

Benedict Kingsbury*

COMPETING CONCEPTUAL
APPROACHES TO INDIGENOUS
GROUP ISSUES IN NEW ZEALAND LAW†

Argument about issues concerning indigenous peoples is characterized by lack of agreement even on core concepts and political languages with which to join debate. To some extent this is inevitable where smaller groups are seeking a radical change in the majority's thinking and fundamental interests clash. Indigenous advocates often make use of concepts established among the majority, and sections of the majority may try to use what they understand to be indigenous concepts. In a relatively integrated society like New Zealand with complex personal identities, many hybrid conceptual forms develop, while at the same time language is fashioned to achieve authenticity (sometimes by questionably claiming purity and tradition for a newly restructured concept) and legitimacy (sometimes by attaching an appealing new label to a refurbished ancient idea.) Deep conceptual uncertainties are also evident in the legal practice of official institutions, and these may have substantial consequences.

Legal discourse on indigenous issues involves unresolved tensions between at least five structures of argument: human rights and non-discrimination; minority rights; self-determination; historical sovereignty; and indigenous peoples. Each of these five structures of argument is supported by a substantial body of precedent and legal ideas, so that it often appears that a problem could be solved simply within the parameters of a single one of these structures. But each has a different logic, so that some solutions reached within one structure are not attainable – and certainly cannot be maintained in a stable way over a variety of cases – within another structure. The logics, although often seeming to overlap, have fundamentally divergent paths – this divergence becomes clear in hard cases. To make use of one particular structure of argument is to accept its fundamental commitments and to foreclose certain positions incompatible with these. It has been argued elsewhere that many international law problems in this area can be understood as struggles between such

* New York University Law School.

† The author is immensely indebted to Kirsty Gover for innumerable perceptive suggestions about source materials and New Zealand approaches, to Natalie Baird, Karen Knop, Jeremy Waldron, and other colleagues and friends for their helpful comments, and to the Filomen D'Agostino and Max E. Greenberg Research Fund.

structures.¹ This paper argues that all five of these structures of argument are employed simultaneously in different elements of New Zealand law and legal policy without systematic prioritization.² In New Zealand, each of the five structures incorporates, and is overlaid by, arguments based on the Treaty of Waitangi (1840), but the sense of harmony among them created by this common link to the Treaty is misleading. Although the Treaty is now widely accepted as a fundamental founding and constitutional document, and reference to its provisions and its principles provides a special source and vocabulary for the debate, this does not dissolve the tensions between the competing structures. To some extent, the Treaty debates have replicated the division between these structures, with sovereignty arguments referring to art. 1 and its connections to arts. 2 and 3, self-determination arguments referring to art. 2, universal human rights arguments referring to art. 3, minority rights arguments drawing some sustenance from statements made at Waitangi about religious freedom (statements a few have argued amount to an extra-textual art. 4),³ and indigenous rights arguments variously held to be the summation of the Treaty or to be available entirely outside the Treaty framework. This paper argues that many of the most difficult problems relating to the legal position of indigenous groups in New Zealand involve the interplay of some or all of these competing structures of argument, so that attempts simply to resolve them within one structure will not convince opponents, who may reasonably reject one structure in favour of another. Premature rationalization or formalization might

indeed preclude the development of creative solutions. The issue is sometimes framed simply as a question of whether or not the Treaty (or its principles) should be enforceable as higher constitutional law, but behind this important question lies a set of not always recognized problems in the interplay between competing conceptual structures that would exist even if there were no Treaty. Rather than take the standard and important approach of focusing on the Treaty, this essay instead elaborates on the use in New Zealand law and policy of these five structures of argument (Parts I–V), offers a few examples of current problems the difficulty of which centres on unresolved tensions between these structures (Part VI), and makes a normative argument for the maintenance of these creative tensions as desirable or at least as a 'second-best' that may be preferable to any of the realistic alternatives (Part VII).

1 Human rights and non-discrimination

The idea that every person has basic rights that ought to be legally enforceable, at least against state action, and that all should benefit from legal protection against illegitimate discrimination, has become almost axiomatic. In institutionalizing such principles and making them subject to judicial protection, however, neither the Bill of Rights Act 1990 nor the Human Rights Act 1993 makes substantial reference to the Treaty or to the relation of human rights provisions to indigenous issues. One historical explanation for the first lacuna may be that, when an entrenched Bill of Rights was initially proposed, many Māori were unwilling to have the Treaty placed in a formal hierarchy of written law in a way that might compromise its mana, or special authority. The possibility of incorporating the Treaty seems not to have been seriously revived when it became clear that an unentrenched Bill of Rights was going to be adopted instead. The Human Rights Act, which was designed primarily to prohibit discrimination and to ensure suitable institutional supervision, seems not initially to have been thought to bear particularly on contentious Treaty issues. The relation of these statutes to other laws, policies, or practices based on Treaty principles has not yet been a source of major difficulty in the courts. But it may soon become one, as the courts have begun to address major issues concerning possible conflicts between the guarantees in the Bill of Rights and competing fundamental constitutional principles,⁴ and the Human Rights Act of 2002 empowers decisions in many more situations where it is alleged that government action, or

1 An attempt to analyse developments in international law in these terms is B. Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in P. Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 69.

2 Cognate mappings of these concepts are explored in B. Kingsbury, 'Claims by Non-State Groups in International Law' (1992) 25 *Cornell Int.L.J.* 481; and W. Kymlicka, *Politics in the Vernacular* (Oxford: Oxford University Press, 2001) at 120–32. The approach taken here differs from that of A. Sharp, *Justice and the Māori* (Auckland: Oxford University Press, 1990; 2d ed, 1997), and from P. Havemann, 'The "Pakeha Constitutional Revolution": Five Perspectives on Maori Rights and Pakeha Duties' (1999) 1 *Waikato L.Rev.* 53. Those works are concerned with tracing and categorizing varieties of political language and ideas, whereas the present article focuses on the interplay of explicitly legal structures of argument. Sharp's careful textual exploration of political languages used in the New Zealand debate offers numerous additional illustrations of themes related to this article that cannot be discussed in the space available here.

3 See the discussion of this and what has occasionally been called 'Article 4' in C. Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987) at 53: 'The Governor says the several faiths of England, of the Wesleyans, or Rome, and also the Maori custom, shall be alike protected by him.' See also New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (Wellington: Law Commission, March 2001) at 73 [hereinafter *Maori Custom*]; and Waitangi Tribunal, *Muriwhenua Land Report* (WAI 45) (Wellington: GP Publications, 1997) at 113–4.

4 *R. v. Paumotu*, [2000] 2 N.Z.L.R. 695; and *R. v. Pora* [2001] 2 N.Z.L.R. 37, on the effect of 1999 'home invasion' legislation purporting to increase the penalties for offences that had already been committed.

another statute, is contrary to the Human Rights Act.⁵ The courts have considerable experience of adjudicating cases under statutes referring to the principles of the Treaty,⁶ although it is increasingly the view of the government and the legislature that the legislature should itself work out in detail what the Treaty principles require on each issue, rather than leaving a broad power to the courts deriving from very general provisions in each statute.⁷ If the Treaty is to retain a quasi-constitutional status, however, it is almost inevitable that the judiciary will on occasion be called upon to assess the justifiability of regulatory infringement of the principles of the Treaty, as has happened under s. 35(1) of the Constitution Act in Canada.⁸ The political system is not always capable at a given moment of producing carefully crafted and fairly balanced approaches in this difficult and contentious policy area, and the judiciary may at times play a valuable role in breaking a logjam. The difficulties Canadian political institutions have had in reaching the level of agreement necessary to implement the spirit of some Supreme Court of Canada decisions, such as those relating to Mikmaq fisheries,⁹ are a salutary reminder that even with a suitable jurisdictional basis, resort to courts can overcome regulatory policy and resource allocation impasses in democratic institutions only where suitable background conditions prevail.¹⁰

For the time being, the major human rights statutes are read as establishing a minimum platform of rights of all New Zealanders regardless of ethnicity or indigeneity, connected perhaps with art. 3 of the Treaty but not obviously with art. 2. The inevitable problems of reconciling this platform of equal rights with other policies and principles based on group identity are not addressed fully in legislation or in government policy.

5 General protection for the government and public functionaries under s. 151 was repealed from 1 January 2002, but some protection and remedies limits were introduced.

6 At least fourteen such statutes existed by the end of 2000 – see Law Commission, *Maori Custom*, supra note 3. Variation in the forms of words used are analysed in M. Palmer, 'The Treaty of Waitangi in Legislation' [2001] N.Z.L.J. 207 [hereinafter 'Treaty of Waitangi'].

7 Such a policy is advocated by Palmer, *ibid.* This policy would not necessarily circumscribe judicial decision making based on common law principles, or on reference to the principles of the Treaty as part of a set of background justificatory principles in hard cases. See, e.g., *Hunkina Development Trust v. Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188.

8 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

9 *R. v. Marshall*, [1999] 3 S.C.R. 456 (17 September 1999) and [1999] 3 S.C.R. 533 (17 November 1999).

10 P. Pettit, 'Minority Claims under Two Conceptions of Democracy' in D. Ivison, P. Patton, & W. Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 199.

Non-discrimination provisions are generally not readily adapted to deal comprehensively with indigenous group rights, being premised on the protection of individuals and communities from adverse discrimination on the basis of characteristics such as race or ethnicity, with equality of all individuals as the ultimate goal. The idea of 'extra' rights for a group of individuals sits uneasily in this equality framework. Menno Boldt's comment with regard to Canadian law is apposite also in New Zealand: 'A "racism" paradigm [for analysing injustice to indigenous peoples] robs Indians of the most significant elements of Indian identity – their history, nationhood, cultures, and languages – and thereby undermines their historical and moral claims to self-determination.'¹¹ Some concession to such concerns is embodied in s. 73 of the Human Rights Act, which permits certain 'measures to ensure equality' by exempting anything 'done or omitted in good faith for the purpose of assisting or advancing persons or groups' protected from discrimination under the Act, where these persons or groups 'need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.'¹² The notion of groups in need of advancement to take up an equal place in society originates in the affirmative action language found in the 1965 Convention on the Elimination of Racial Discrimination,¹³ language that caused much analytical difficulty to the High Court of Australia when applied to uphold as a special measure what the court thought was *prima facie* racial discrimination (albeit it pro-Aboriginal) in a statute returning public lands to Pitjantjatjara control.¹⁴ The cogent view that returning land to its traditional owners should not have been regarded as discrimination at all, so that the question of special measures need not have been addressed, involves an approach that in New Zealand is supported by the text of s. 19 of the Bill of Rights Act: 'Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race ... do not constitute discrimination.' The possibility that a measure might be defined by the Bill of Rights Act as not constituting discrimination, but nevertheless be held under the Human Rights Act to be unlawful discrimination not saved by the narrower phrasing of s. 73, is a structural incongruity that Parliament finally addressed in 2001 but may not have completely resolved.¹⁵

11 M. Boldt, *Surviving as Indians* (Toronto: University of Toronto Press, 1993) at xv.

12 See also the 'freedom from discrimination' clause in s. 19 of the Bill of Rights Act 1990.

13 *International Convention on the Elimination of All Forms of Racial Discrimination*, 4 January 1969, 660 U.N.T.S. 195

14 *Gecharly v. Brown* (1985), 159 C.L.R. 70.

15 The Human Rights Amendment Act 2001 provides procedures and remedies where any branch of government or public functionary breaches s. 19 and is not covered by the

The more deep-seated problem is that, while s. 73 (especially if modified in light of s. 19) might bear the weight of certain group rights claims, this provision is not likely to prove well suited to the vast jurisprudential edifice that would have to be constructed precariously on it to accommodate Treaty issues.¹⁶ The Human Rights Act takes no position on, but can hardly be said to embrace, the view that indigenous nations are 'constitutional entities rather than ethnic or racial groups.'¹⁷ The result of the inherent difficulty of reconciling the various conceptual structures involved here, coupled with more pressing demands on scarce resources, has been that government efforts to ensure consistency of legislation and policy with the Human Rights Act have not succeeded in resolving the conflicts that potentially arise between the human rights conceptual structure and the application of the principles of the Treaty of Waitangi and other sources of legal policy on indigenous issues.¹⁸

II Minority rights

The language of 'minority rights' has not acquired in New Zealand the political and juridical salience it held in much of Central and Eastern Europe after World War I, and again assumed after the break-up of the Soviet Union and Yugoslavia. Nevertheless, a minority rights clause was

justified limitations clause in s. 5 (BoRA). But an identical act by a private institution would be covered only by s. 73.

16 The first, and still the only, decision to consider whether 'measures to ensure equality' were permissible in terms of s. 73 concerned a fisheries training course in which places were reserved specifically for applicants of Māori or Pacific Island descent. The Complaints Review Tribunal found that this measure breached the Human Rights Act and that the elements of the 'measure to ensure equality' defence were not established (the defendant did not, however, take an active part in the case). *Amattal Fishing Co Ltd v. Nelson Polytechnic (No 2)* (1996), 2 H.R.N.Z. 225. On related questions in Canada, see P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 215-33.

17 B. Slattey, 'First Nations and the Constitution: A Question of Trust' (1992) 71 Can. Bar Rev. 273.

18 In its June 2000 guidelines on the Human Rights Act 1993, the Ministry of Justice made no attempt to place Māori group rights within the framework of the Act: the Guidelines contain no reference to the Treaty of Waitangi, and only a passing reference to Māori (along with Pacific Islanders) in the context of discussion on s. 73 and 'measures to ensure equality.' See Ministry of Justice, *The Human Rights Act 1993 - Guidelines for Government Policy Advisors* (Wellington: Ministry of Justice, June 2000). Problems are unlikely to be resolved by adoption, in isolation from any substantive amendments, of the suggestion in the Ministry of Justice discussion paper 'Re-evaluation of the Human Rights Protections in New Zealand' (October 2000) that a reference to the Treaty simply be inserted in the long title of the Act, so that the Act be entitled 'An Act ... to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights and the Treaty of Waitangi.'

included in the Bill of Rights Act (s. 20): 'A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language of that minority.' This provision is closely modeled on art. 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR).¹⁹ Like the Bill of Rights, art. 27 of the ICCPR does not address the position of indigenous peoples explicitly, but art. 27 has been applied and interpreted in several cases dealing with indigenous issues in the Human Rights Committee and in national courts in countries in which the ICCPR is directly cognizable, with potential implications for New Zealand jurisprudence. Cases on art. 27 developed initially in two basic patterns: those focused on the position of individuals or dissenting groups vis-à-vis the wider group, and those focused on the position of the group vis-à-vis the state.

Article 27 has been applied by the Human Rights Committee in cases brought by individual members of indigenous groups claiming to have been wrongly excluded from participation in the particular group's culture. These cases have challenged indigenous group policies (embodied in or structured by state legislation) terminating the 'Indian' status of women who married non-Indians in Canada and excluding from the entitlement to herd reindeer in Sweden those Sami who had ceased herding for three years, even if they had been forced to do so by straitened circumstances.²⁰ The effect of such jurisprudence is to involve bodies outside the group in struggles within the group. A minority rights provision can therefore be a zone of contention between individual rights claims and claims to group self-determination or the exercise of *tino rangatiratanga*. New Zealand courts have struggled with this tension, in some cases tipping towards autonomy and being reluctant to get closely involved in issues of group membership and mandate,²¹ in others

19 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can.T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976).

20 *Lovelace v. Canada* (Communication No. R.6/24), Final Views, 30 July 1981, UN Doc. A/36/40, Annex XVIII (1981); *Kitok v. Sweden*, UN Doc. A/43/40 221 (1988).

21 See, e.g., the clear indications by Hammond J. and Robertson J. that it would be strongly preferable for the courts not to play a significant role in the dispute between the Tainui executive committee and the Kingitanga representatives. *Porima v. Te Kauhanganui o Waikato* (22 September 2000), Hamilton M208/00 (H.C.); *Porima v. Waikato Rauapatu Trustee Company* (20 February 2001), Auckland M327/00 and M330/00 (H.C.). Note also the circumspection manifested by Doogue J. in *Kai Tahu o Puketapu Hapu Inc v. Attorney-General* (5 February 1999), Wellington CP 344/97 (H.C.). In *Te Runanga o Wharehauri Rekohu Inc v. Attorney-General*, [1993] 2 N.Z.L.R. 301, the Court of Appeal refused to disturb legislative implementation of the 1992 fisheries settlement agreement, despite opposition of some Māori to it, commenting that the agreement 'is a compact of a political kind.' The Waitangi Tribunal has also expressed hesitation

tipping toward individual entitlements and feeling obliged to rule on which groups are the relevant groups where they see a danger of groups or individuals being excluded.²²

Questions concerning entitlement to take part in determining the future of Māori involvement in New Zealand's commercial fishery, or to benefit from the proceeds of the long-term settlement of Māori claims in relation to this fishery, raised such problems acutely. Members of Ngāti Porou and other tribes persuaded the Human Rights Committee that by establishing, without their consent, a new quota-based control structure for Māori commercial fisheries that eliminated other legal bases for Māori authority and traditional commercial fishing, the 1992 fisheries settlement limited their right to enjoy their own culture. The Committee concluded, however, that no violation of art. 27 had occurred, as the government had legislated only after broad consultation with interested Māori and had paid specific attention to the sustainability of Māori fishing activities.²³ The Committee took its cue from the Waitangi Tribunal and the New Zealand courts, which had denied challenges to the pan-tribal settlement by dissenting Māori tribal groups, but it did not formulate its own case for subsuming the specific cultural circumstances of different whānau, hapū, and iwi into evaluation of a global Māori interest. The Committee might have chosen to make such a case by resting on economic, managerial, or legal requirements arising from the nature of the fisheries system, or on a view of Māori society and Māori rights, or perhaps even on the simple necessities of politics. But rather than reason along such lines, the Committee seems instead to have seen this as a case of a conflict of art. 27 rights, between some individuals and groups whose rights to enjoy their culture would be enhanced by the settlement and others whose rights to enjoy their culture would be diminished.²⁴ The felt necessity to set up one rights claim as a counterweight to another, in order to reach questions of balancing and of

about determining who makes up a particular group and who is actually represented by the representatives, although it has seen little option but to address these matters, at least in the absence of jurisdictional objection. See, e.g., Waitangi Tribunal, *The Pakakohi and Tangahoe Settlement Claims Report* (WAI 142 and WAI 758) (Wellington: GP Publications, November 2000).

22 *Te Waka Hī Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*, [2000] 1 N.Z.L.R. 285 (C.A.).

23 *Apirana Mahuika v. New Zealand*, UN Doc. CCPR/C/70/D/547/1993 (2000) at paras. 9.5-9 [hereinafter *Apirana Mahuika*].

24 'In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.' *Apirana Mahuika*, *ibid.* at para. 9.6.

objective and reasonable justifications for limitations, is an understandable feature of this discourse, but one that can lead to some artificiality of assessment. The funds flowing to Māori as a result of the fisheries settlement undoubtedly should enable some Māori to enter or remain in the fishing industry, as well as enabling funding of Māori language education and other activities related specifically to art. 27. This is even more true where art. 27 is interpreted in light of art. 1 of the Covenant on self-determination;²⁵ the Committee in this case further carries forward an important jurisprudential innovation in endorsing the possibility of such an interpretive use of art. 1, although it does not expressly refer to self-determination in weighing the specific merits of the case. But triggering a full assessment of the complex issues involved in such a settlement should not necessarily depend on whether the settlement advances rights that exactly 'parallel' those it diminishes – a settlement might, for instance, have important consequences in advancing realization of the objectives of other rights, including economic and social rights. This is by no means to suggest that the Committee faces an easy task in such cases – their difficulty is an indication of a fundamental tension between different structures of argument that has been internalized also in art. 27 and hence, it may be inferred, in s. 20.

Article 27 has also been a vehicle for complaints by indigenous groups against state action, or inaction, not involving intra-group questions. The Human Rights Committee has indicated that wrongful failure to secure to the Lubicon Lake band a reservation to which they were at least morally entitled, depriving them of hunting and trapping, would constitute a violation of their art. 27 cultural rights in the absence of remedial action by Canada.²⁶ Ainu succeeded in arguing, in a Japanese court, that government construction of a dam without regard to potential harm to Ainu culture was an actionable violation of art. 27.²⁷ Sami succeeded in persuading the Supreme Administrative Court in Finland to overturn mining concessions on the grounds that insufficient attention had been paid to the risk of damage to traditional cultural activities violating art. 27.²⁸ Entirely unresolved, however, is the question of whether art. 27

25 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976).

26 *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, U.N. Doc. A/49/40, Annex IX at 1, 27 (1990).

27 *Kayano and Kaizawa v. Hokkaido Expropriation Committee* (Sapporo District Court, Japan, 1997), trans. M. Levin, 38 I.L.M. (1999) 397. See also M.A. Levin, 'Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan' (2000) 33 N.Y.U.J.I.L.P. 419.

28 *Kasivarsi Reindeer Herders' Cooperative v. Ministry of Trade and Industry*, File No. 1447, Helsinki, 15 May 1996.

would in fact be applied with the same liberality to a full range of non-indigenous minorities or whether art. 27 is to some extent being adapted to respond to the surge in acceptance of the justice of many indigenous claims. This, too, is an impending dilemma under s. 20, especially acute in an instance where cultural claims by Māori and a non-Māori minority happen to conflict.

Considerable disagreement with any proposal to equate Māori with other numerical minorities in New Zealand maps the strong opposition of indigenous peoples' representatives to being treated as 'minorities' in international fora. An effort led by the Department of Internal Affairs to develop an 'ethnic policy framework' languished in the face of the difficulty of which numerical minorities to address and the problem of whether 'minority' policy and 'indigenous' policy should be treated as overlapping or entirely disjunct. Ducking these difficulties, the Department's starting proposition that the 'ethnic sector' comprises 'people in New Zealand of non-Anglo-Celtic and non-Polynesian ethnicity' was essentially bureaucratic: the Ministry of Pacific Island Affairs could address issues involving those groups, and Māori issues were dealt with elsewhere.²⁹ In political terms, an active minorities policy has implications for Māori, touching on resource allocation, economic competition, immigration, integration, social equity, and the value and problems of multiculturalism. Conversely, a strongly pro-indigenous or 'bicultural' policy has implications for minorities. These complexities have played out in controversies about the stance and priorities of the Race Relations Conciliator (from 2002, the Race Relations Commissioner).³⁰

III Self-determination – *Tino rangatiratanga*

In the United Nations Charter and the practice of decolonization and human rights protection, a dichotomy was routinely drawn between the right to self-determination and minority rights. Self-determination applied principally to the entire people of a European colony, and minority rights to national minorities within existing states. But the concept of self-determination is increasingly extended to autonomy or substantial

29 See, e.g., Department of Internal Affairs, Briefing to the Incoming Minister Responsible for Ethnic Affairs, December 1999, online: <www.dia.govt.nz>.

30 See 'Henare Triggers Race Office Row' *The [Wellington] Dominion* (22 June 22 1999) 1: 'Maori Affairs Minister Tau Henare accused Race Relations Conciliator Rajen Prasad yesterday of "undermining" Maoris by promoting multiculturalism ... He said Maoris were disillusioned with the office and resentful of state institutions not living up to the promises of the Treaty ... Dr Prasad said the Human Rights Act did not tell the office to give priority to Maori issues.' In the months following the police shooting of a young Māori man in Waitara in 2000, however, Dr Prasad, then the Race Relations Conciliator, was reported to have played a role in ameliorating tensions in Waitara.

involvement in decision making by indigenous peoples or other groups within recognized states – to the structuring and maintenance of relations, rather than separation.³¹ Both the decolonization variety and the emergent relational variety of self-determination have been significant in New Zealand debates.

The nationalist-decolonization approach has underpinned some arguments that there exists a single 'Māori nation' whose wrongful subordination by colonial power should be rectified as far as feasible in a continuation of the logic of decolonization.³² Some of these arguments treat the Māori nation as a political unit, isomorphic with other 'nations' that have found their political expression in modern 'nation-states'.³³ As in nationalist movements all over the world, some such contemporary nationalist claims have also involved constructing a view of Māori history in which the presence and attributes of a Māori nation are traced from early periods.³⁴ Such claims have been met with rejoinders, such as Chief Judge Durie's warning that 'the researcher should not ... be captured by current ideologies that manicure a perception of the past to suit a current purpose'.³⁵ The difficulties of maintaining strong national Māori political organizations over long periods – with notable exceptions, such

31 See, e.g., K. Coates & P. McHugh, *Living Relationships, Kōhiri Ngātahi: The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998) [hereinafter *Living Relationships*]; B. Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in P. Aikio & M. Scheinin, eds., *Operationalizing The Right of Indigenous Peoples to Self-Determination* (Turku, Finland: Abo Akademi, 2000) 19; I.M. Young, 'Two Concepts of Self-Determination' in A. Sarat & T.R. Kearns, eds., *Human Rights: Concepts, Contests, Contingencies* (Ann Arbor: University of Michigan Press, 2001) 25.

32 See also M. Jackson, 'The Crown, the Treaty, and the Usurpation of Maori Rights' in *Proceedings of Aotearoa/New Zealand and Human Rights in the Pacific and Asia Region: A Policy Conference* (1989) 17.

33 One strand of this argument places great emphasis on the 1835 Declaration of Confederation and Independence made by leaders of Northern hapū. This has been the basis for contemporary assertions by 'The Confederation of Chiefs of the United Tribes' of entitlements to fish and to issue Aotearoa citizenship papers. See, e.g., *M.W. Manukau v. Attorney-General* (19 July 2000), Palmerston North M259-SD00 (H.C.); and *Re Manukau* (1993), noted by F.M. Brookfield, [1993] N.Z.L.Rev. 278. Another strand simply asserts continuing exclusive Māori sovereignty over land not properly acquired from its Māori owners – see, e.g., *Whiti Te Ra Kaihau v. New Zealand Police* (11 May 2000), Palmerston North AP5/2000 (H.C.). Online: *Maori Law Bulletin* July 2000 <www.bennion.co.nz/mlr/2000/jul.html>.

34 For discussion in the context of Chinese historiography, see, e.g., P. Duara, *Rescuing History from the Nation* (Chicago: University of Chicago Press, 1995). A different approach is to conjecture on the likely future evolution of Māori political organization had it not been interrupted by colonialism, as Rangimui Walker does in H. Melbourne, ed., *Maori Sovereignty: The Maori Perspective* (Auckland: Hodder Moa Beckett, 1995) at 23.

35 E.T. Durie, 'Ethics and Values' (Te Oru Rangahaua Maori Research and Development Conference, Massey University, 7–9 July 1998), online: *Indigenous Peoples and the Law Homepage* <www.kennett.co.nz/law/indigenous/1999/39.html>.

as the Māori Women's Welfare League – indicate limits to the viability of such a Māori national project for the time being.³⁶

Self-determination in the post-decolonization sense of a relationship between indigenous peoples and states, which is gradually finding acceptance in international fora, is increasingly part of the New Zealand debate.³⁷ But at present this debate is centred not so much on an international concept of self-determination as on the related but distinctive concept of *tino rangatiratanga*.³⁸ The Waitangi Tribunal has indicated that the principle of *rangatiratanga* refers to rights of autonomous action and management.³⁹ *Vis-à-vis* the Crown, the principle of *rangatiratanga* means that a particular Māori community 'should control their own *tikanga* and *taonga*, including their social and political organisation, and, to the extent practical and reasonable, fix their own policy and manage their own programmes.'⁴⁰ In evolving practice, *tino rangatiratanga* is

36 L. Cox, *Kotahitanga: The Search for Māori Political Unity* (Auckland: Oxford University Press, 1993); M. Durie, *Te Mana, Te Kāwanatanga: The Politics of Maori Self-Determination* (Auckland: Oxford University Press, 1998) [hereinafter *Te Mana, Te Kāwanatanga*].

37 See, e.g., Durie, *Te Mana, Te Kāwanatanga*, supra note 36 esp. at 228–40.

38 For the government, the process of giving meaning to this expression is legitimated *vis-à-vis* the electorate by its presence in art. 2 of the Māori versions of the Treaty, and is advantageous in being more evolutionary and controllable as simply one of a set of Treaty principles than would be a potentially polarized struggle about self-determination. M. Maniapoto-Jackson is one of several commentators to voice misgivings about state appropriation of this concept: M. Maniapoto-Jackson, 'The Crown and Te Tino Rangatiratanga' in *Proceedings of Aotearoa/New Zealand and Human Rights in the Pacific and Asia Region: A Policy Conference* (supra note 32) 21. See also Annie Mikaere's caustic comment on Pākehā legal scholars and judges who 'bandied about terms such as *rangatiratanga*, almost as though they were qualified to understand what they meant.' A. Mikaere, Book Review of *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* by I.H. Kawharu (1990) 14 N.Z.U.L.Rev. 97 at 99.

39 The Waitangi Tribunal suggests connections between evolving international law concepts and the understanding of *tino rangatiratanga*: 'The international term of "aboriginal autonomy" or "aboriginal self-government" describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are "*tino rangatiratanga*," as used in the Treaty, and "*mana motuhake*," as used since the 1860s.' Waitangi Tribunal, *Tirānaki Report – Kaupapa Tuatahi* (WAI 143) (Wellington: GP Publications, 1996) at ch. 1.4 ('Autonomy.') Earlier, in the *Maori Electoral Option Report*, the Waitangi Tribunal emphasized the contextual and *sui generis* character of *tino rangatiratanga*: 'Some have argued that *tino rangatiratanga* was a guarantee of Maori sovereignty; others a right to self-determination; others again a right of self-management. The difficulty is that no one of these English constitutional terms properly captures the Maori meaning – or meanings – of *tino rangatiratanga*, a term that is eminently adaptable to time and circumstance.' Waitangi Tribunal, *Maori Electoral Option Report* (WAI 413) (Wellington: GP Publications, 1994) at ch. 2.1 ('The Treaty of Waitangi, Maori Representation in Parliament: An Historical Overview').

40 Waitangi Tribunal, *Te Whānau o Waipareira Report* (WAI 414) (Wellington: GP Publications, 1998) at xxv [hereinafter *Waipareira Report*].

accepted as involving such elements as respect and formal status in relations with various level of government; recognition of proprietorship and guardianship; special roles in relation to traditional lands, waters, treasures and sites of significance; a presumption of exclusivity of deliberation and governance in certain matters involving only members of the group; consultation in inter-tribal and inter-community issues; and the capacity to form and secure recognition for inter-tribal or non-tribal organizations.

One of the great difficulties in making self-determination operational as an international legal principle has been the problem of identifying the 'self.' This difficulty was addressed in European decolonization by declaring the self to be the entire people of the colonized territory, but such simple solutions are insufficient where the goal is to apply self-determination to relations between states and indigenous peoples. In the *Waipareira Report*, the Tribunal faced an analogous problem to that of the 'self' in self-determination, namely the question of which groups are entitled to the special recognition required by the Treaty guarantees of *tino rangatiratanga*. Confronted by the situation of urban Māori communities, who, as collectivities, are not unified by kinship, the Tribunal adopted an ingenious if adventurous solution. It rejected the view that because the Treaty was made with *rangatira* representing what in 1840 were the principal groups of Māori political organization, *whānau*, *hapū*, and *iwi*⁴¹ – all of these being kinship groups premised upon links through ties to a common ancestor – the present application of *rangatiratanga* is limited to such kinship groups. Instead, *rangatiratanga* can exist in a wide array of Māori communities, it being 'a relationship fundamental to Māori cultural identity' between leaders and members that 'gives a group a distinctly Māori character; it offers members a group identity and rights.' According to the Tribunal, any group in which *rangatiratanga* now exists internally is one to which the Crown's obligation of special

41 Note that in referring to Māori parties to the Treaty, the text of the Treaty mentions only *hapū*, as does the Tribunal's summary of principle 6. It is widely agreed that both *iwi* and inter-tribal organizations existed for certain purposes prior to 1840. Then Chief Judge Durie puts one expert view: 'It is to "hapu" that the Treaty of Waitangi refers where the English text mentions "tribes." These were groups large enough to be effective for such purposes as war, gift exchange, hosting and harvesting resources. There were several hundred hapu, most of them free and independent. In terms of structure they were remarkably fluid, constantly changing, dividing as numbers increased, or fusing if due to war or famine numbers were reduced. In the result there were generally many hapu in any natural geographic region, which, through historic genealogies reinforced by continuing inter-marriage, were all related. It was characteristic of these hapu to be self-managing, but to federate in varying combinations for specific purposes, from war to entertaining, or fishing to long distance travel. They were independent yet inter-dependent, and related through a complex web of kin networks.' E.T. Durie, 'Will the Settlers Settle? Cultural Conciliation and Law' (1996) 8 *Otago L.Rev.* 449 [hereinafter 'Will the Settlers Settle?'].

protection applies.⁴² This is controversial among Māori, some of whom argue that whakapapa and membership of kin groups is essential to Māori identity.⁴³ The issue is further complicated because the organizing principles and dynamics within a group may have already been shaped by continuing state action, so the argument that state innovations should now adopt a detached posture may be far from the usual liberal arguments for state neutrality.

Apart from this aspect of the controversy about Māori identity, the *Waipareira Report* raises questions for liberal political theory and even, potentially, some tension with the human rights structure of argument. This is because entitlement, from which benefits to individuals flow, is based on the way in which a particular community chooses to organize leadership and power relations.⁴⁴ In describing rangatiratanga, the Tribunal appears in some passages to suggest that it entails a particular type of relationship between leaders and ordinary people, which might leave room for doubt about the status of a totally non-hierarchical but close-knit urban Māori group. In other passages, however, the Tribunal suggests that in appropriate circumstances it would not take such a prescriptive view.⁴⁵

The Tribunal limits the entitlement of special recognition and protection to groups that demonstrate rangatiratanga values; not all

groups composed of Māori individuals qualify.⁴⁶ Te Puni Kōkiri (TPK) justifies this criterion in two ways. One is contractual: someone must have inherited the rights and obligations of the Māori signatories to the Treaty of Waitangi. But the Tribunal seems itself to reject this approach. Its holding that the Treaty was signed by rangatira 'on behalf of all Maori people, collectively and individually,' has been described by F.M. Brookfield as 'remarkable,' and Brookfield suggests that, however this may be as current policy, it cannot represent what actually happened in 1840.⁴⁷ TPK's other justification, which the Tribunal seems to endorse, is in terms of the maintenance of a distinctive Māori culture and identity. Presumably this is a policy argument, and one that reinforces the preference for rangatiratanga over self-determination as the governing concept. For liberal self-determination implies a freedom to choose assimilation or integration, just as European colonies, on decolonization, were in theory free to choose to merge with other states. Although the ethos of the indigenous peoples movement strongly supposes that self-determining groups will seek to maintain their distinct identities and values, some groups are conscious of problems of isolation and seek greater involvement in the ambient society.⁴⁸

42 'Protection' is not an ideal term because of its connotations of old notions of wardship or guardianship, but it has become an established term of art, referring here to positive recognition of the capacity of the group to act.

43 For example, Apirana Mahuika (Chair of Ngati Porou and former Head of the Māori Congress): 'Whakapapa is the determinant of all mana rights to land, to marae, to membership of a whanau, hapu, and, collectively, the iwi whakapapa determines kinship roles and responsibilities of other kin, as well as one's place and status within society. To deny whakapapa therefore as the key to both culture and iwi is a recipe for disaster, conflict and disharmony.' A. Mahuika, 'Whakapapa is the Heart' in Coates & McHugh, *Living Relationships*, supra note 31 at 219. One measure of the controversy is the pragmatic but temporizing response of Te Puni Kōkiri (TPK), a government agency whose staff includes many senior members of tribal groups and which has the complex task of steering relations between the Crown and an array of Māori groups: 'Even though recognition of the rangatiratanga of non-kin groups would seem a practical response by the Government to the emergence of Maori as an urban people, kinship is still the core of Maori culture and must not be depreciated.' Te Puni Kōkiri, *Draft Treaty Framework*, Draft 8.4 (July 2000).

44 This idea has some similarities with arguments that states organized as liberal democracies ought to have particular privileges over and above other states in the international legal system.

45 'A rangatira secures the support and political allegiance of the people, the community from whom he or she gains the authority to articulate their will and advocate their interests. Rangatiratanga is a dynamic relationship; popular support, freely given, can equally freely be withheld or transferred in order to better secure the interests of individual members or the community.' *Waipareira Report*, supra note 40 at 214.

46 Here the Tribunal's reference to 'all the Maori people' is potentially of great significance. It appears that the Crown's duty of 'protection' applies to all Māori, while special recognition applies to rangatiratanga groups: 'Another important question is whether the policies and practices at issue in this claim enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them. In chapter 1, we reiterated that the Queen's protection applies in a general way to all Maori people; in particular, we found that article three assured Maori of recognition and protection as a people, in addition to rights of equal citizenship.' *Waipareira Report*, supra note 40 at 215-6. Perhaps the Tribunal means to refer to the protection of a Māori individual's capacity/ability to belong to a rangatiratanga group (which is also part of the protection of rangatiratanga itself).

47 F.M. Brookfield, *Waitangi and Indigenous Rights* (Auckland: Auckland University Press, 1999) at 105-6.

48 One element that has influenced some indigenous leaders of Nunavut to seek a municipal rather than an ethnic model of government was a wish to be open to such contact. 'Inuit in particular have long been concerned about the social, economic and political implications of being confined to exclusive land bases. Because Inuit constitute a majority of the population in their traditional territories, they are in a position to exercise effective control over local and regional governments elected by majority rule. In these circumstances, public government allows Inuit to maintain and strengthen their relationships with their traditional lands while avoiding the risks they associate with confinement to an exclusive land base.' Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Communication Group, 1996) at vol. 2, s. 1.3 [hereinafter *Royal Commission Report*]. Other pressures were also involved, and the choice of the municipal model has been much criticized by other indigenous groups. One critic, Sharon Venne, proclaims a Dene position on the Nunavut model: 'none-of-it.' S. Venne, personal communication. The Royal Commission was careful to note that 'Inuit of the eastern sector of the Northwest territories have recently exercised their right of self-

The Tribunal's approach has called for new thinking on the part of the Crown, because such groups may be recently formed, even evanescent, and have no particular connections with traditional lands, fisheries, forests, or other properties the Crown is accustomed to dealing with in historic grievance claims centred on art. 2. The beginning of a governmental effort to recognize a wider conception of rangatiratanga, tie it in to free-market ideology, and carve out for the concept some autonomous scope in what might previously have been described as art. 3 terrain, is evident in TPK's November 1999 post-election briefing:

The Government must therefore ensure that Maori are able to adapt in a Maori way to changing conditions. This has implications for Maori standards of health and education and the processes of wealth production generally: if Maori are not competitive under modern market conditions they cannot develop and thrive. ... But what is it to adapt and develop in a Maori way, and how can the Government determine this? In fact, of course, only Maori can determine the Maori response. The primary Treaty obligation of the Government is therefore to recognize and respect Maori processes for determining their own responses. The way Maori do this is essentially through the institution of rangatiratanga – the principle of Maori collective organization and development. As the Tribunal says, the Crown should protect rangatiratanga because it is through the exercise of rangatiratanga that Maori protect themselves.⁴⁹

So conceived, the Tribunal's reliance on a dynamic and autonomous concept of rangatiratanga is potentially more flexible and adaptable to contemporary situations than have been approaches taken elsewhere to identifying units of self-determination. Canada's Royal Commission on Aboriginal Peoples, for instance, thought it would be possible to identify in a fixed way all of the Canadian indigenous groups eligible for self-determination, based on criteria including tradition, identity, and size, and that the number of such groups would be between sixty and eighty.⁵⁰

One view expressed within TPK and other policy institutions is that the protection envisaged by the Treaty is open to all Māori who continue to live *as Māori*, but that it is only as part of a Māori collective, living by the principle of rangatiratanga, that Māori individuals should qualify for the special, additional protection which the Treaty offers over and above the citizenship rights enjoyed by all New Zealanders including Māori. Tino rangatiratanga is a fundamental concept in the Treaty, but for the

determination in deciding to establish a public government ... However, should conditions in the territory change significantly (for example, a large influx of non-Aboriginal people), Inuit could review their earlier decision and negotiate alternative governmental arrangements.' *Ibid.* at vol. 2, s. 2.2.

49 Te Puni Kōkiri, Post-Election Briefing (November 1999) at 48.

50 *Royal Commission Report*, supra note 48 at vol. 2, s. 2.31, para. 4.

specific purpose of determining which groups are entitled to be regarded as participants in the relationships with the Crown contemplated by the Treaty, it seems reasonable to envisage that, in addition to rangatiratanga, the presence in a particular group of other widely recognized features of Māori social relations might also be relevant, for example, manaakitanga, arohatanga, utu, whanaungatanga, mana, tapu, kaitiakitanga, and other elements of tikanga.⁵¹ Whether the Tribunal believes that there is a simple bifurcation between Māori as ordinary citizens and Māori as constituents of rangatiratanga groups is not so clear: at times it seems to suggest that the Crown has obligations to the Māori people as a whole, under the principle of royal protection, that go beyond the obligations connoted by equal citizenship.⁵²

The government has been decidedly cautious in setting forth general views on the meaning and implications of rangatiratanga. It has been even more reticent in its treatment of self-determination, an issue upon which it is frequently required to comment as part of tortuous efforts in the United Nations to elaborate a draft Declaration on the Rights of Indigenous Peoples. The courts, too, in enunciating principles of the Treaty and views about its relevance in law, have not focused extensively on the dimensions of self-determination that rangatiratanga may connote. Such issues have been raised with increasing frequency before the courts in Canada, where the Supreme Court is likely eventually to have to

51 New Zealand Law Commission, *Maori Custom*, supra note 3, discusses some of these concepts. In 'Will the Settlers Settle?' supra note 41 at 451ff, E.T. Durie, then Chief Judge of the Māori Land Court, provides paraphrased explanations of several: manaakitanga, 'generosity, caregiving, or compassion ... mainly about establishing one's status and authority (or mana) by acts of kindness and caring'; utu, 'the maintenance of harmony and balance'; arohatanga, 'Aroha, love or empathy, was the basis for peaceful coexistence.' Whanaungatanga is described by the Law Commission as stressing the relationships that are central to Māori thinking and enabling the blurring of lines between different groups and between humans and the physical and deistic world. The importance of whanaungatanga is also emphasized by Joseph Williams, now Chief Judge of the Māori Land Court, in J. Williams, 'A Summing Up' in A. Quentin-Baxter, ed., *Recognising the Rights of Indigenous Peoples* (Wellington: Institute of Policy Studies, 1998) 187 at 191. The *Waipareira Report* does not appear to address these various concepts explicitly, but the Tribunal does remark, 'There are then other Maori values to be brought into account. Respect for other Maori communities is one, a respect still played out in marae proceedings. A sense of inclusiveness is another, not an exclusive regime that provides for some but denies opportunities for others or which is unconcerned for different sections of the Maori people. It is the sense of generosity and concern for all the people that has been the hallmark of the modern rangatira and which characterises our current rangatiratanga. We do not believe that prescriptive practice is a genuine reflection of Maori custom.' *Waipareira Report*, supra note 40 at 219-20.

52 See especially *Waipareira Report*, supra note 40 at 21.

rule on claims to an aboriginal right to self-government.⁵³ Although not established in legislation or extensively elaborated in judicial opinions, arguments based on self-determination or rangatiratanga have been central in New Zealand debates and are likely to become more so.

IV Sovereignty

Arguments for the revival of a pre-existing sovereignty differ from arguments for self-determination in relying on evidence of the former enjoyment of sovereignty rather than on a general entitlement of modern collectivities to a degree of self-governance. Thus when Estonia, Latvia, and Lithuania broke away from the Soviet Union in 1991, they claimed simply to be restoring a pre-existing sovereignty that had been illegally interfered with by unlawful forcible incorporation into the USSR in 1940–1941, although the attitudes of other states to this juridical claim varied sharply. In New Zealand, the argument is made that Māori were sovereign prior to 1840, that this collective sovereignty was recognized not only by Busby as British Resident but by the British government and was never lawfully surrendered, and that it should now be revived and made operational. But the number of voluble proponents of historically grounded Māori sovereignty in this unitary form has remained modest.⁵⁴ This may reflect disagreement with the suitability of this structure of argument for Māori society. Durie C.J. has argued that '[c]ontrol from a centralized or super-ordinate authority was antithetical to the Maori system'⁵⁵ and that '[t]he current constructs of hapu acting collectively as national states and exercising mana whenua or dominion over defined territories may owe more to European influence than we may care to admit.'⁵⁶ In recent politics, most hapū and iwi appear to have been more concerned with structuring relations with the Crown than with repudiating its claims to sovereignty. The increased influence of Māori under the

53 Such a claim was dismissed on case-specific grounds in *R. v. Pamajewon*, [1996] 2 S.C.R. 821. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*], the Court declined to rule on such a claim because an amendment to the pleadings was involved.

54 See Andrew Sharp's nuanced discussion of the political thought of Donna Awātere, Ripeka Evans, Atareta Poananga, and others in A. Sharp, *Justice and the Māori* (Oxford: Oxford University Press, 1990) at 249–65.

55 Durie, 'Will the Settlers Settle?' supra note 41 at 449. Elsewhere he commented, 'As with all tribal societies, Maori authority was located at the most local or village level. All above that were mere federations of interests dependant for their validity on continued support from the base. The Western power structure, where law and power descends from the top down, becomes inverted in the tribal context. Indigenous societies work from the bottom up.' E.T. Durie, 'Maori Sovereignty—Threat or Opportunity?' (Capital City Forum, Wellington, 31 October 1995) [unpublished].

56 Durie, 'Ethics and Values,' supra note 35.

Mixed Member Proportional representation (MMP) electoral system, the outlets provided by such institutions as the Waitangi Tribunal and new consultation mechanisms, and the increase in the national flow of resources towards Māori have also attenuated the radical sovereignty movement.⁵⁷

The formal theory of the unitary and exclusive sovereignty of the Crown-in-Parliament has endured as a vestigial orthodoxy, relatively unperturbed by theories denying the Crown's unitary character or its formal supremacy. In part this endurance may be inertial. In part it may reflect an assumption, not technically accurate, that reconsideration of the theoretical nature and location of sovereignty is likely to entail expanding the role of the courts in constraining parliamentary and ministerial action, a proposal on which public opinion, including much Māori opinion, remains wary. Public opinion seems to envisage that the decentralization of governmental functions does not and should not affect the backdrop of parliamentary supremacy, and it hesitates to see the courts determine vital questions of policy relating to this functional division of sovereignty – for example, the question of requiring local governments to take account of or comply with the Treaty. More positively, the commitment to parliamentary sovereignty reflects wide agreement that the status and responsibilities of 'the Crown,' anchored in the Treaty and in the practices of New Zealand life, are crucial in the management of indigenous issues. The Crown as an inclusive institution forges a sense of the population as bound together in a common enterprise. The Crown as a mediating institution is the addressee of demands and complaints made by different groups, enabling the country to avoid a dangerously ethnicized politics in which Māori and non-Māori confront each other directly and repeatedly.

The view that sovereignty represents ultimate power and cannot have more than one decisive location in any political system is embraced with even greater fervour by diehard proponents of legally unlimited parliamentary supremacy than by radical advocates of exclusive Māori sovereignty. Yet in practice, understandings of what Crown sovereignty means have changed. If the warfare state evolved in the twentieth century into a welfare state, it has since the 1980s seemed to be a retreating state. Corporatization and privatization have created an array of bodies in complex relationships with the core of the government, so that, for Treaty pur-

57 The first election held under the MMP system, in 1996, resulted in a substantial increase in the number of Māori in Parliament, the percentage approximating that of Māori in the general population. Alison Quentin-Baxter suggests that 'the cross-cutting allegiances of Maori voters among different political parties, and between the general and the Maori rolls, are likely to prevent the divisiveness of a system of representation based exclusively on ethnicity.' A. Quentin-Baxter, 'The International and Constitutional Law Contexts' in Quentin-Baxter, *Recognising the Rights* 22 at 44 (supra note 51).

poses, 'the Crown' has become a layered entity with murky boundaries.⁵⁸ Much governance is organized by contract rather than by edict. Governmental functions have been devolved, in some cases to Māori organizations.⁵⁹ International commitments increasingly constrain policy. At a time of anxiety about globalization, the terms of state-society relations have shifted so that more is required of society and less confidence placed in solutions from the state.

The complacent assumption of political and cultural superiority with which the British model was transmitted and justified has come under attack. Historians have sought to demonstrate the contingency and fortuity of much of what in retrospect seemed inexorable. The Waitangi Tribunal has functioned as a kind of truth commission, documenting abuses and dishonours. The incompleteness of the nineteenth-century state, and the sophistication of nineteenth-century Māori political practices, has become much more widely understood.⁶⁰ Rather than an unquestioning hierarchy of the modern over the tribal, the advantages and limitations of the centralized system of political organization practised and advocated by the nineteenth-century British have begun to be weighed in more nuanced fashion with the advantages and limitations of the decentralized political system practised and theorized by Māori in the same period.⁶¹

58 See, e.g., M. Taggart, 'Corporatisation, Privatization and Public Law' (1991) 2 *Pub.L.Rev.* 77.

59 A remarkable example is the Te Waipounamu regional offices of the government policy agency TPK, which are operated by the Ngāi Tahu tribal organization under a service contract with TPK. See Te Puni Kōkiri, *Post-Election Briefing*, supra note 49 at 26.

60 The practical process of establishing modern states on the ground often began with the establishment of little islands of authority. In New Zealand, zones of functional Māori autonomy and jurisdiction were one factor prompting the settler government's military *raupatu* in Waikato, Taranaki, and elsewhere in the 1860s, and such zones endured for decades after that in Tuhoe country, the King country, Parihaka, and elsewhere. See, e.g., J. Binney, 'Te Mana Tuatoru: The Rohe Potae of Tuhoe' (1997) 31 *N.Z.J. History* 117. Such possibilities were envisaged, although never formally operationalized, in the *New Zealand Constitution Act 1852* (U.K.), s. 71.

61 Durie, 'Will the Settlers Settle?' supra note 41 at 450: 'tribal societies do not see themselves as an undeveloped embryo but as maintaining a way of life independent of the state as a matter of positive policy.' See also A. Mikaere, 'Maori Women: Caught in the Contradictions of a Colonized Reality' (1994) 2 *Waikato L.Rev.* 125; and J. Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press / Bridget Williams Books, 1995.) Heightened appreciation of the richness of socio-political discourse in at least some Māori societies has tempted historians of Pākehā political thought to the inevitable revisionist reversal. Some have explored interpretations of early New Zealand colonial political theory and practice as comprising only ill-fitting fragments of ideas, 'too rudimentary, too fluid, and too peripheral ... to have had a significant impact on government.' P. McHugh, 'The

The resilience and durability of tribal social and political organization, albeit buffeted and shaped by immense change, has provided a nucleus of ideas and structure potentially well adapted to the decentralizing spirit of the times. How fully this will endure and flourish remains unknown. But the visibility and mana of a large number of self-determining socio-political collectivities, variously competing and coalitioning in Māori and national politics while carrying forward a distinct culture, is a transformation of the epistemic environment within which the orthodox account of Crown sovereignty was embedded. This transformation is evident in the metaphor of partnership, given legal currency in some Court of Appeal judgments and disputed on exactly this ground by then Attorney-General Doug Graham.⁶² The Waitangi Tribunal has begun to explore *kāwanatanga* as a concept that might be constructed to better capture the rights and responsibilities that lie with the Crown. But '*kāwanatanga*,' generally thought to be rooted in a transliteration of 'governor' and a neologism in the period of the Treaty, for the time being seems outmatched as a concept of political thought by the continuing global weight of 'sovereignty,' a weight that does not so much flow from as explain its position of importance in the English text of the Treaty.

V *Indigenous peoples*

The position of 'indigenous peoples' as a distinctive legal concept underpins both the common law doctrine of aboriginal title and international instruments such as International Labour Organizations (ILO) Conventions 107 (1957) and 169 (1989).⁶³ Although New Zealand is not a party to either ILO convention (in part because of criticism by Māori involved in the UN process that Convention 169 was too weak in not recognizing an indigenous right to self-determination), the New Zealand government and many Māori groups have accepted 'indigenous peoples'

Historiography of New Zealand's Constitutional History' in P. Joseph, ed., *Essays on the Constitution* (Wellington: Brooker's, 1995) 344 at 361, discussing M. Francis, *Governors and Settlers: Images of Authority in the British Colonies, 1820-1860* (Christchurch: Canterbury University Press, 1992). Paul McHugh hypothesizes an ongoing indigenization of discourse to cope with changing political culture and notes Paul Temm's speculation that the future might be Pākehā assimilation to Māori rather than vice versa. P. McHugh, 'Constitutional Voices' (1996) 26 *V.U.W.L.Rev.* 499 at 524.

62 D. Graham, 'Reflections on the Constitution' [1999] *N.Z.L.Rev.* 561 at 566-7.

63 *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107), 26 June 1957, 328 U.N.T.S. 249 (entered into force 2 June 1959); *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169), 27 June 1989, 28 I.L.M. 1382 (entered into force 5 September 1991).

as a relevant legal category in the ILO and the UN, and a cognate idea is applied in the savings provision with respect to Māori and the Treaty of Waitangi in the New Zealand-Singapore Agreement on a Closer Economic Partnership.⁶⁴

Arguments that law and policy must recognize the special situation of 'indigenous peoples' are at the core of many legal developments in New Zealand. The contemporary legal weight given to the history of precolonial possession and post-colonization dispossession necessarily takes indigeneity as a premise. While the basis of the modern jurisprudence of aboriginal title and other aboriginal rights has not been as fully explored in New Zealand as in Canada, in current practice it certainly depends on aboriginality and continuity from precolonial times. The Treaty of Waitangi, while theoretically analogizable to other great compacts defining the terms of inter-group relations and arrangements for government, has become salient to the majority in New Zealand because of its connection with colonialism and indigeneity. This has made easy its transposition from a contract to a constitution applicable to all, including hapū whose representatives did not sign it.⁶⁵

What does it mean to be an indigenous people? It is widely accepted that the meaning of 'indigenous' in New Zealand is a function of Māori identity, which is largely to be determined within Māori communities: debates continue among Māori about whether and how far traditional kin-based groups (and the aggregations they have historically formed) are now complemented by non-tribal groupings such as Te Whānau o Waipareira Trust. But bringing a claim or entering negotiations usually requires the group to have, or establish, an organizational structure, the form of which may be substantially influenced by state rules or processes

64 *Agreement between New Zealand and Singapore on a Closer Economic Partnership*, online: <www.mft.govt.nz/foreign/regions/sea/Singpdf/contents.pdf> (date accessed: 12 December 2001). Article 74 provides, subject to certain caveats, that 'nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi.' This is an important, if limited, precedent for one form of safeguard for indigenous peoples in other agreements on international trade and investment around the world.

65 It is an interesting question whether these groups can now be taken to have implicitly ratified the Treaty. The general attitude of New Zealand courts is exemplified by *Berkell v. Tauranga District Court*, [1992] 3 N.Z.L.R. 206 at 213 (H.C.), a case in which the application on Tuhua (Mayor Island) of a criminal statute was challenged because the rangatira had not signed the Treaty: 'the acts or omissions of one's ancestors with respect to the Treaty can have no bearing upon one's liability under a New Zealand statute of general application.' The Waitangi Tribunal has routinely proceeded on the basis that Māori groups whose forebears did not sign the Treaty are nevertheless entitled to benefit from it.

or by state institutions such as the Waitangi Tribunal.⁶⁶ Many participants in the New Zealand debate recognize 'indigenous' as a transnational concept, but one that has meaning for New Zealand only for the very broad purposes of designating the inheritors of those who were already present as European colonial expansion began⁶⁷ and of importing into New Zealand thinking not a set of ideas developing in dialogues around the world but a limited set of parallels confined to Australia, Canada, and the United States.⁶⁸ Canadian courts, including the Supreme Court in *Delgamuukw*,⁶⁹ have suggested that the key fact is that when settlers arrived to establish what became the state, aboriginal peoples were already there. Thomas Berger expresses the liberal consent-based foundation of this argument for differentiation: 'The Indians, the Inuit and the Metis did not immigrate to Canada as individuals or families who expected to be assimilated. Immigrants chose to come here and to submit to Canadian laws and institutions; their choices were individual choices. The Indians, the Inuit and the Metis were already here....'⁷⁰ Once large waves of European settlers began arriving in these regions, most did not regard themselves as immigrants to existing native societies but, rather, as colonists, establishing a juridical society new to the territory.⁷¹ The meaning of 'indigenous' in a society in which waves of people have arrived and many more have been native-born since the beginning of colonization is not intrinsic: it is bound up with the function that concept is serving in a particular society.

The question of what exactly the valid justifications are for basing entitlements on status as indigenous peoples is contentious. A strong argument is made for the maintenance of distinct cultures, especially cultures rooted in a particular land and found nowhere else. But this can

66 Note Roger Maaka's comment that, after ignoring or diminishing tribes for a century, in the government's sudden embracing of them 'it is not surprising that the tribe cannot meet the unrealistic expectations that are thrust upon it by both Māori and Pākehā ... Even in a political climate that recognises the tribe, the government has pressured Māori to codify the tribe into a form that fits its own notions of political organisation.' The short-lived Runanga Iwi Act 1990 'was legislative social engineering. It ... regulated the acceptable shape, form, and mandate of an iwi.' R. Maaka, 'A Relationship, Not a Problem' in Coates & McHugh, *Living Relationships* 201 at 203 (supra note 31).

67 See, e.g., F.M. Brookfield, *Waitangi and Indigenous Rights*, supra note 47.

68 See, e.g., W.H. Oliver, 'The Fragility of Pākehā Support' in *Living Relationships* (supra note 31) 222 [hereinafter 'Fragility']. Also P. McHugh, 'Aboriginal Identity and Relations in North America and Australasia,' *ibid.* 107.

69 Supra note 54.

70 Quoted in P. Macklem, 'Distributing Sovereignty: Indian Nations and Equality of Peoples' (1993) 45 *Stan.L.Rev.* 1311 at 1329.

71 J. Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995).

become patronizing and stultifying in emphasizing what is deemed 'traditional,' especially where the state funnels the flow of resources with the aim of ensuring that the culture continues to look 'indigenous.'

A different argument is based on history: gross wrongs were done in the past, and present generations have at least the duties to prevent the compounding of past wrongs by future ones and to engage in ameliorative restitution as well as symbolic acknowledgement.⁷² The intense interest in the Moriori claim, made in opposition to rights asserted by Māori who colonized Moriori lands shortly before British colonial power was established, is partly attributable to its problematization of the view of indigeneity as the counterpoint of European colonialism, defined by reference to critical dates in colonial history.⁷³ The histories of claims such as that of the Moriori are cited for varying purposes: to call for broader approaches to contemporary justice; to relativize and debunk any concept of 'indigenous'; to promote means for settling intra-indigenous disputes and grievances outside the aegis of the state. They reinforce the more general argument that the statist structure of the 'indigenous' category allows the history of colonialism to govern the history of the indigenous people. As Edward Said and many others have pointed out, in decolonization, "resistance" can be understood as groups asserting their own history rather than reacting in others.⁷⁴ The Waitangi Tribunal, although in some respects an institution of state power, was able, in addressing the Moriori claim, to elaborate approaches that in several ways carry forward these ideas.⁷⁵ The Moriori in Rekohu (the Chatham

72 See generally J. Waldron, 'Historic Injustice: Its Remembrance and Supersession' in G. Oddie & R. Perrett, eds., *Justice, Ethics, and New Zealand Society* (Auckland: Oxford University Press, 1992) 139.

73 Representative of the general interest in the Moriori issue are F.M. Brookfield, *Waitangi and Indigenous Rights*, supra note 47; and J. Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: Norton, 1997) at 53-7. (Without referring to the historical issues, the Court of Appeal, in an *obiter dictum* apropos the claim of Te Iwi Moriori Trust Board on behalf of the Moriori of Rekohu for a greater share of Māori fishing quota than the Treaty of Waitangi Fisheries Commission had originally proposed, commented, 'The people of the Chatham Islands, a small population very largely dependent on the resources of the ocean, appear to have strong grounds to be treated as a special case.' *Te Runanga o Muriwhenua v. Te Runanganui o Te Upoko o Te Iha Association*, [1996] 3 N.Z.L.R. 10 at 15-6 (C.A.). Part of this judgment was set aside by the Privy Council, *Treaty Tribes Coalition v. Urban Maori Authorities*, [1997] 1 N.Z.L.R. 513 (P.C.), but the Treaty of Waitangi Fisheries Commission nevertheless accepted the weight of the Court of Appeal's remark for the purposes of its deliberations on fisheries allocation policy.)

74 E. Said, *Culture and Imperialism* (New York: Knopf, 1993).

75 Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga Claims in the Chatham Islands* (WAI 64) (Wellington: GP Publications, 25 May 2001). In *Te Runanga o Wharekauri Rekohu Inc v. Waitangi Tribunal* (12 May 1994), Wellington CP 118/94, an organization representing various Wharekauri/Rekohu iwi had applied unsuccessfully

Islands) were brutally conquered, colonized and reduced to chattel slavery by Ngāti Mutunga and other Māori groups from the distant mainland in 1835-1836,⁷⁶ but when they claimed land rights in the Native Land Court (1870) and in petitions to the government later in the nineteenth century, their claims were denied because they had lost possession before the date on which the British asserted sovereignty and the formal structure of 'indigenous' rights began. In the Waitangi Tribunal, the Moriori claim was based primarily on indigeneity and gross mistreatment, while the Ngāti Mutunga claim was based largely on rights alleged to flow from conquest in customary law, and the Ngāti Tama claim was in part framed in terms of indigenous rights derived from the conquered Moriori. The jurisdiction of the Waitangi Tribunal is predicated on a simple indigeneity paradigm - claims by Māori that the claimants are prejudicially affected by acts, policies, or practices of the Crown inconsistent with the principles of the Treaty.⁷⁷ To establish its own jurisdiction, the Tribunal determined that the Moriori were 'Māori' for purposes of the Treaty, although they had not signed the Treaty, had evolved separate practices during the more than 600 years since their migration to Rekohu from mainland Māori society, and were treated by Ngāti Mutunga conquerors as a special case, the conquerors refusing to allow intermarriage even while intermarriage between conquerors and conquered was an important customary practice and source of entitlement on the mainland. The Tribunal held that the fact that Moriori (like many mainland chiefs) did not sign the Treaty was not an obstacle to their right to benefit from it. In accordance with the jurisdictional predicates on which the Tribunal is structured, all three groups had to formulate their Rekohu claims as allegations of breaches by the Crown of principles of the Treaty. Yet any coherent approach to the competing claims necessarily involved an assessment of the histories of the relations of these groups with one another and a consideration of the implications of this assessment for current questions. The Tribunal moved away from the simple indigeneity paradigm by the characteristic and valuable device of utilizing a Māori concept that is related to indigeneity but allowed scope for more subtle distinctions and nuances. The Tribunal observed that the

for a court order to prevent the Waitangi Tribunal from hearing claims by the Moriori claimants.

76 The Ngāti Mutunga people, who along with Ngāti Tama had conquered the Moriori and reduced them to virtual chattel slavery, had themselves been driven out of their own Taranaki lands in the North Island by Waikato people shortly before their conquering expedition to Rekohu. They did not return to Taranaki until forty years later. The irony that Ngāti Mutunga were claiming their historic rights in Taranaki despite not being in possession in 1840, while arguing that Moriori in a comparable situation had lost their rights, was emphasized by the Tribunal.

77 *Treaty of Waitangi Act 1975*, s. 6.

core meaning of 'tangata whenua' ('people of the land'), a concept involving an association between people and land akin to the umbilical connection between mother and unborn child, encompasses both the first people of a place and those who have become one with the land through occupation over generations. The concept thus embraced both 'tangata tūturu ake,' first people like the Moriori, and 'tangata whenua iho,' later people like Ngāti Mutunga. Building on this distinction, the Tribunal evaluated the competing equities among groups with different kinds of tangata whenua status in light of Māori customary practice, concluding that had a Māori panel evaluated the situation in 1870, instead of the Native Lands Court, the virtually all-or-nothing approach to indigenous rights would not have been taken, and a solution nearer to a 50:50 division of Rekohu lands would likely have been proposed. Reformulating the concept of indigeneity in this way led the Tribunal to repudiate the notion, embraced in one construction of important New Zealand statutes such as the Resource Management Act, that tangata whenua status in a particular area was coextensive with mana whenua or customary authority exercised by an iwi or hapū. Rejecting the concept of mana whenua as being a nineteenth-century Māori endeavour to conceptualize Māori authority in terms that mapped to English land law, the Tribunal denied that it was necessarily the case that one group was entitled to speak for all in a particular area, or to claim priority *vis-à-vis* all other Māori groups. There might exist several distinct communities of interest, all of which were now entitled to recognition and respect. The Tribunal's approach suggests a variegation and nuancing of the indigenous rights argument that is likely to become more prevalent. It is premature, however, to envisage a decline in the salience of the 'indigenous peoples' category as one important basis for the framing of arguments on these questions.⁷⁸

The Tribunal's assessment of the significance of Rekohu's indigenous history was further tempered by invoking a human rights paradigm. An argument – perhaps implied by some Ngāti Mutunga speakers in claims hearings – that the former status of the Moriori as slaves should now, in Māori practice, disentitle them to claim the land was met by the Tribunal with a grim allusion to the clanking of the ghostly chains of slavery. 'In our hearings, some Maori were content to rattle those chains even now, referring to the fact of past enslavement to deny recognition to Moriori today. In 20 years of sittings on the mainland, the Tribunal has never heard Maori talk like that before.'⁷⁹

78 W.H. Oliver, 'Fragility,' *supra* note 68, expects 'indigenous' to be a concept of declining vitality.

79 On the twentieth-century reinvigoration of Ngāi Hako identity after several centuries of vassalage under the dominion of Marutuahu tribes in the Hauraki region, see T.

There is no necessary incompatibility between a focus on specifically indigenous rights and a focus on human rights. But the Tribunal's clear preference for a doctrine of equal concern and respect over any possible argument for a vestigial hierarchy based on past status reflects a more general pattern of using one of the five conceptual structures to check excessive consequences that might result from the unswerving application of another. This pattern is evident also in the politics of health care provision. Complaints that the formal equality embodied in the equal right to health care was not overcoming the persistent experience of Māori health indicators being much worse than those for the rest of the population led to a demand for special attention to the health of indigenous people, including culturally specific factors and distinctive Māori participation in policy formation and decision making. Yet framing this in sweeping terms as an indigenous peoples or Treaty issue provoked strong hostility, with the opposing argument framed as the human right of all New Zealanders to adequate health care. The New Zealand Public Health and Disability Act 2000 represents an amalgam of these two positions that is as conceptually chaotic as it is politically intelligible. The advocates of a human rights approach largely succeeded in shifting the most difficult questions into the already overstretched human rights framework discussed above, incorporating into s. 3 provisions that nothing in the Act entitles a person to preferential access to services on the basis of race and that nothing in the Act limits s. 73 of the Human Rights Act 1993 (which allows for affirmative action in defined circumstances). Yet proponents of an indigenous peoples structure also had some success – thus the Act provides, in s. 29, that each District Health Board must include at least two Māori members, no matter how small the percentage of Māori in the relevant district – but in a political compromise this conceptual structure is formally confined to only one part of the Act, whereas it is bound in fact to be relevant to other parts as well.⁸⁰ The Labour–Alliance government's 'closing the gaps' policy, which initially focused on ameliorating disadvantage by closing gaps between Māori health indicators, life expectancy, living standards, and so on and those of other New Zealanders, was officially broadened in 2000 to focus

Turoa, *Te Takato o Te Whenua o Hauraki*, ed. T.A.C. Royall (Auckland: Reed, 2000) at 44ff.

80 *New Zealand Public Health and Disability Act 2000*. The Act, in s. 4, avows recognition and respect for the principles of the Treaty, and a concern to improve health outcomes for Māori, but specifies that these goals are accomplished by pt. 3, which relates to the objectives, functions, and composition of District Health Boards (DHBs). Yet other parts of the Act, including, for example, provisions in pt. 2 for the establishment of national health and disability strategies and the formation of a national advisory committee, must necessarily involve Māori. Palmer, 'Treaty of Waitangi,' *supra* note 6, expresses perplexity on the same issue.

on all groups suffering disadvantage. But this apparently dramatic shift in underlying political justifications, from an indigenous peoples to a human rights structure, seems to have been intended only to place a check on practice, not to effect a dramatic realignment – programs designed specifically for Māori, and in some cases for Pacific Islanders, continue to emerge from government ministries focused on these groups.⁸¹

VI Interplay between competing structures of argument: Some examples

Many of the most difficult issues in national debate involve the competing pull of two or more of these structures of argument. Four further contemporary examples will be noted to illustrate the point.

A. MĀORI MINERAL AND HYDRO-POWER RESOURCE CLAIMS

All five conceptual structures are implicated in the New Zealand debate on these claims. When characterized as indigenous rights claims, they are frequently analysed by the government and the courts as depending on property rights or contractual rights. Human rights language is used to overcome legal obstacles to realization of these entitlements, alleging unjustifiable discrimination where Māori have been deprived of historic resources; but equality arguments are also invoked against such claims, asserting that Māori landholders have no greater rights in Crown minerals than do other landholders. Minority rights arguments buttress claims by groups and members of groups to resources of particular cultural significance. The interweaving of these patterns has led to Crown attempts to restrict mineral resource entitlements of Māori to minerals of traditional cultural importance – such as the vesting of control of pounamu (New Zealand jade) in Ngāi Tahu under the Ngāi Tahu settlement agreement – while Māori formulate claims to new uses where resources were the subject of traditional uses, such as the argument that Taranaki Māori may have a right to petroleum gas deposits grounded in the historic use of tar seepage in canoes. The Court of Appeal's limited jurisprudence in this area has similar qualities: in a preliminary decision, it indicated some sympathy with Tainui coal claims (although these claims were subsequently given up in the settlement negotiations), but in other cases it rejected Ika Whenua claims to hydroelectric generating capacity on rivers they traditionally used,⁸² Whanganui claims to special rights in

81 See, e.g., Report of the Māori Affairs Committee of the New Zealand House of Representatives on the auditing and monitoring of 'closing the gaps' programs, 15 February 2001, summarized in (2001) Maori L.Rev. 8.

82 *Te Runanganui o Te Ika Whenua Society v. Attorney-General*, [1994] 2 N.Z.L.R. 20 (C.A.). The Court left open the possibility that Māori might be entitled to compensation for obstruction of the flow of the river, including damage to eel fisheries, caused by the

relation to introduced species of trout in their traditional fishery,⁸³ and Ngāi Tahu claims to exclusivity in the emerging industry of watching whales they had traditionally hunted.⁸⁴ Chief Judge Durie, by contrast, has argued for assimilating all such resource rights to Māori control and use of land to which those resources appertain, regardless of historic use of the resources or intervening Crown arrogation of them. Stronger plenary-sovereignty claims to minerals are made by some indigenous groups as part of territorial claims, in a transposition of sovereignty claims to minerals that are routinely asserted by the Crown. In Canada, the holding in *Delgamuukw* that natural resources appertaining to land are subject to aboriginal title without being confined to the ambit of traditional uses embodies a limited form of self-determination insofar as the use of these resources is a matter for decision by the collectivity.⁸⁵

B. MĀORI POLITICAL REPRESENTATION

Questions of representation, whether in the growing number of provisions for specific Māori seats in bodies exercising local government powers relating to the general population⁸⁶ or in the national electoral system and the future of the long-established practice of designating seats in Parliament to be elected exclusively by Māori voters, oppose human rights arguments for an undifferentiated electoral system to arguments

dams whose ownership Māori unsuccessfully sought.

83 *McRitchie v. Taranaki Fish and Game Council*, [1999] 2 N.Z.L.R. 139 (C.A.), rejecting Māori claims to special rights to fish trout, an important freshwater species introduced to New Zealand after the Treaty and always subject to a statutory regime. P. McHugh, 'Proving Aboriginal Title' [2001] N.Z.L.J. 303 at 305, criticizes the *McRitchie* decision as 'fundamentally flawed' for confining indigenous customary rights to particular species of fish rather than recognizing that fishing for the introduced species was simply an extension of a precolonial Māori fishing tradition to modern circumstances. The view that the approach of the majority decision may have been unduly limited is buttressed by the arguments of statutory interpretation made by Thomas J. and by evidence that trout had been introduced without Māori consent and had displaced native species in the same fishery. But in an evolving society there must also be scope for new practices involving new sets of participants to emerge under new legal regimes: the specific problems in such circumstances include assuring that account is taken of Māori aboriginal and Treaty rights that may be implicated, that adequate consultation takes place, and that Māori are not denied opportunities for participation in the new regime. Thomas J.'s dissenting opinion persuasively raises such questions, suggesting in one passage that neither of the rights-based starting points asserted by the contending parties, that Māori customary rights were only in the fish species traditionally fished or that they were in the entire food fishery regardless of species, contains within it conclusive arguments for rejecting the other position.

84 *Ngāi Tahu Maori Trust Board v. Director-General of Conservation*, [1995] 3 N.Z.L.R. 553 (C.A.).

85 *Supra* note 53.

86 See, e.g., the *Bay of Plenty Council (Maori Constituency Empowering) Act 2001*.

for the special representation of minorities and indigenous peoples. The question of direct Māori representation in international intergovernmental bodies has been seen by the government as threatening its sovereignty – as evident in Attorney-General Doug Graham's strongly hostile reaction to New Zealand Māori Council proposals that it participate in APEC – but nuanced arrangements for international representation are increasingly accepted as part of the indigenous peoples' and self-determination programs, as with the status of indigenous peoples' groups as 'permanent participants' alongside the eight member states of the intergovernmental Arctic Council. Familiar conflicts between human rights claims (or individual minority rights claims) and self-determination claims arise where an aggrieved member seeks to invoke state power to challenge the group about decisions or practices concerning representation, as in the Mana Wahine complaint lodged with the Waitangi Tribunal by Māori women seeking greater gender equity in bodies representing Māori in dealings with the state.

C. MĀORI CRIMINAL ADJUDICATIVE AUTHORITY

Claims to such authority are generally regarded by the majority in the New Zealand debate as inimical to national sovereignty or to the principle of equal treatment. Yet some such authority has long pertained to numerous Indian tribes in the United States, albeit with federal restrictions directed towards individual human rights as well as numerous diminutions driven by federal or state political interests. The structures of the conceptual arguments in New Zealand are not intrinsically different from those in the United States, although contextual factors such as the territoriality of Indian reservations and the long distances of some of them from large urban areas may be relevant. Problems of equality and fairness to victims that would arise were Māori and non-Māori offenders subject to separate justice systems, especially where they jointly committed a crime, are weighed against the structural problems of human rights and inequality associated with Māori experience under the current criminal justice system.

D. MĀORI LANGUAGE

The guarantees of *te reo* (Māori language) in the Treaty could to some extent be operationalized under a general argument that members of a linguistic minority have a right to use and maintain their own language. But New Zealand government policy seems to understand protection of the Māori language as a much stronger duty than protection of other 'minority' languages, because of the fundamental entitlement of Māori as an indigenous people and the related facts of the uniqueness of the language and its connection to the land. Yet, while *te reo* is undoubtedly a 'taonga' (treasure) under art. 2 of the Treaty, the government has hesi-

tated to translate *taonga* into state-recognized property rights in the way it has been willing to recognize other art. 2 claims (principally lands and fisheries) under the rubric of indigenous peoples. Perhaps for sovereignty reasons, the government remains reluctant to treat communications media (such as the radio spectrum) as appertaining to Māori, and the conceptual structure for specific legal protection for *te reo* remains obscure. Interesting problems would arise were Māori to claim, as a form of self-determination, exclusivity in controlling the use of *te reo*, so that the language itself was not open to all for access, replication, and adaptation. In the interim, much narrower claims rely (often unsatisfactorily) on intellectual property law to control the use of certain specific formulations.

VIII Normative implications: Law as the interplay of five competing structures

How important is it to find a way to resolve the conceptual tensions that have been identified here? The usual arguments for the virtues of a rule of law system – coherence, predictability, equal treatment of like cases, and so on – favour a resolution. But while the rule of law requires a broad coherence, a system of law and government that is both effective and legitimate must have the capacity to express and to balance competing objectives, and this capacity may in some circumstances have to be secured by forgoing aspirations for strict conceptual consistency, narrow determinacy, or unity of substantive norms across different institutional contexts.

Issues relating to Māori have become central preoccupations in the national political and legal system at a time of rapid change in New Zealand. Ideas from external sources, including approaches in other countries and concepts espoused in international law and in the transnational indigenous peoples movement, are fast evolving and incompletely formed on these issues. It is not surprising that the predominant approach among many of the major players in the New Zealand debate has been pragmatic rather than highly theoretical. Specific issues are frequently addressed in *ad hoc* fashion, without great concern about conceptual conflicts with structures employed in other policy areas or even in other cases on the same topic. This unstructured, pragmatic approach has permitted nuanced compromise, accompanied by a degree of conceptual incoherence. In some cases this conceptual incoherence comes at a price, which may be paid by future generations. Yet such a multiplicity pervades the current development of international law on these issues and is probably inevitable in the specific circumstances obtaining in any contemporary liberal polity where indigenous peoples questions are important.

On balance, it is not necessarily normatively undesirable that these competing conceptual structures coexist and operate simultaneously in

New Zealand. The competition among the different conceptual structures is a fruitful source of political and legal dialogue and evolution: it blunts the sharpest confrontations, precisely because argument can move from one legitimate conceptual structure to another. Each can be deployed to provide a check on the excesses and hard cases that arise when any one is carried to the extremes of its logical entailment. This multiplicity of conceptual structures has proven manageable, to the extent that the five structures can be understood, in many instances, not as competing but as overlapping, complementary, or mutually reinforcing. The multiplicity found in international law provides a much richer set of conceptual resources in New Zealand because of the widespread, if highly approximated, acceptance of Māori political concepts that leaven and in some cases transpose these basic international legal ideas. The multiplicity of identities and ways of belonging and political expression among members of New Zealand society may be better upheld by a multiplicity of conceptual structures than by a tightly ordered hierarchy.

The multiplicity of conceptual structures has important connections with the allocation of competences and roles among state institutions. It may be hypothesized, for example, that bureaucratic rationality will prompt government policy agencies to seek coherence and clarity among relevant conceptual structures,⁸⁷ whereas the New Zealand legislature is not required to formulate a single set of reasons for legislation, and under the coalition politics of the MMP system, legislation may indeed gain legitimacy precisely from having been voted upon by a large group of representatives acting for many different sets of reasons based on different and perhaps irreconcilable conceptual structures.⁸⁸ It is possible that a definition and ordering of applicable conceptual structures will increasingly be demanded by courts if they remain centrally involved in indigenous issues, since judges obliged to articulate convincing reasons for decisions, and bound to a system of authority and precedent, are likely over time to seek or prescribe means for stable choices among justiciable structures of argument. Conversely, certain local government and Crown-connected entities that are not required to provide externally reviewable reasons for their decisions, and may not have a clearly defined set of duties in relation to the Treaty, may not have much to gain from consistency across institutions, preferring to make their own choices in an environment of conceptual multiplicity. The Waitangi Tribunal has contributed much to the richness of the conceptual resources available in New Zealand, and the multiplicity of available concepts has allowed it to craft innovative understandings in exercising its recommendatory powers in relation to historical injustices, but the lack of clear conceptual

87 Palmer, 'Treaty of Waitangi,' *supra* note 6.

88 J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

ordering may pose challenges in the exercise of its binding powers in relation to the State-Owned Enterprises Act, or of its advisory powers in relation to current legislation or government policy decisions. Māori governmental authorities, such as runanga and trust boards, are established for special purposes reflecting the concepts of self-determination and tino rangatiratanga, but important unresolved issues remain concerning the applicability to them of other structures, including possible duties under general New Zealand public or private law in relation to non-discrimination, minority claims, and use of post-settlement assets.⁸⁹

Where the needs for coherence are high, one possibility is to build on the existing consensus on the importance of universal human rights. Some extend this by advocating that resolution be achieved by giving a strong priority to the human rights structure of ideas. The language of rights suggests that rights are trumps, so that an argument to uphold a right should prevail over almost any other form of argument. All agree on the overwhelming priority of protection of the most basic human rights, most of which are non-derogable – prevention of genocide, murder, torture, slavery, rape, forced labour, disenfranchisement, or absolute impoverishment, and provision for basic food, shelter, health care, education, freedom of political speech, and other basic entitlements. Occasionally a plan is proposed under one of the other structures that does appear to trample on someone's fundamental human rights, and vigilance in this respect is called for. Rights thus provide a vital safeguard. But in relation to many of the difficult current problems, the language of rights does not necessarily provide a comprehensive solution to problems of balancing, policy innovation, and prioritization in the context of scarce resources.

Another solution might be to recast the discourse so that it does not divide into these structures of argument. In terms of process, some suggest that Māori traditions may provide a different and better way of thinking about and resolving some of these hard cases. This may or may not be generally true. Certainly there is appreciable national support for increased allocation of intra-hapū or intra-iwi or even intra-Māori questions to Māori governance and decision fora. But it would take a further cultural and political transformation for distinctively Māori methods to become the norm for resolving the myriad issues affecting non-Māori. In terms of principles, the Treaty as a living document is, at present, the principal normative source, but, as suggested above, it does not contain within it a means to transcend structures of argument that are embedded in national and international values and practices.

89 At the time of writing, the question of responsibilities in relation to assets received in claims settlement agreements is on the agenda of the New Zealand Law Commission.

In current circumstances, any attempt to establish a general scheme of prioritization could not be based on consensus, and would involve imposition. The costs of such imposition are likely to be much greater than any advantages it achieves. Any such imposition would require an answer to the question 'Who decides?' – not simply who decides hard cases, which is already problematic now, but who decides fundamental questions of priorities. For the Crown in Parliament to do this on a grand scale without general support would rekindle dangerous fires that might consume the legitimacy of the state. For a constitutional convention to do it, either years of debate or divisive majoritarian voting systems would be needed. Reconciling the unity of political culture and basic values that must underpin a constitution with the demands of pluralism and distinctive identity is immensely difficult. One of the arguments against a round of constitution making is that written constitutionalism would open a discussion about prioritization among these five concepts, at a time when priorities remain fundamentally in dispute, and much more experience working out the practical relations among them may be required first. Recognizing all of this, public opinion is right to be sceptical of the possibility of a great constitutional re-founding predicated on adoption of a carefully parsed text. Most of the hard problems in current and impending national debates relate to the tensions between the categories mentioned here, but the kind of coherent rationalization that preponderates in calls for constitutional agreement risks transforming or foreclosing these debates before the country is necessarily ready. In addition to well-known problems about republicanism, judicial review, organization of the legislature, and the formal status of the Treaty of Waitangi, this is a significant further reason why agreement on a newly written constitution is not yet attainable and may not even be desirable.

It is concluded, therefore, that these different structures of argument will continue to pervade law and policy. Although a cause of unpredictability and contention, this is normatively attractive as a means to achieve at least a degree of pluralism without closure or exclusion. Institutions required to make decisions in hard cases will not have the comfort of simple prioritization but will have to acknowledge the competing pulls, respect the legitimacy and good faith of those subscribing to various positions, and do the best they can in the context as they understand it. In normative terms, this is, in hard cases, an argument for the second-best; but the alternatives seem worse.