shall also be granted certain prerogatives”.⁸⁵ Hence Talebov, similarly to Malkum, seems to have held a pragmatic view that the Western constitutional models would not be fit for Iran’s context. The only difference between the two is that Talebov defends the Japanese constitution of 1889 (Meiji Constitution) while Malkum (before the *Qanun* era) recommended that the Shah look up to the Russian Tsar.

Yet Talebov’s full resentment of absolute monarchy is well reflected in the *Book of Ahmad* as well as his other books. Furthermore, Talebov is unequivocal in flagging the British constitutional system as the most advanced among other systems in ways which resemble Dicey, his contemporary English scholar.⁸⁶ He further notes:⁸⁷

In other nations, liberty and the rule of law is a matter of legislation and is maintained through their constitution. In Britain however, constitutional law is being emerged and established out of people’s respect for the law throughout history. It is part of the inner nature of each and every single English citizen.

C. *Talebov on International Law: A Pure Reflection of Classical Legal Consciousness*

Despite Talebov’s criticism of the West’s self-perceived mission of “civilizing” other nations, Talebov’s approach to sovereignty and international law remains consistent with his positivist line of thought:⁸⁸

We explained in defining law that only those ones who appreciate the necessity of preserving the [rule of] law would benefit from its virtues. Otherwise it is generally accepted that anybody can appropriate an ownerless property ... Throughout the Asian history, the sons of the kings killed their fathers; brothers killed brothers [to gain power]. [Then] how can one expect foreigners (or powerful foreign States in present times) not to encroach upon other countries’ rights or occupy their land [in such circumstances] where the owners of such land are not aware of their right [let alone] deem necessary to preserve it.

He continues:⁸⁹

A high-ranking British official has said in a speech that Morocco should be controlled by an organized government so that commercial interests of the civilized nations could be preserved. A German statesman has [also] said that the European states shall not respect the independence of lawless nations. Because where there is no law governing a land, it is an ownerless property and whoever possesses it and determines the rights and responsibilities of the residents therein would be its sharii [lawful] owner.

Talebov uses the term “Sharii” (according to Sharia) with respect to ownerless property by which he implies that even Sharia endorses this basic property rule of ownerless lands. Talebov’s analogy between Sharia property law and international law is striking since international law of Grotius’ times has roots in the private property rights of Roman law.⁹⁰ More importantly, Talebov’s view on sovereignty and international law is significant since it is a mirror reflection of international law theories of his time:⁹¹

85 Ibid.

86 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1885, 1915).

87 Talebov, above n 65.

88 Talebov, above n 65.

89 Ibid.

90 Anthony Carty *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, Manchester, 1986) at 4.

91 Talebov, above n 65.

A French scholar opined that law making and its enforcement is to ensure the world order and the endurance of humanity. [In that sense] it is imperative [according to this scholar] for the wise people to occupy lawless lands. We reiterate the fact that a right only exists if it is conducive to prosperity and if the right holder appreciates it and consciously strives to maintain it. Otherwise there remains neither a right nor a right holder.

The doctrine of *terra nullius*, or the so-called empty land, that is so unmistakably noted by Talebov, was expounded by positivist international lawyers such as Wheaton,⁹² Westlake⁹³ and Oppenheim,⁹⁴ among others. According to this doctrine, non-European states exercised no rights under international law over their own territory.⁹⁵ As Anghie suggests, the idea of the universality of international law applied in the *naturalist* discourse of sixteenth and seventeenth centuries gave way to *positivist* international law that distinguished between civilised states and non-civilised states.⁹⁶ Positivist international law of the nineteenth century developed an entire doctrine to justify the acquisition of territory by colonial powers.⁹⁷ It asserted that international law applied only to the “sovereign states” that composed the civilised “Family of Nations”.⁹⁸ Oppenheim, for instance, after pointing out that the law of nations was a product of Christian civilisation, suggests that despite the disappearance of perpetual enmity among groups of nations, especially among the Christian, Mohammedan and Buddhist states, in the nineteenth century, there is still a broad and deep gulf between Christian civilisation and others.⁹⁹ As a first condition for non-Christian nations to become part of the Family of Nations, Oppenheim opines that they should become “civilised”.¹⁰⁰ This distinction between civilised and uncivilised nations as an element of sovereignty is fully reflected in Talebov’s views.

Talebov’s knowledge about international law theories of his time puts him in an uncomfortable position — on the one hand, by praising international law as the field of law where “rights are used in their real sense”, and on the other hand by reiterating the doctrine of conquest, which at the time was openly used by Europeans as a basis for obtaining colonial title.¹⁰¹ Talebov’s provocative views should also be seen in light of his extreme frustration with the sheer ignorance of Iranian officials who were “living in their fantasies bragging about the Russians and the British having no right” to interfere in Iran’s affair.¹⁰² Talebov complains that Iranian rulers “have no idea

92 Henry Wheaton *Elements of International Law* Edited by Wilson (1964), (Little, Brown and Company, Boston, 1866).

93 John Westlake *Chapters on the Principles of International Law* (Cambridge University Press, Cambridge, 1894).

94 Lassa Oppenheim *International Law; A Treatise, Vol I, Peace* (Longmans, Green, London, 1905–1906) at 30–31, 34, 218–219, 266, 267.

95 Antony Anghie “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 *Harv Int’l L J* 1.

96 *Ibid.*, at 4.

97 Jeffrey L Dunoff, Steven R Ratner and David Wippman *International Law, Norms, Actors, Process: A Problem Oriented Approach* (Aspen Publishers, Aspen, 2006) at 11.

98 Anghie, above n 96, at 4.

99 Oppenheim, above n 95, at 30–31.

100 *Ibid.*

101 Sharon Korman *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Clarendon Press, Oxford, 1996).

102 Talebov, above n 65, at 87.

that Russia and the Great Britain do not perceive Iran as sovereign. They are struggling over their own rights [vis-à-vis our country]”.¹⁰³

Yet, Talebov is not naïve to the political implications of the nineteenth-century positivist theories of international law. He believes that Europeans are well aware of the ramifications of such theories too. He thinks they understand that there may come a day when the three hundred million Muslims from Istanbul to central Asia unite and rise against them to reclaim their rights:¹⁰⁴

Thereafter [the Quran’s promise of] “everything will return to its origin” will transform the law of the conquest to the law of Islam and humanity. The respectful readership may think of me as a Pan-Islamist or one of those who fantasize in vain about the union of the feeble Islamic nations. This is not the case I swear to Allah. This is just a fate determined by God that shall come true. Europeans can use no tricks to prevent this from happening since eventually one will meet the consequences of one’s deeds. [This shall be the case] unless the nations who consider themselves as “civilized”... suddenly change course, refrain from their [colonial] ambitions of occupying the lands of the weak nations, reclaim their humanity and appreciate the true meaning of rights.

Talebov bases his critique mostly on moral grounds but remains faithful to the idea of the lack of sovereignty in the lawless nations:¹⁰⁵

They should hold a big conference and build a new system for the totality of the Nations in the world ... to force lawless nations to adopt constitutions and collectively base their relationship with the Muslim and Asian countries on integrity, honesty, friendship and consent.

Talebov goes on to detail a few suggestions about the formation of a big world federation under the rubric of a “red republic”¹⁰⁶ – a socialist rhetoric of the time. In another instance, he reiterates the idea of establishing an “international community”,¹⁰⁷ which, despite the fact it “seemed preposterous to his readers”, he believes will someday come true.¹⁰⁸

IV. CONCLUDING REMARKS

By the end of the nineteenth century, when the identity of “intellectuals” had gone global, the dominant ideology had shifted to a “positivist liberalism”.¹⁰⁹ This paper provides evidence as to how Iranian intellectuals were heavily influenced by the wave of legal positivist ideas that were globalised in the late nineteenth and early twentieth century.¹¹⁰ As the paper demonstrates, legal positivism was dominant in the consciousness of Malkum Khan and Talebov, who were among the founding fathers of modern legal thought in nineteenth century Iran. Although each had distinct influences and personal motives, both Malkum, an influential politician and an activist, and Talebov, a middle-class businessman and an independent mind, adhered to state-centred notions of law and governance as well as concepts of civilisation and organisation as a basis for maintaining sovereignty in international law.

103 Ibid.

104 Ibid, at 90.

105 Talebov, above n 65, at 91.

106 Ibid, at 91.

107 Ibid, at 75.

108 Ibid, at 91.

109 Kurzman, above n 2, at 13.

110 Kurzman, above n 2, at 24–52.

MISSING THE POINT? LAW, FUNCTIONALISM AND LEGAL EDUCATION IN NEW ZEALAND

BY W JOHN HOPKINS*

I. INTRODUCTION

Legal education in New Zealand/Aotearoa has always placed significant emphasis on the practice of law as a profession rather than its study as a scientific discipline. Like its English counterpart, the New Zealand system of legal education developed from an “apprenticeship” model. This model saw academic study take place in conjunction with practical training, if such study took place at all.¹ It is to New Zealand’s credit that it never slavishly adopted the English approach, in particular demanding university study as part of a legal education early in its development.² Yet, despite this early adoption of an academic component, the development of law as an autonomous university discipline was to occur much later in New Zealand than in its English parent.³ In fact it was not until the 1950s that the South Island Law Faculties acquired full-time professorial staff.⁴ Even after the establishment of such positions, law remained a subject to be undertaken part-time as part of a practical education until the 1960s.

The legacy of this practical focus continues to influence the teaching of law in New Zealand and acts as the historical backdrop to the issues discussed below. This paper argues that the dominance of practical approaches to legal education continues to influence the very parameters of the subject of law as it is taught and understood in New Zealand today. The legacy of this approach has seen the largely uncritical adoption of a “formalist” definition of law in New Zealand. This formalist approach remains so pervasive that it is often accepted without critique or comment. The practical consequence of such formal dominance is to “privilege” the formal elements of the legal system while “othering” those elements of the legal system that fall outside this category. This in turn leads to a poor understanding of the practical operation of New Zealand’s legal system and fundamentally limits the ability of the system to develop in the future.

This article argues for a broader definition of law and a more holistic approach to legal education in New Zealand than has become the norm. It argues that we need to consider not only justice, but law “in the round” if academics are to both understand their own system of law and equip their students to cope with the realities of working in that system. To achieve this, it advocates the adoption of a functionalist definition of law and the incorporation of such a concept into legal education. Such an approach would enhance the understanding of law’s role in New Zealand society.

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1. P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 291.

2. *Ibid.*

3. RL Abel *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988) at 263.

4. Spiller et al, above n 1, at 1.

This paper argues against the dominant formalist tradition in New Zealand, but it does not suggest that such approaches are universal in Aotearoa and elements of this approach are to be found in a number of individual courses and texts.⁵ It is significant, for example, that a version of this article was first delivered at the University of Waikato. The choice of venue was no accident. There is no doubt that the founding commitment of Te Piringa – Faculty of Law to law in context has come closest to the delivery of some of the elements that I advocate in this paper. Although others have advocated such approaches throughout the history of legal education in New Zealand,⁶ Te Piringa – Faculty of Law and the University of Waikato have come closest to putting these ideas into coherent practice. Nevertheless, they remain outliers in their approach and formalism remains the dominant paradigm within which legal education operates in New Zealand.

My own personal journey also has much to do with the approach I suggest in this paper. Although I have taught at both Te Piringa – Faculty of Law and The University of Canterbury Law School, I come originally from somewhere far removed from New Zealand. Despite the fact that I have spent more time outside Scotland than in it, it remains part of my identity and self. The fact that I have a split identity is significant to my approach to this subject. When, like myself, a person loses their roots and their *turanagawae* becomes confused, they start to question some core issues. Such questions revolve around identity and more importantly what we mean by identity. Such quests for essentialism also find their way into academic life.

Like many legal academics who work outside the systems in which they were educated, I found myself drawn inexorably to comparative law and comparative method. Such approaches demand a different approach to law and legal education than is provided in the relatively narrow context of a national legal education. They demand a more essentialist approach to our subject and fundamental questioning of long cherished assumptions. More specifically, they drive us to constantly ask what we mean by “law”. The underlying argument presented in this paper is that such uncomfortable considerations must be far more fundamental to our approach to the teaching of law than is currently the case. If we are to be confident in our approach to legal education, we need a solid place to stand. I would argue that to achieve this requires greater use of the functional approach to law, of the type familiar to comparative method.

II. A FUNCTIONAL APPROACH TO LEGAL EDUCATION

Those who have engaged in the practice of legal comparison are well aware of the difficulties that it presents. This has long been recognised by the academic discipline of comparative law. This academic subject, and the methods associated with it, recognise that such examinations beyond the comfort zone of national systems require lawyers to quickly reconsider their preconceptions regarding the concept of law. The practical reason for this is simple. Unlike most academic disciplines, there is no accepted international “language of law”. A biologist can be confident that the insect being examined in country “a” is the same as the one being studied in country “b” because of the use of Latin terms. By the same token, New Zealand geologists using the Richter scale can be pretty sure it is the same Richter scale that is being used by their colleagues in Japan.

Law, by contrast, has no such universality of language. For reasons that need not detain us here, there are no simple mechanisms to ensure universal understanding across legal systems.⁷

5 G Morris *Law Alive: The New Zealand Legal System in Context* (Oxford University Press, Melbourne, 2008).

6 R McGechan “The Case Method of Teaching Law” (1953) 1 *Victoria University College of Law Review* at 9.

7 P De Cruz *Comparative Law in a Changing World* (3rd ed, Routledge-Cavendish, Abingdon, 2007) at 219.

Leaving aside the obvious difficulties caused by the use of different languages in different systems, the application of legal concepts is often very different. This is so even when systems share a common language and appear superficially similar. The use of identical linguistic terms does not denote reference to the same concept. Something as simple as the word “precedent”, for example, has the potential to cause significant confusion. Although the term is widely used in the United States and New Zealand, such are the differences between the approaches of judges in each system to the binding nature of previous judgments, its use is open to misinterpretation by lawyers from either system studying the other.

The lack of universalism in legal language (and thus legal thought) has led comparative law to develop methods to allow meaningful comparison. For these reasons, comparative law has turned, in the main, to functional approaches to legal study. These define law, not by reference to the form of particular rules, but according to the functions that those rules attempt to perform.⁸

The most famous example of this approach was taken by Karl Llewellyn in his work on the native American Cheyenne in the 1920s.⁹ Llewellyn based his oft quoted argument upon a sociological approach to law. This approach, advocated by Emile Durkheim, argues that law is a product of society. Equally, it argues that a society without law is impossible.¹⁰ The very definition of society, according to this approach, is closely bound to the notion of law. Law, by this definition, is the set of functions that must be performed to make a society function. These are Llewellyn’s famous Law Jobs, which he identified as:¹¹

- Resolving the Trouble Case (Dispute Resolution)
- Channelling of Expectations (Rule Making)
- Direction (Leadership)
- The Allocation of Functions

Of course, Llewellyn’s definition implies that the academic discipline of law should examine how and where such functions are delivered, however that may be. The methods of delivery are therefore irrelevant to the definition of law and the scope of legal study.¹² In fact the study of law involves the examination of the mechanisms that deliver these functions, whatever they are. Their formality or otherwise is likely to be worthy of comment, but it does not define them as law or otherwise. This functional approach to law is vital to the effective comparative study of the subject. It is by these means that an international language of law can be constructed and true comparisons made. But such an approach can pay even greater dividends if we direct it inwards, to our own society. This, of course, was Llewellyn’s original point.¹³

8 The classic, if rather simplistic, formulation of the functionalist method in Comparative Law can be found in K Zweigert and H Kotz *An Introduction to Comparative Law* (3rd ed, Oxford University Press, Oxford, 1998) at 32. A more sophisticated approach can be found in R Michaels “The Functional Method of Comparative Law” in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 339.

9 KN Llewellyn and EA Hoebel *The Cheyenne Way* (University of Oklahoma Press, Norman, 1941).

10 E Durkheim (translated by George Simpson) *On The Division of Labour in Society* (Collier Macmillan, New York, 1963).

11 KL Llewellyn, “The Normative, the Legal and the Law Jobs: The Problem of Juristic Method” (1940) 49 *Yale Law Journal* 1355.

12 S Roberts *Order and Dispute* (Penguin, London, 1979).

13 KN Llewellyn *The Bramble Bush: On Our Law and its Study* (Oceania, New York, 1951).

III. THE DOMINANCE OF FORMALISM

Llewellyn's work is hardly new, dating back as it does to the first half of the last century. His ideas are well understood and have long been part of the standard legal curriculum across most of the developed world. For the vast majority of academics, therefore, the above brief description is hardly worthy of note.¹⁴ Under the influence of authors such as Llewellyn most, if not all, legal academics today would claim to have moved beyond the formal "Eurocentric" definitions of law that dominated the subject in the 19th and early part of the 20th centuries.

Given this claimed rejection of formalism, it is perhaps surprising how pervasive the formal approach to legal education remains both in how law is taught in New Zealand and, by extension, how it is understood. When New Zealand law students later practise or utilise law throughout their careers (legal or otherwise) they do so through the formalist lens provided by their undergraduate education.

The dominant formalist theory in this regard remains that of HLA Hart, whose seminal text, *The Concept of Law* remains influential in New Zealand.¹⁵ Hart's concept of law revolved around the formal usage of rules. When rules accorded to a particular formal structure, these were to be regarded as law. According to Hart's definition, for rules to be regarded as "law" required them to fit into his famous pyramidic structure, topped by a rule of recognition and supported by primary and secondary rules. Despite the fact that few students will have been exposed to Hart's work first hand, his three tiered pyramid continues to implicitly and uncritically dominate our approach to legal education. It seems accepted wisdom in New Zealand that this concept of law is the basis upon which legal education should be built. Although many of New Zealand's introductory law texts today give a brief nod to wider conceptions of law, their content remains limited by the Hartian paradigm.¹⁶

The evidence for such an uncritical adoption of formalism across much of the New Zealand legal academy can found by reference to the standard texts used by the core courses required by the Council of Legal Education.¹⁷ These books, although excellent in themselves, focus heavily upon the formal law as decided in the superior courts. They teach law as seen in the courts, not how it applies to individuals in practice. For example, they teach the law of contract and its formalities, not how people interact outside the formal and how contracts are practically used in our society. Such an approach risks teaching a one-dimensional view of law.

We can see this approach more clearly if we look at one area of law as an example. In my own discipline of administrative law, the focus of most courses does not accord with the reality as experienced by individuals. The main textbook in public law, for example, gives very limited coverage outside the formal judicial process.¹⁸ In Joseph, there is no chapter on tribunals, while the Ombudsman gets only the most cursory of nods. Even this limited coverage is couched only in terms of the office's statutory powers. This is not to criticise Joseph's work, which remains

14 See for example, J Adams and R Brownsword *Understanding Law* (2nd ed, Sweet and Maxwell, London, 1999) at 135.

15 HLA Hart *The Concept of Law* (Clarendon, Oxford, 1961).

16 See for example D Webb, K Sanders and P Scott *The New Zealand Legal System: Structures and Processes* (5th ed, LexisNexis, Wellington, 2010). An excellent book but formalist in its coverage of the legal system.

17 I have specifically avoided reference to individual texts here as my intention is not to attack individual authors but to argue for a wider approach to law teaching across the core curriculum.

18 PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson, Wellington, 2007).

the leading text in New Zealand. The lack of recognition of such non-judicial elements in the key public law text is instead symptomatic of the general approach to the subject.

To put it rather crudely, public lawyers in New Zealand largely teach judicial review. In the year 2010, the majority of public law exams approved by the Council of Legal Education were comprised entirely, or predominantly, of case based problem questions on judicial review. According to this, admittedly anecdotal and limited sample, public law teaching appears to be focussed primarily upon the actions of the courts through the medium of judicial review. Yet such is the cost and complexity of judicial review in New Zealand that only the rich, the desperate and the insane go to court over administrative matters. Why do public lawyers spend so much time teaching it?

Further evidence of this formalist dominance can be seen in the approach taken to non-judicial remedies in the New Zealand legal curriculum as whole. These are largely placed in special optional boxes outside the core subjects. These can have different names such as “dispute resolution” or “alternative remedies”. Whatever the particular name utilised, the point to note is that they are always “othered” and treated as something outside the “law”. Rarely are they even regarded as a core subject (Waikato seems to be the exception to this general rule) and where they exist at all they are often regarded as a quaint alternative to the standard optional subjects. The most damning example of this approach can be seen in relation to Māori customary law. Due to the dominance of Eurocentric formalism, tikanga is treated as separate entity from ture (and implicitly seen as inferior), if it is taught at all. In a country where such law is fundamental to understanding of our bicultural state such an educational approach appears deeply flawed.

IV. FUNCTIONALISM AND LEGAL EDUCATION IN NEW ZEALAND

It is the belief of this author that when a more coherent concept of law is utilised, the selective nature of New Zealand’s legal education becomes more evident. When a functional lens is properly directed against New Zealand’s domestic legal system, perceptions of both the nature of law and its role within New Zealand society change dramatically.

To illustrate this argument, let us take a simple example. According to the law jobs theory, the second job of a legal system is to resolve the trouble case or, to put it more prosaically, resolve disputes. To properly understand the scope of law under this concept, we must answer the simple question, how is this law job undertaken in New Zealand? The answer is both multi-faceted and complex, but a brief moment’s thought leads us to a wide range of possibilities. Disputes in New Zealand can be solved through negotiation, tribunals, ombudsmen, on marae, through statutory (or voluntary) watchdogs, internal disputes mechanisms and the judicial system (amongst others). The point to be made here is that the formal court process is only one element of the wider legal system. It is clearly an important one and may, depending upon the nature of the dispute, provide the framework for all the others, but it is not the whole story. Indeed, from the viewpoint of the disputee, courts are peripheral to the resolution of disputes in the vast majority of cases.

Yet, despite the fact that most disputes get nowhere near a court, this is where the bulk of our consideration of dispute resolution at law school focusses. Students can go through an entire law degree with little or no exposure to the non-judicial elements of the legal system mentioned above. Instead, students are served a diet of court decisions and even these are limited to the higher appellate courts. First year students might be briefly exposed to the lower courts in the early years of their education but, after a worthy comment on their importance, the next five years are

then confined to teaching about appeal court cases. To paraphrase Adams and Brownsword, many legal academics appear to have contracted “appeal courtitis”.¹⁹

When the legal curriculum does focus on other elements of the legal system it tends to teach them as alternatives, outside the mainstream of “law”, relegating them to the educational back blocks of optional courses, subject to the fickle winds of student preference, assuming that they are taught at all. These elements of our legal system are “othered” and thus de-privileged in the eyes of our students. In the fullness of time they potentially suffer the same fate in the wider world as these same students make their way in society in general and the legal profession in particular.

V. WHY FUNCTIONALISM MATTERS

Having explored the dominance of formalism in New Zealand and its impact on legal education, the reader may be forgiven for asking why such a state of affairs should concern us. Why should academics move beyond their formal limits and embrace a more functional concept of law? The answer to this is both simple and, I believe, fundamental in its importance. The underlying acceptance of a formal approach to legal understanding leads to an implicit pre-supposition that equates formal “law” with “real” law. The impact of this on legal understanding can be profound and lead to fundamental misunderstandings on the nature of a legal system. In essence I would argue that without a functional conception of law, students can never hope to truly understand the legal system that operates in New Zealand. As an anecdotal example of this, I recall many years ago attending a seminar paper on the codification of law in certain Pacific Island states. The paper was interesting and well presented but when asked about the project’s interaction with customary law, as practised by the majority of individuals in these islands, the speaker answered that the project was only concerned with “law” not “custom”. Such a response appeared to suggest that the project would be 100 per cent accurate and 0 per cent useful, given that such “customs” were in reality the “law” by which most citizens of these islands lived. By approaching the subject with a formal conception of law the project had failed to engage with key elements of the legal system. To use Llewellyn’s words, it managed only to engage with a few of the societal mechanisms used to deliver the law jobs. A formal definition excludes such rules from our legal universe, a functional one includes them.

Such formalist definitions of law also undermine any attempts to re-consider the nature of the legal system from the standpoint of its users or its purpose. The pre-supposition that such a definition contains, takes as its starting point the desirability (or necessity) of formal law. This limits attempts at reform and institutional development both in New Zealand and overseas. Even when New Zealand has appeared to lead the world in its development of “alternatives” to the court process, the formality of our approach to law has had a significant impact upon their development.

Such a drift towards judicialisation can be seen, for example, in both the current structure of Commissions of Inquiry and their proposed reforms. Today’s inquiries are dominated by pseudo adversarial processes, cross-examination and the presence of counsel. Their involvement (which stems from the predominance of judges as inquiry heads) becomes self-perpetuating as interested parties rightly demand legal representation in what they deem to be a hostile and legalistic environment. The attitude of the courts, in both allowing judicial review of inquiries and imposing

19 J Adams and R Brownsword *Understanding Law* (4th ed, Sweet and Maxwell, 2006), referring to the ideas of Jerome Frank. This “disease” is, of course not exclusive to New Zealand. Frank was referring to United States practice while Adams and Brownsword were referring to United Kingdom experience.

court-developed rules of “natural” justice, has encouraged this process.²⁰ Despite the best intentions of judges, commissioners and counsel, this unthinking judicialisation of inquiries and their procedures cannot but defeat the primary purpose of the institution.²¹ Inquiries exist to inquire, not decide.

The related world of the tribunal has also seen a drift towards judicialisation. The most obvious example of this is the increased linkage between the office of the Chief Dispute Tribunal Referee and the judiciary.²² Such a relationship is explicitly seen as a positive development and forms a key plank of the Law Commission’s now stalled tribunal reform proposals.²³

Such privileging of formalist legal rules risks perpetuating the dominance of a formal, expensive, court based system that requires significant numbers of lawyers to operate it. In turn, such systems require the training of large number of legal practitioners capable of both understanding and using them. However, do we really need such formalities and do we really need so many lawyers? By such mechanisms, the dominance of legal formality risks becoming a self-perpetuating prophecy.

The formal approach to legal education leads in turn to a formal approach by lawyers both to their own work and legal reform. Such dominance means that whenever problems in our society or legal system are identified, reforms will tend to propose a formal legal response as the default position.²⁴ In a country such as New Zealand where lawyers make up such a prominent part of society the formalist bias of the legal community potentially provides a serious barrier to reform. Although the number of practising lawyers has fallen in recent years, New Zealand still ranks in the top three states for lawyers per head of population.²⁵ Of course this figure under-represents the role of lawyers in New Zealand as around only half of law students move into the profession itself. Whatever the exact figure, the influence of the formalist approach to legal education in New Zealand is all pervasive.

VI. FUNCTIONALISM AND THE FUTURE

This article has argued that the dominance of formal concepts of law in New Zealand legal education remains strong and has had a significant impact upon New Zealand society. However, such a critique would be somewhat churlish without considering how the chilling effects of such an approach might be reduced. For this we need to return to the earlier theme of functionalism and the comparative method. The easiest way to mitigate the impacts of legal formalism upon the New Zealand legal system is to develop a better understanding of that legal system in the first place. If we are to truly educate our lawyers in how the New Zealand legal system works, law schools must encourage their students to ask the right questions. Such questions will emerge from

20 I Harden and ND Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson Education, London, 1986).

21 PP Craig *Administrative Law* (6th ed, Sweet and Maxwell, London, 2008) at 287.

22 The current Chief Tribunal Referee is a District Court Judge.

23 Law Commission *Tribunal Reform* (NZLC SP20, 2008). See WJ Hopkins “Order From Chaos? Tribunal Reform in New Zealand” (2009) 2 JALTA 47.

24 See, for example, The Law Commission’s proposals for Commissions of Inquiry. New Zealand Law Commission *A New Inquiries Act* NZLC, R102.

25 *NZ World Leader in Per-Capita Lawyer Stakes* NZ Herald 15th July 2010. These figures are open to significant interpretation, but the general point seems valid.

a method that makes clear to students the role of law in society. It should not start from a formalist pre-supposition.

Comparative law does not provide a magic bullet but its methods do provide a pragmatic mechanism for students to truly understand their future role as lawyers within any society. This should not be provided as some optional paper tucked away in third year but as one of the first things that students learn when they enter law school. Such an approach would see first year courses begin, not with a discussion of the New Zealand legal system, but with an examination of legal systems generally. Such an approach could examine tikanga, indigenous systems, Pacific custom or the law of France, the substance matters not. Whichever legal systems were examined would be unimportant, the aim would be to show that the concept of law is not related to the form it takes but the functions it performs. Such a radical, yet conceptually coherent, approach would provide students with a broader and better understanding of the discipline of law. It would show at the very least that oranges are not the only fruit and that current practice in New Zealand is not the only way of organising a legal system.

This could provide the basis upon which other elements of the legal system could be far more effectively taught and understood. If such an approach were adopted in New Zealand, graduates might truly understand the nature of law in their country. In the years to come such students might eventually create a system more closely attuned to the needs of a South Pacific state with a bi-cultural constitution, rather than one based upon assumptions taken from its colonial past and the dead hand of British history. Such a legacy would be valuable indeed.

A THORN IN THE FLESH THAT CANNOT FESTER: HABERMAS, THE DULUTH MODEL, DOMESTIC VIOLENCE PROGRAMMES

BY PHILIP ROSSITER*

This paper will look the relevance of the ideas of the German sociologist and philosopher Jurgen Habermas to domestic violence, with particular reference to the debate about the causes of domestic violence, and to the programmes offered for perpetrators of domestic violence. The first part of this paper will outline the Habermasian concepts of communicative action, with a particular focus on the ways that conventionally non-rational forms of communication are compatible with Habermasian discourse. There will be a focus on the idea that critiques that occur in communicative actions can be what Habermas calls “thorns in the flesh of social reality.” The second part of the paper will look at the feminist movement around domestic violence and how, from a Habermasian point of view, feminist discourse appears to have been effective in making domestic violence an important issue in the public sphere. Specific emphasis will be placed on the “Duluth Model” of domestic violence analysis and its efficacy. The final part will look specifically at the offender programmes offered at the Waitakere Family Violence Courts and whether or not these programmes can cure the thorns in the flesh of domestic violence.

In the Habermasian model of social relations, individuals live in what is called a “lifeworld.” This lifeworld comprises our taken for granted definitions and understandings of the world that give coherence and direction to our everyday actions and interactions. Habermas states that our lifeworld is so unproblematic that we are “...simply incapable of making ourselves conscious of this or that part of it at will.” Put simply, we cannot step outside our lifeworld.¹

Lifeworlds meet in what Habermas calls “the public sphere.” The public sphere is defined as:²
...first of all a realm of our social life in which something approaching public opinion can be formed...
Citizens behave as a public body when they confer in an unrestricted fashion-that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions about matters of general interest...the expression ‘public opinion’ refers to the tasks of criticism and control which a public body of citizens informally practices...vis-à-vis a ruling class.

Habermas further refined his ideas on the public sphere in what he calls “formal pragmatics.” Formal pragmatics allows the identification and explication of normative conditions of argumentation presupposed by participants engaged in communicative interaction.³ Formal pragmatics aims to unearth the general structures of action and understanding that are intuitively drawn upon in everyday communicative practice.⁴ Formal pragmatics are “formal” in the sense of attempting to

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1 A Honneth “The Dialectics of Rationalisation: An Interview with Jurgen Habermas” 49 *Telos* 4, cited in M Pusey *Jurgen Habermas*, (Tavistock, London, 1987 at 58.

2 Jurgen Habermas “The Public Sphere: An Encyclopedia Article.” (1974) 1(3) *New German Critique*, 49.

3 Lincoln Dahlberg “The Habermasian Public Sphere: Taking Difference Seriously?” (2005) 31(2) *Theory and Society* 111 at 112.

4 *Ibid*, at 131.

reconstruct the conditions of possibility of communicative action,⁵ and it is “pragmatic” to the extent that it focuses on the *use* of language and hence, on speech acts or utterances.⁶ The conditions of formal pragmatics include: thematization and reasoned critique of problematic validity claims, reflexivity, ideal role taking (impartiality and respectful listening), sincerity, formal inclusion, discursive equality, and autonomy from state and corporate interests.⁷

It is clear that Habermas is trying to envisage, through the public sphere, the ideal conditions under which discussion, debate and decision-making can occur in a democratic society. This concept of the public sphere has been criticised for being overly rational, and therefore negating aesthetic forms of communication.⁸ These aesthetic modes of communication include rhetoric, myth, metaphor, poetry, theatre and ceremony.⁹ This privileging of “rational” discourse is seen as marginalising the voices of women and non-Western persons.¹⁰ As one writer points out, women and non-Western people employ aesthetic styles of speaking; their speech is more embodied, more valuing of emotion, includes more use of figurative language, changes in tone and voice, and hand gestures.¹¹ According to this critique, the only way for these marginalised voices to be heard in the public sphere is by adopting the rational, critical style of discourse used by the privileged mode of communication.¹²

Defenders of the Habermasian public sphere argue that the above critique is a somewhat narrow interpretation of the public sphere. As Dahlberg points out, the concepts that are central to the public sphere and that are seen by its critics as exclusionary – those of reflexivity, impartiality and the reasoned contestation of validity claims – are not only complemented by requirements that embrace difference (inclusion, equality, mutual respect), but in themselves do not exclude

5 Ibid.

6 Maeve Cooke *Language and Reason: A Study of Habermas's Pragmatics*. (Cambridge; MIT Press, 1994) at 3.

7 Dahlberg, above n 3, 112; Lincoln Dahlberg, “The Habermasian Public Sphere: A Specification of the Idealized Conditions of Democratic Communication.” (2004) 10(2) *Studies in Social and Political Theory* 3; Jürgen Habermas *Theory of Communicative Action, Vol I, Reason and the Rationalization of Society* T McCarthy (trans) (Beacon Press, Boston, 1984); Jürgen Habermas *Moral Consciousness and Communicative Action* C Lenhardt and SN Weber (trans) (MIT Press, Cambridge, 1990); Jürgen Habermas *Between Facts and Norms* (Polity Press, Oxford, 1996); Jürgen Habermas “From Kant’s “Ideas” of Pure Reason to the “Idolizing” Presuppositions of Communicative Action: Reflections on the Detranscendentalized “Use of Reason” in W Rheg & J Bohman (eds) *Pluralism and Pragmatic Turn: The Transformation of Critical Theory* (MIT Press, Cambridge, 2001).

8 Jodi Dean “Civil Society: Beyond the Public Sphere” in D Rasmussen (ed) *The Handbook of Critical Theory*. (Blackwell, Oxford, 1996); Jane Flax “Is Enlightenment Emancipatory? A Feminist Reading of ‘What is Enlightenment?’” in F Barker, P Hulme and M Iversen (eds) *Postmodernism and the Re-reading of Modernity* (Manchester University Press, Manchester, 1992); C Mouffe “Democracy, Power, and the ‘Political’” in Seyla Beuhabib (ed) *Democracy and Difference* (Princeton University Press, Princeton, NJ, 1996).

9 Dahlgren, above, n 3; Flax, above n 8, 246; Jane Mansbridge “Self-interest and Public Transformation” in G Marcus and RL Hanson (eds) *Reconsidering the Democratic Public*. (Pennsylvania State University Press, University Park, PA, 1993) at 99; Iris Young, “Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory” in S Beuhabib S and D Cornell (eds) *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies*. (Polity Press, Cambridge, 1987); Iris Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, NJ, 1990) at 118; Iris Young *Inclusion and Democracy*. (Oxford University Press, Oxford, 1990) at 39.

10 Dahlberg, above n 3, at 114.

11 Iris Young, “Communication and the Other: Beyond Deliberative Democracy” in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995).

12 Eyal Rabinovitch “Gender and the Public Sphere: Alternative Forms of Integration in Nineteenth-Century America” (2001) 19(3) *Sociological Theory* 344.

aesthetic-affective dimensions of interaction.¹³ Reflexivity includes aesthetic dimensions such as intuition and imagination, which draws on feeling.¹⁴ Similarly, impartiality indicates an ethic of fairness, as opposed to non-empathetic, disembodied judgement.¹⁵ Impartiality also demands that participants put themselves in the position of the “concrete other”, and assess the situation from their point of view.¹⁶ To take the position of the “concrete other” is an attempt to make judgement *more* impartial and is not bereft of feeling.¹⁷

An example of an aesthetic-affective mode of communication participating in, and indeed enhancing, validity claims in the Habermasian public sphere, is storytelling. Storytelling contributes to communicative rationality in several ways. Storytelling enhances the understanding among different members of a polity with very different experiences or assumptions about what is important;¹⁸ it helps to make claims visible as significant concerns for public debate where they may not be visible due to a particular hegemony in the discursive order about what is important;¹⁹ it can give an account of why a particular issue constitutes an injustice needing public attention;²⁰ and in regards to this contribute to a shared language that allows a previously un-named injustice to be spoken.²¹

The goal of formal pragmatics in the public sphere is communication and decision making that is both moral and democratic. When people seek to establish understanding and consensus, in conditions where power is kept in check, moral communication can occur.²² Part of what gives communicative rationality its legitimacy is that it involves negotiation between equally entitled participants who can agree on a course of action, which includes a process of public participation, and that the law is a medium through which this can be done.²³ The references here to keeping power in check and equally entitled participation are important, as they imply that Habermas is attempting to address power imbalances that may distort communication and consensus.

The ideas of free and equal participation, and discursive deliberation and decision-making, may sound utopian. However, this view fails to take into account that these concepts are “immanent”. Immanent here means that these concepts are real presuppositions and assumptions made by actual persons engaged in everyday social and political life.²⁴ Habermas does concede that power imbalances can occur. Non-democratic subsystems such as those driven by money, bureau-

13 Dahlberg, above n 3, at 116.

14 Scott Lash “Reflexivity and its Doubles: Structures, Aesthetics, Community.” in Ulrich Beck, Anthony Giddens and S Lash (eds) *Reflective Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Polity Press, Cambridge, 1994).

15 Seyla Benhabib “Towards a Deliberative Model of Democratic Legitimacy” in Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, Princeton, NJ, 1996) at 82.

16 Simone Chambers *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse*. (Cornell University Press, Ithaca, NY, 1996) at 101.

17 Dahlberg, above n 3, at 117.

18 Young, above, n 9, 71.

19 Dahlberg, above n 3, at 118.

20 Ibid.

21 Young, above n 9, at 72.

22 D Hayes and S Houston “Lifeworlds, ‘System’ and Family Group Conference: Habermas’s Contribution to Discourse in Child Protection.” (2007) 37 *British Journal of Social Work* 987 at 988.

23 Jurgen Habermas and William Rehg “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” (2001) 29(6) *Political Theory* 766 at 772.

24 Robert Shelly “Institutionalising Deliberative Democracy” (2001) 26(1) *Alternative Law Review* 36 at 37.

cracy and power, can influence lifeworlds from outside, and he describes the intrusion of these non-democratic subsystems as being like “colonial masters coming to a tribal society and forcing a process of assimilation on it”.²⁵ However, it seems that even when non-democratic subsystems are operating, there is still a “push” for communication and understanding that is not controlled by these subsystems. Critiques of democracy go on all the time in news media and the internet, to cite two examples. Such ability (and the assumption of an ability) to critique comes from the belief that such a critique is possible within the practice of democracy. Habermas refers to these critiques as “thorns in the flesh” of social reality.²⁶ These “thorns in the flesh” can only be ignored at the cost of a terrible festering, which takes the form of social, cultural and psychological pathologies that occur when a political and/or economic crisis is avoided by displacing it onto the lifeworld.²⁷ This suggests that when there is distorted communication, there must be something wrong with the pattern of social relations in which we are forced to live. This does not exempt us from being responsible for our lives; the point is that systemically distorted communication points back to systemically distorted social structures and so to the effects of power on individual life histories.²⁸ Lifeworlds are reinterpreted by the powerful. For Habermas, the way to stop this festering is to press these democratic thorns so far and wide into the social reality, that they are able to compete with, and in a specific way govern, the many counter-discursive tendencies that had the better of them.²⁹

One area in which these “democratic thorns” have been pressed to such an extent that they have produced debate and changes in public opinion is the area of domestic violence. As Nancy Fraser explains:³⁰

...until quite recently, feminists were in the minority in thinking that domestic violence against women was a matter of common concern and thus a legitimate topic of public discourse. The great majority of people considered this issue to be a private matter between what was assumed to be a fairly small number of heterosexual couples (and perhaps the social and legal professionals who were supposed to deal with them). Then, feminists formed a subaltern counterpublic from which we disseminated a view of domestic violence as a widespread systemic feature of male-dominated societies. Eventually after sustained contestation, we succeeded in making it a common concern.

This “counterpublic” that Fraser talks about has added weight because of another aspect of the Habermasian analysis of communication: that of epistemic privilege. Epistemic privilege holds that only the people involved or affected by a particular issue have the lived experience of their own particular situation;³¹ and means that only they can make sure all the problems, needs and values that they consider relevant are introduced into the discursive process.³² Epistemic privilege can therefore have a transformative function, allowing citizens to adopt the perspective of all others, and in doing so subject their own preferences, interests and interpretations to critical examina-

25 Jürgen Habermas “The Theory of Communicative Action” *A Critique of Functionalist Reason* (Polity Press, Cambridge, 1987) Vol 2 at 85.

26 Jürgen Habermas *Postmetaphysical Thinking* (MIT Press, Cambridge, 1992) at 47.

27 Habermas, above n 25, cited in Shelley, above, n 24, at 37.

28 M Pusey *Jürgen Habermas* (Tavistock, London, 1987) at 58.

29 Shelly, above n 24, at 37.

30 Nancy Fraser “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy.” (1990) 25/26 *Social Text* 56 at 71.

31 Sarah Sorial “Habermas, Feminism, and Law: Beyond Equality and Difference?” (2011) 24(1) *Ratio Juris* 25 at 31.

32 Stefan Rummens “Democratic Deliberation as the Open-Ended Construction of Justice.” (2007) 20 *Ratio Juris* 335 at 346.

tion and assessment, enabling citizens to have an enlarged understanding, and perhaps, correct or revise their views.³³ As Habermas states:³⁴

...the moral point of view calls for the extension and reversibility of interpretative perspectives so that alternative viewpoints and interest structures and differences in individual self-understandings and world-views are not effaced but are given full play in discourse.

So what, specifically, was the content of the “thorn in the flesh” that feminism wanted to press home about domestic violence? For feminism, domestic violence is not a private matter that goes on behind closed doors, but is a matter to be brought into the public sphere and debated. Domestic violence is not dealt with by changing the character of the perpetrator, or the victim’s response to the violence. For feminism, domestic violence is prevented and changed by the response of public agencies to the violence, to the perpetrator and to the victim.³⁵ A significant part of this analysis is what has come to be known as the “Duluth Model” of domestic violence. The Duluth Model reflects the paradigm shift away from placing the responsibility for stopping the violence on the victim, and towards how agencies respond, as well as confronting the perpetrator.³⁶

A central element of the Duluth Model is the Power and Control Wheel, which highlights the various ways in which domestic violence can occur.³⁷

The Duluth Model can be characterised as a gender-based, cognitive-behavioural approach to counselling and/or educating men arrested for domestic violence and mandated by the courts to domestic violence programmes.³⁸ The use of the term “men” is deliberate. The Duluth Model does use a historical analysis of male privilege which gave men supremacy over women; institutional rules that required female submission; the objectification of women that made male violence acceptable; and the right of men to use violence to punish with impunity.³⁹ To use the Habermasian term, the Duluth Model presents the lifeworlds of victims of domestic violence as characterised by power and control, and male privilege.

It needs to be said at this juncture that there is some debate about the dynamics involved in domestic violence. Joan Kelly and Michael Johnson state that the kind of domestic violence portrayed by the Duluth Model is only one of several kinds of intimate partner violence.⁴⁰ Kelly and Johnson refer to the kind of violence in the Duluth Model as “Coercive Controlling Violence”.⁴¹ The authors then talk about “Violent Resistant”, behaviour which they refer to as an immediate reaction to an assault, often referred to as self-defence.⁴² They then talk about what they call the most common form of violence, which is “Situational Couple Violence”, where an argument es-

33 Sorial, above n 31, at 31.

34 Jurgen Habermas *Justification and Application: Remarks on Discursive Ethics* C Cronin (trans.) (MIT Press, Cambridge, MA, 1995) at 58.

35 Ruth Busch and Neville Robertson “I Just Didn’t Know How Far You Could Fight: Contextualising the Bristol Inquiry” (1994) 2 Wai L Rev 41.

36 Domestic Abuse Intervention History” <www.theduluthmodel.org/batteredwomenhistory.php>.

37 Power and Control Wheel <www.theduluthmodel.org/pdf/PowerandControl.pdf>.

38 Edward Gondolf “Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo.” (2007) 12 *Aggression and Violent Behaviour* 644 at 645.

39 Michael Paymer and Graham Barnes “Countering Confusion About the Duluth Model” The Battered Women’s Justice Project <www.bwjp.org>.

40 Joan B Kelly and Michael P Johnson “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions.” (2008) 46(3) *Family Court Review* 476.

41 *Ibid*, at 481.

42 *Ibid*, at 484.

calates into physical violence;⁴³ and “Separation Instigated Violence,” where physical acts of violence occur during the end of a relationship when there has been no previous history of violence.⁴⁴ There have been other critiques of the Duluth Model’s so called gender-bias that states that it is ideologically driven, rather than based on empirical research.⁴⁵

Dealing with the so-called gender-bias in domestic violence analysis first, there is evidence that the Duluth Model has a sound research footing.⁴⁶ On the basis of this evidence, this paper flat out rejects the view that the gender-bias is ideological, but rather that it is based on empirical evidence. In regards to the work of Johnson and Kelly, this paper has two main concerns. The first is that, throughout their analysis, the authors constantly refer to violence as being an automatic reaction to so-called out of control situations, and that couples who inflict Situational Couple Violence have poor management skills. There is research that indicates that, consistent with the Duluth Model, violence against women is not anger based. Prisoners incarcerated for violent crimes showed no difference between their propensity for violence and anger.⁴⁷ Anger management programmes do not appear, of themselves, to be effective in curbing violent behaviour in prisoners convicted of violent crimes.⁴⁸ Another study concluded that the majority of partner abusive men do not present with anger-related disturbances.⁴⁹ The attempt by Johnson and Kelly to relate domestic violence to anger could be a result of an attempt to repackage old psychological theories to explain domestic violence in opposition to analyses that indicate that culture and socialisation shape the way men who batter think and act in intimate relationships. In this regard, attempts have been made to explain violent behaviour in terms of attachment theory.⁵⁰ However, these need to be seen in light of the general debate that questions attachment theory.⁵¹ These same cautions need to be given in regards to psychiatric diagnoses for batterers such as “intermittent explosive

43 Ibid, at 485.

44 Ibid, at 487.

45 Donald G Dutton and Kenneth Corvo “Transforming a Flawed Policy: A call to revive psychology and science in domestic violence research and practice.” (2006) 11 *Aggression and Violent Behaviour* 457.

46 R Bachman “A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-partner Violence against Women from the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)” (2000) 6 *Violence Against Women* 339; Bureau of Justice Statistics “National Crime Victimization Survey” (Department of Justice, Washington DC, 2004) <www.ojp.usdoj.gov/bjs/vict.htm#vcvs> (accessed 24/05/2011); Patricia Tjaden and Nancy Thoennes “Full Report of Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey (NCJ 183781). (Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention, Washington DC, 2000); Linda Saltzman “Definitional and Methodological Issues Related to Trans-national Research on Intimate Partner Violence” (2004) 10 *Violence Against Women* 812.

47 Wagdy Loza and Amel Loza-Fanou (1999). “Anger and Prediction of Violent and Non-violent Offenders’ Recidivism” (1999) 14 *Journal of Interpersonal Violence* 1014.

48 Wagdy Loza, and Amel Loza-Fanou “The Fallacy of Reducing Rape and Violent Recidivism by Reducing Anger” (1999) 43 *International Journal of Offender Therapy and Comparative Criminology* 492.

49 B Norlander and C Lehardt “Anger, Hostility, and Male Perpetrators of Intimate Partner Violence: A Meta-analytic Review” (2005) 25 *Clinical Psychology Review* 1119. N Jacobson and others, “Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with a Violent Husband.” (1994) 62 *Journal of Counselling and Clinical Psychology* 982.

50 Donald Dutton *The Abusive Personality: Violence and Control in Intimate Relationships*. (Guilford Press, New York, 1998).

51 R Bolen “Validity of Attachment Theory” (2000) 1 *Trauma Violence Abuse* 128.

disorder”.⁵² Whilst there may be some value in psychology of this kind that can benefit both victims and perpetrators, this paper takes the view that the cognitive-behavioural, gender-biased view of violence is still the most significant model both in terms of how violence is perceived, and what interventions should be used.⁵³ It concurs with Paymer and Barnes, who state that “...we do not see men’s violence against women as stemming from individual pathology, but rather from a socially reinforced sense of entitlement”.⁵⁴

These findings have been borne out in New Zealand. As part of a review of the Waitakere Family Violence Court, victims of domestic violence who went through the Court were interviewed.⁵⁵ The researchers found that victims contextualised the violence, describing it as a “... pattern of economic, physical and psychological control and on-going abuse”,⁵⁶ as well as stating that the violence “...was an on-going pattern of psychological and social abuses, control strategies and physical assaults”.⁵⁷ This review of the Waitakere Family Violence Court, called *Responding Together*, stated very clearly that the responsibility for stopping violence remains with the perpetrators, “...and within social relationships that continue to support violence in the home.”⁵⁸ The references here to patterns of behaviour and control strategies, in this paper’s view, clearly indicate a kind of violence that is similar to the “economic abuse”, “emotional abuse”, coercion and threats”, and “intimidation”, parts of the Power and Control Wheel.

This psychologising of violence leads to this paper’s second concern with Johnson and Kelly’s analysis, namely, that it will not deal with the thorn in the flesh that feminism created in regards to domestic violence. From a Habermasian perspective, feminism brought the matter of domestic violence into the public sphere because it was seen as a matter for public concern about societal values and attitudes. Making domestic violence a matter of individual psychology turns this public matter private again. A woman who was part of the “Responding Together” review mentioned above, has a lifeworld full of violence that is part of a societal concern about gender and violence, but Johnson and Kelly’s analysis reinterprets her lifeworld as being a matter of her abusive partner’s psychological issues, or tells her that the issue is about “the relationship,” thereby implicating her in the violence and the responsibility for it.

This negating of the perceptions of victims of domestic violence is a serious issue for two further reasons. The first is that, from a Habermasian point of view, victims of domestic violence have an epistemic privilege when it comes to their experience. The other reason, borne out in

52 Edward Gondolf “Cautions about Applying Neuroscience in Batterer Interventions” (2008) 43(3) Court Review 178.

53 Edward Gondolf “The Weak Evidence for Batterer Program Alternatives” (2011) 16 Aggression and Violent Behaviour 347.

54 Paymer and Barnes, above n 39, at 7.

55 Mandy Morgan and others *Responding Together: Report Evaluating the Aims of the Waitakere Family Violence Court Protocols* (Ministry of Justice, Wellington, 2008).

56 *Ibid*, at 75.

57 *Ibid*, at 76.

58 *Ibid*, at 121.

research, is that the woman's own perception of danger is the best predictor for future risk of violence.⁵⁹

An important point needs to be made here. Proponents of the Duluth Model who reject a central causal relationship between domestic violence and anger also reject such a relationship between domestic violence and issues such as substance abuse and psychiatric disorders. As Gondolf states, the Duluth Model is not opposed to identifying possible factors that may compound domestic violence. However, services and programmes that deal with these issues should only be used in conjunction with, as opposed to replacing, counselling under the Duluth Model that deals specifically with the power and control dynamics that underpin domestic violence.⁶⁰ In a more general sense, attempts to explain domestic violence by saying it is due to "multiple factors" that may not involve power and control, have been unconvincing. Studies have shown that these "multiple factors" are few and their predictive power is weak.⁶¹

The Duluth Model emphasises power and control. Beliefs among batterers about male privilege are central to understanding domestic violence. Men who batter think that they are "the man of the house...Men should be in charge...and just like children, she needs to be disciplined too".⁶²

The foundation of the Duluth Model is as relevant as it has always been. As Paymer and Barnes point out, although it is desirable to change the attitudes of men who batter, the ultimate goal of the Duluth Model is to ensure that victims are safer by having the state intervene to stop the violence and address the power imbalances inherent in relationships where one partner has been systematically dominated and subjugated by another.⁶³

From a Habermasian point of view, the legal system has a critical part to play in domestic violence. This is because, for Habermas, the mechanism for achieving the goal of making these democratic thorns cure the festering that could take place, is the law. Modern law relies on the rationality of its binding force,⁶⁴ and legitimacy depends on the communicative agreement between those who participate.⁶⁵ It is a responsibility of law that, firstly, the communicative conditions are met, and secondly, that its own rules of rationality are met.⁶⁶ Systems of rights and principles

59 Neville Robertson and others *Living on the Cutting Edge: Women's Experiences of Protection Orders: Volume 2. What is to be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (Ministry of Women's Affairs Mintatanga Mo Nga Wahine, Wellington, 2007); LA Goodman, MA Dutton and MA Bennett "Predicting Repeat Abuse among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System" (2000) 15(1) *Journal of Interpersonal Violence* 63; AN Weiss, RM Tolman and DG Saunders "Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions" (2000) 15 *Journal of Interpersonal Violence* 75; Jacquelyn C. Campbell "Helping Women Understand the Risk in Situations of Interpersonal Partner Violence" (2004) 19 *Journal of Interpersonal Violence* 1464.

60 Edward Gondolf "Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo" (2007) 12 *Aggression and Violent Behaviour* 644 at 650.

61 Alex Heckert and Edward Gondolf "Battered Women's Perception of Sanctions on Batterer Program Outcomes" (2004) 19 *Journal of Interpersonal Violence* 778; Alex Heckert and Edward Gondolf "Do Multiple Outcomes and Conditional Factors Improve Prediction of Domestic Violence?" (2005) 20(1) *Violence and Victims* 3.

62 Carolyn Tubbs and Oliver Williams "Shared Parenting after Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship" in Jeffrey Edelson and Oliver Williams (eds) *Parenting By Men Who Batter*. (Oxford University Press, New York, 2007) 19 at 32.

63 Paymer and Barnes, above n 39, at 4.

64 Habermas *Between Facts and Norms*, above n 7, at 110.

65 *Ibid*, at 103-104.

66 Shelley, above n 24, at 38.

of the constitutive state accomplish these responsibilities.⁶⁷ In this way governmental power and popular sovereignty are intertwined with individual rights in such a way that all governmental power derives from the people.⁶⁸

There have been legal responses to domestic violence in New Zealand that attempt (if we take a Habermasian view) to cure the thorn in the flesh created by domestic violence. One of these was the passing of the Domestic Violence Act 1995. The provisions of the Domestic Violence Act 1995 that refer to psychological abuse, which can take the form of intimidation, harassment, damage to property and threats of violence,⁶⁹ and those referring to domestic violence being “a number of acts that form a pattern of behaviour”,⁷⁰ both appear, in my view, to support a Duluth Model way of viewing domestic violence.

Another more recent initiative was the establishment of specialist family violence courts in Waitakere and Manukau. The Waitakere and Manukau family violence courts are a judicial initiative operating within the criminal jurisdiction, and follow an international trend towards implementing problem-solving courts for specific social problems.⁷¹ In the case of the Waitakere Family Violence Court, a central role was played by the Waitakere Anti-Violence Essential Services (WAVES), which became a family violence network operation. This emphasis on a collaborative, co-ordinated response to family violence was derived from the Duluth Model.⁷² With regards to the Manukau Family Violence Court, the efforts of Judge Russell Johnson and a subsequent working group were responsible for setting up the Manukau Family Violence Courts.⁷³ Both of these Family Violence Courts have objectives that involve reducing delays in processing cases, increasing safety for victims and holding perpetrators responsible for their actions.⁷⁴ The key question this paper would like to ask is: to what extent do the Waitakere and Manukau family violence courts deal with the underlying causes of domestic violence, in light of the discussion regarding Power and Control and the Duluth Model? Or, to put it in a Habermasian context: Do the family violence courts cure the “thorn in the flesh” created by the storytelling and academic discourses around domestic violence?

The short answer, in this writer’s view, is no. According to *Responding Together*, an evaluation of the Waitakere Family Violence Court, there are twelve community-based offender services that the Court refers offenders to.⁷⁵ Of these twelve community-based services, four were relationship/counselling services; three were specific alcohol, drug and addiction services; two were services that deal with anger; two were mental health services; and one provided legal advice. The only service that even mentions the word “violence” is the “Living Without Violence Man Alive” service provider. But even here it appears that “violence” is seen in the context of “anger”

67 Habermas *Between Facts and Norms*, above n 7, at 308.

68 *Ibid.*, at 135.

69 Domestic Violence Act 1995, s 3(2)(c).

70 *Ibid.*, at 3(4)(b).

71 “Establishment of Family Violence Courts in New Zealand” in *The Waitakere and Manukau Family Violence Courts: An Evaluation Summary* (Ministry of Justice, Wellington, 2008) <www.justice.govt.nz/publications/global-publications/t/the-waitakere-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/2-establishment-of-family-violence-courts-in-new-zealand>.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 Mandy Morgan and others, above n 55, at 54.

when, as has been discussed in this paper, violence and anger are not related. Also, according to the Duluth Model researchers, programmes for mental health, drug and alcohol issues can only be useful alongside programmes that deal directly with the violence. The “relationship/counselling” services wish to put violence into individualistic, therapeutic paradigms that overlook (or indeed, ignore) the societal beliefs that underpin domestic violence. In fact, programmes for offenders that promote “communication skills” and “assertiveness” may in fact produce a better educated batterer.⁷⁶ So, although the Waitakere Family Violence Court may espouse to follow the Duluth Model, in this writer’s view the kinds of programmes offered in Waitakere do not appear to have any reference to the Duluth Model in their service delivery.

There are other concerns raised about the Waitakere and Manukau Family Violence Courts that indicate that victims’ needs are not heard and that perpetrators are not taking responsibility for their offending. *Responding Together* reports that victims believe that the only reason the men went to the programmes provided was to get a lighter sentence.⁷⁷ Some services associated with the Waitakere Family Violence Court have a “common sense” understanding of violence that ignores the specific understanding of domestic violence that is required.⁷⁸ This is in a context of findings in *Responding Together* that indicate that victims saw little positive change as a result of their partners attending a treatment or intervention programme.⁷⁹ Victims of domestic violence did not believe that the Waitakere Family Violence Court successfully held offenders accountable to victims for changing their violent behaviour.⁸⁰

Reasons why behaviour is not changed go beyond simply the nature of the programmes that perpetrators are referred to. Often offenders who go to programmes do not complete them.⁸¹ Robertson and colleagues tell of an experienced co-ordinator of one large stopping violence programme who could not recall a single instance in which a man completed a programme.⁸² This is not helped by Courts that do not prosecute men who attend a programme for a few sessions and then stop, because “at least they were making an effort.”⁸³ Further, the introduction of the Waitakere Family Violence Court has had no significant impact on reoffending, as measured by one-year reconvictions.⁸⁴

None of the above concerns give comfort in terms of dealing with the heart of domestic violence: male privilege and societal beliefs. Only when this occurs will the “thorn in the flesh” created by the storytelling and academic discourses around domestic violence, be a real attempt to cure the festering that is created when these issues are ignored.

The point of communicative action, and of creating “thorns in the flesh”, such as, in the writer’s view, those made by domestic violence discourses:⁸⁵

76 Neville Robertson “Stopping Violence Programmes: Enhancing the Safety of Battered Women or Producing Better Educated Batterers.” (1999) 28 *New Zealand Journal of Psychology* 68.

77 Mandy Morgan and others, above n 55, at 75.

78 *Ibid.*, at 57.

79 *Ibid.*, at xix.

80 *Ibid.*, at xx.

81 Neville Robertson and others, above n 59, at 252-253.

82 *Ibid.*, at 248.

83 *Ibid.*, at 252.

84 Trish Knoggs and others *The Waitakere and Manukau Family Violence Courts: An Evaluation Study* (Ministry of Justice, Wellington, 2008) at 36.

85 Jurgen Habermas, above n 25, at 372.

...is to protect areas of life that are functionally dependent on social integration through values, norms, and consensus formation, to preserve them from falling prey to the systemic imperatives of economic and administrative subsystems growing with dynamics of their own, and to defend them from becoming converted over, through the steering medium of law, to a principle of sociation that is, for them, dysfunctional.

The victims of domestic violence have come a long way. They have brought their lifeworlds into the public sphere; they have created a strong counterpublic that has made domestic violence an issue for everyone; they have a substantial amount of research and academic support; they have highlighted the causes and dynamics that underlie domestic violence; they have created a thorn in the flesh that the law, at first glance, has responded to. But it appears that the gains made by victims of domestic violence need to be protected, and by failing to match up victims' perceptions of domestic violence, as well as the dynamics of domestic violence, with the programmes that espouse to treat offenders, the Family Violence Courts are failing to respond. In this paper's view, the festering will continue unless domestic violence is seen for what it is, and until the legal system, in terms of the programmes offered to perpetrators, responds appropriately. Ever-present in this discussion, in this paper's view, is Habermas, who reminds us about the importance of addressing power imbalances; of a possible reconciliation between expert, empirical evidence and the stories and experiences of those with less power; and the law's role in continuing to press home the thorns in the flesh until the festering stops. It is hoped that this paper is a contribution to such an endeavour.