



Spring 2009

## First Peoples and Human Rights, a South Seas Perspective

Sian Elias

### Recommended Citation

Sian Elias, *First Peoples and Human Rights, a South Seas Perspective*, 39 N.M. L. Rev. 299 (2009).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol39/iss2/5>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: [www.lawschool.unm.edu/nmlr](http://www.lawschool.unm.edu/nmlr)

# FIRST PEOPLES AND HUMAN RIGHTS, A SOUTH SEAS PERSPECTIVE

THE RIGHT HONORABLE DAME SIAN ELIAS\*

I am honored by the invitation to speak to you today in this distinguished lecture series. I am conscious that I follow in the steps of speakers of great reputation and that this series is held to honor an outstanding lawyer, herself a wonderful and inspiring public speaker. So the standards are high. Roberta Ramo is someone who is admired and respected everywhere. She has been a trailblazer for women in law. At the far end of the world, where I come from, she is known and admired especially for her pioneering work as first woman President of the American Bar Association and first woman President of the American Law Institute. Both are organizations that are critical in promoting a world culture of respect for law and in making sure the law we practice is fit for the modern societies it serves. It is a very great privilege to be asked to speak in this lecture in her honor. It is also a very great personal pleasure to be able to record my admiration for Roberta Ramo here in her home state, to which she has given such service, and to thank her and Dr. Ramo for their generosity in bringing us here and for their hospitality and friendship.

It has been suggested to me that I might tell you something of the dealings of the indigenous people of New Zealand and the law. I am glad to do so, because it has enabled me to reflect on the connections between our countries as each has addressed the just claims of our indigenous peoples. Indeed, the case law of the U.S. Supreme Court has been highly influential in New Zealand, Australia, and Canada as our legal systems have struggled to translate pre-colonial rights into the law imposed during settlement. Although we have adopted quite different responses, many of the underlying themes and challenges are common.

The issues raised by indigenous peoples today raise similar themes. The claims for sufficient autonomy and authority to enable indigenous cultures to live and prosper in the modern states of which they are part no longer seem as preposterous as they once did, even in unitary states like mine with no federal model of power-sharing. It is true that care needs to be taken about importing solutions from or rejecting those solutions rejected in different legal and political contexts. I think in the past that may have led to some confusion in national legal systems. But the immediate point to be made is that there is enough inherent commonality in the experiences and needs of indigenous people to suggest that we should be open to the ideas of other countries and other legal systems in shaping our own. So, let me tell you a little about the background in my country.

## I. A NEW START?

In 1642 the Dutch explorer, Abel Tasman, made unexpected landfall in southern seas in a country he named New Zealand. The bay he anchored in used to be known as “Murderers’ Bay,” because members of Tasman’s crew, the first Europeans to

---

\* The Right Honorable Dame Sian Elias, G.N.Z.M., Chief Justice of New Zealand. Dame Elias presented these remarks at the University of New Mexico School of Law in Albuquerque, New Mexico, on October 23, 2008, where she was the featured speaker for the biannual Ramo Lecture on International Law and Justice.

encounter the native people of New Zealand, did not survive. Tasman, prudently, sailed swiftly away.

New Zealand remained a tiny squiggle on maps until the brilliant English navigator, James Cook (whose North American connection was in assisting in the British victory over the French in Quebec), came to New Zealand in 1769 to observe the transit of Mercury and charted the whole. Cook's dealings with the native inhabitants were a little more satisfactory than Tasman's, but perhaps only because he understood that the warlike inhabitants of New Zealand were to be treated with great caution. Ten years later, when American independence precluded the British from sending convicts to North America, Cook's reports that Australia was more sparsely populated and the natives "timorous and inoffensive,"<sup>1</sup> led to Botany Bay being preferred as the site of a new British penal colony. That was a decision calamitous for the Aborigines of Australia. Settlement of the Australian continent proceeded on the basis that the land was *terra nullius*, owned by no one. The assumption was to warp the Australian legal system and its response to its native peoples in a way that is only now being addressed, amid high public anxiety.

From the beginning of the nineteenth century, New Zealand, despite the fearsome reputation of the native inhabitants, was regularly visited by ships to harvest timber, whales, and seals. Many whaling vessels in New Zealand waters were from the eastern seaboard of the United States. Some of the native New Zealanders were taken on as seamen and travelled to Australia, the United States, and Europe. Those who returned brought knowledge of other societies. Missionaries set up stations, especially in the far north. Deserters from ships and escaped convicts from New South Wales and Tasmania settled in New Zealand and took native New Zealand women as wives. The European population was lawless and disruptive of Māori society. They were avid for land and exploited tribal conflicts to obtain it. The goods they exchanged for land included muskets, which were then used by the northern tribes to settle old scores in terrible fashion against tribes armed only with stone-age weapons. Europeans were sometimes complicit in the worst atrocities. As a result, there was huge dislocation of native peoples as they fled from their tribal homes and sheltered in inaccessible parts of the country, sometimes for decades. (These dislocations were much later to cause injustice when customary native title to land was supplanted by title principally based on occupation at the date of British annexation in 1840.)

The state of lawlessness in New Zealand led the missionaries and their supporters in England to promote British intervention. The British colonial office was itself reluctant. Instead it sent a British Resident as envoy, to do what he could by persuasion and example. James Busby's residency was set up at Waitangi, in the Bay of Islands in the north of the country. He promoted Māori political organization through assemblies of the chiefs of the north. With his encouragement, they adopted a flag, so that New Zealand shipping would be recognized internationally. In 1835 they made a declaration of independence, asserting their sovereignty over their respective territories. The flag and the declaration were formally acknowledged by

---

1. THE EXPLORATIONS OF CAPTAIN JAMES COOK IN THE PACIFIC: AS TOLD BY SELECTIONS OF HIS OWN JOURNALS 1768-1779, at 84 (A. Grenfell Price ed., 1971).

the British government. But such preliminary moves towards local political organization were overtaken before they could develop.

It became increasingly urgent to address European lawlessness and land-grabbing. It is estimated that at the time there were 100,000 native New Zealanders, belonging to an estimated fourteen loose groupings, comprising many distinct tribes, or *hapu*. Before contact, they had no common name for themselves because they identified only with their tribes. After contact, they came to refer to themselves as “Māori,” or the common people, although for many years the Europeans referred to them as New Zealanders. There were perhaps 2,000 Europeans living in New Zealand in 1840 but within a few years the European population had increased fivefold. The native tribes were acknowledged to own the whole of the land of New Zealand, according to their customs and usages, but Europeans had purported to purchase substantial tracts. One such estate was purportedly acquired by an American settler, William Webster, who was described by a contemporary as “half horse, half alligator, with a touch of earthquake.”<sup>2</sup> His claim to title to the land was eventually rejected in an international arbitration between the United States and Britain not determined until long after his death by a panel that included the distinguished American, Roscoe Pound. (The award held that the Treaty of Waitangi was valid as a treaty of cession.) The late 1830s also saw land speculators organizing British immigration on a large scale. Because of the social disintegration which had followed the musket wars, it was not clear that they were dealing with those with the authority to sell the land. There were also fears of French intentions towards the country.

In 1839 the British Colonial Office dispatched Captain William Hobson to treat with the native New Zealanders for the cession of their territories and for an acknowledgement that land they wished to sell could be sold only to the Crown. The Colonial Secretary explained the decision as being prompted by the need to establish legal order and to avoid the repetition in New Zealand of “the calamities by which the aborigines of American and African colonies have been afflicted.” The instructions to Hobson stressed that he was to act scrupulously in his dealing with Māori.<sup>3</sup> New Zealand was not to be annexed by the British Crown “unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained.” Māori were to be “carefully defended in the observance of their own customs, so far as compatible with the universal maxims of humanity and morals.” With the exception of customs “in conflict with the universal laws of morality,” the expectation was that there was “no reason why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages.”<sup>4</sup>

The expectation that Māori custom was not to be interfered with and that Māori might be “permitted to live among themselves according to their national laws or

---

2. THE FOUNDING OF NEW ZEALAND: THE JOURNALS OF FELTON MATHEW, FIRST SURVEYOR-GENERAL OF NEW ZEALAND, AND HIS WIFE, 1840–1847, at 133 (J. Rutherford ed., 1940).

3. CORRESPONDENCE WITH THE SECRETARY OF STATE RELATIVE TO NEW ZEALAND, 1840, [238], at 37 (Letter from Lord Normanby to Captain Hobson dated Aug. 14, 1839).

4. REPORT FROM THE SELECT COMMITTEE ON NEW ZEALAND, 1844, [556] app. 19, at 475 (Copy of a Despatch from Lord Stanley to the Officer administering the Government dated June 21, 1843).

usages” was in accordance with the British Colonial policy described in relation to North American indigenous peoples by Chief Justice Marshall in *Worcester v. Georgia*.<sup>5</sup> The policy of Britain, he said, was to treat such people as “nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.”

In February of 1840 Hobson entered into the Treaty of Waitangi with the northern chiefs on the beautiful headland overlooking the Bay of Islands where the British Resident had his home. The Treaty was eventually signed by 500 chiefs from all around the country. There were two versions, in English and Māori. The Māori version was signed by all but a handful of Māori. The Treaty comprised a preamble and three short articles. The preamble explained the reasons for seeking the treaty in terms of Queen Victoria’s wish to protect the “just Rights and Property” of the Native Chiefs and Tribes threatened by both the existing European settlement and “the rapid extension of Emigration both from Europe and Australia which is still in progress....” It sought to “secure to [the Chiefs and Tribes] the enjoyment of Peace and Good Order” and to “avert the evil consequences” of absence of laws and settled government. In the English language version the three articles provided for: (1) the cession of sovereignty to Queen Victoria; (2) confirmation and guarantee to the “Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession,” with the chiefs yielding however to the Queen the exclusive right to purchase any land that “the proprietors thereof may be disposed to alienate” at prices to be agreed; and (3) the extension to the natives of New Zealand of the Queen’s protection and the conferral upon them of all the rights and privileges of British Subjects. The terms of the subscription were that the signing chiefs signed in respect of the tribes and territories over which they claimed authority.

The Māori language version of the Treaty translated “sovereignty” not as *mana* (the Māori word which had been used for “sovereignty” in the 1835 Declaration of Independence), but *kawanatanga*. It was a coined word used in the Māori bible to describe the “governorship” of Pontius Pilate. Māori, in return, were guaranteed not only their *taonga*, or treasured possessions, and habitations, but the *тино rangatiratanga*, or highest chieftanship, in them. In the bible, *rangatiratanga* was used to describe the authority of God. In the explanations given at the time the Treaty was entered into, Māori received assurances that their customs would not be interfered with. In these circumstances, one great chief explained the consequence of the Treaty as having been to pass only the shadow of the land to the Queen, while preserving the substance and the authority of their lands to Māori. He was later to change his mind.

---

5. 31 U.S. (6 Pet.) 515, 548–49 (1832); see also *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

This account sets the stage for what will be here a familiar general pattern for indigenous peoples soon overwhelmed by a settler population. The upshot was probably inevitable. Despite the property guarantee of the Treaty and the acknowledgment from the outset that all the land in New Zealand was owned by the various tribes according to their customs and usages, no effective system for legal protection of land held according to custom was established before responsible government was transferred to the settlers. Huge settlement occurred from the 1860s. Before then, in about 1858, the European population had passed that of Māori.

In 1877 a New Zealand court decided that there was no customary law of the Māori of which the courts could take cognizance.<sup>6</sup> It held that the Treaty of Waitangi was a “simple nullity” both because it was entered into by “savages” who lacked the capacity to enter into such a Treaty and because, irrespective of its effect in international law, it had no domestic effect according to the orthodox English view of treaties.

Although the Privy Council in London, on appeals from New Zealand, tried to correct the position in relation to common law recognition of native title, the local view prevailed until its reconsideration by the New Zealand Court of Appeal in 2003. The failure of the courts in application of the common law to recognize title to land held according to native custom was compounded by statutory disadvantage. From 1909 those holding land according to native custom were prevented from asserting their title against the Crown. Nor could they bring actions for ejectment or trespass without the intervention of the Attorney General. Substitution of Crown title for customary land, undertaken from the 1860s, rapidly achieved individualization of title, in a crude approximation of English property which ignored overlapping interests and failed to recognize interests in waters. The individualization of land titles in this way destroyed communal ownership and undermined tribal society. Land wars in the 1860s were precipitated by government purchases that were disputed or opposed. They led to substantial confiscation of tribal lands by those considered to be in rebellion. Policies of assimilation followed in which there was substantial denial of culture. Māori religions were suppressed and native marriage and adoption were not recognized.

Today, customary land has been almost entirely replaced by Māori freehold land, held in common, generally in smaller family groupings and regulated through the Māori Land Court. In 2008, only 5 percent of the land in New Zealand is Māori freehold land, held of the Crown in fee. Eighty percent is classified as poor land for farming, with perhaps 30 percent being landlocked.

The view that the Treaty had no effect in domestic law was the subject of some dispute in early years. The retired first Chief Justice of New Zealand argued in 1861, in protest at the land wars, that sovereignty (or “governorship” in the Māori version of the Treaty) was to be seen and defined by reference to its *object*. On this argument, the sovereignty obtained by the British Crown was qualified by the Treaty of Waitangi. That is not the way it has been treated as a matter of domestic law in New Zealand. The view that the Treaty is not part of the domestic law of

---

6. *Wi Parata v. Bishop of Wellington*, [1877] 3 N.Z. Jur. (N.S.) 72 (S.C.).

New Zealand, except in so far as it has been incorporated by legislation, was eventually endorsed in a perfunctory decision by the Privy Council in 1942<sup>7</sup> and has not been reconsidered by the New Zealand courts.

The path of diminished sovereignty adopted in the United States in the *Cherokee* cases<sup>8</sup> by Chief Justice Marshall has not been followed in New Zealand, although in 1840 and for some time afterwards it remained an open possibility. Until its repeal in 1986, the New Zealand Constitution Act, 1852, provided for the gazetting of Māori Districts in which Māori custom would operate as law provided it was not “repugnant to the general Principles of Humanity.”<sup>9</sup> No such districts were gazetted. Legislation has provided for *marae* (tribal) courts in minor matters, but they have never been established. Limited control, provided in legislation in 1900 over liquor control, health, and education, did not survive.<sup>10</sup> Claims for a measure of autonomy have nevertheless been made by Māori throughout New Zealand history. Since James Busby had first promoted the idea of a Māori Parliament, before the Treaty was signed, the idea has continued to exert a hold on Māori imagination. Such “Parliaments” were held by Māori loyalists at the time of the land wars in 1869 and 1879 and were later advocated by the tribes who were defeated in the wars.

In 1884, Tawhiao (the second Māori king set up by a land league adopted by a number of tribes to stop further sales of land) left the King Country where he had remained a refugee after the land wars and led a Māori delegation to London to petition the Queen to “grant a government to your Māori subjects... that they may have power to make laws regarding their own lands, and race, lest they perish by the ills which have come upon them.”<sup>11</sup> His hope was the establishment of Māori Districts under the Constitution Act. The British government was sympathetic and recommended this solution to the New Zealand government, which had responsibility for Māori affairs. But Māori autonomy in Districts was not the vision of the New Zealand government. And, in any event, when the Land Court issued titles in respect of the King Country and it was opened up to the new railway, it was soon too late for the creation of a Māori District there. At least since the beginning of the twentieth century, claims for a degree of autonomy have been widely regarded as preposterous by those who have forgotten the idea of Māori Districts and the initial indications and assurances of self-government.

I do not want to suggest that the idea of distinct Māori Districts was the best outcome Māori could have obtained. In some ways it might have suited the settler governments to effect a partial exclusion of Māori. Whether a reservation policy of limited sovereignty in the United States has been, overall, a good thing is not something upon which I am qualified to express a view. But it was not the approach followed in New Zealand.

---

7. *See* *Hoani Te Heuheu Tukino v. Aotea District Māori Land Board*, [1941] A.C. 308.

8. *See Cherokee*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515.

9. 15 & 16 Vict., c. 72, § 71 (1852).

10. The Māori Councils Act, 1900, gave limited authority to eleven tribal councils and, below them, village committees, in matters of sanitation, liquor control, health, and education. The Act was put forward to blunt Māori support for more extensive political autonomy, as proposed by the Kotahitanga (Māori Parliament) movement.

11. REPORT OF THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM, TOWARDS A BETTER DEMOCRACY app. B, at B-26 (1986).

With loss of tribal social structures and territories and the substantial integration of Māori into the wider community, particularly with increasing urbanization, very little practical opportunity for such accommodation may now exist. Māori political activity instead has focused on representation through the Parliamentary processes. The separate Māori seats were first proposed as a temporary expedient in the 1860s when four were established.<sup>12</sup> Separate representation for those who opt to go on the Māori roll is still in place under the current system of proportional representation. The seats have increased and are currently seven.

From the mid-1970s there were widespread protests about the loss of Māori land. They were accompanied by calls to “ratify” the Treaty of Waitangi. In 1975 the New Zealand Parliament enacted legislation to set up a tribunal, the Waitangi Tribunal, to consider claims of breach of the Treaty of Waitangi and to recommend to the government what steps it should take to remedy such breaches, including by reconsideration of legislation inconsistent with the Treaty.<sup>13</sup> The process, though conducted by a tribunal acting in a judicial manner, was set up to assist the Crown in a political response. Nevertheless, the Tribunal has played a pivotal role in bringing to the attention of the public and the courts the Treaty and the claims made under it.

It is difficult for those of us who have lived through the years since to think back to how ignorant we non-Māori were of our history. Few would ever have read the text of the Treaty before it was attached as a schedule to the Treaty of Waitangi Act in 1975. The content of the Treaty was not taught as part of the constitutional law curriculum in our law schools, much less in the schools. It was thought of as a historical artifact. The Waitangi Tribunal itself started slowly. It was not until it published its first major report in 1983<sup>14</sup>—on the pollution of fishing reefs valued by the Taranaki tribes—that the current claims of our indigenous peoples became accessible to a wider audience.

After years of disappointment in litigation, Māori had given up seeking to advance their claims through the courts. As a result, generations of lawyers had failed to appreciate the arguments that could be made on their behalf. The Canadian litigation then current about fishing rights, made accessible by the Waitangi Tribunal, was a revelation. Claims to the Tribunal were made in relation to land losses, fishing rights, and the retention of the Māori language. The Waitangi Tribunal reports provided a bridge for non-Māori into the values and traditions of Māori, and in particular their spiritual association with land and waters.

While these claims were being brought, the government in the mid-1980s was embarked on a major restructuring of government activities. The reforms entailed the transfer of substantial land holdings of the Crown to corporate bodies and the privatization of the fisheries through a transferable quota system which regulated commercial fishing through property rights. At the last minute, it was appreciated by Māori that claims to the Waitangi Tribunal could be disappointed if the Crown had divested itself of the properties from which reparation could be sought.

---

12. *See* Māori Representation Act, 1867 (N.Z.).

13. *See* Treaty of Waitangi Act, 1975 (N.Z.).

14. DEPARTMENT OF JUSTICE, REPORT OF THE WAITANGI TRIBUNAL ON THE MOTUNUI-WAITARA CLAIM (Wai 6) (1983).

Litigation was launched to prevent the Crown transferring the land, forests, and fisheries assets and to stop it divesting itself of the capacity to provide for Māori language broadcasting. The litigation succeeded in shutting down a major government initiative until procedural safeguards had been put in place to safeguard Crown capacity to meet its Treaty obligations.

Eventually, the litigation led to substantial settlements which in the last ten years have resulted in the transfer of land, forest, and fisheries assets to tribal authorities. The settlements have led to the establishment of a number of tribal radio stations and to the establishment of a Māori television channel. These achievements are important in themselves. But, even more importantly, the decisions of the Court of Appeal brought the Treaty of Waitangi out of mothballs and into the consciousness of the nation. They also placed us in touch with the more recent North American case law and ideas about indigenous people, after more than a century of neglect.

## II. THE INTERNATIONALIZATION OF INDIGENOUS CLAIMS

Resurgence of Māori claims was part of a world-wide move for recognition by indigenous people. The position of indigenous peoples has been taken up in the past decades by international organizations. The United Nations and the Organization of American States are now looking critically at our domestic laws. I therefore deal with the international context before coming back to compare our national legal systems.

An initial problem for *international* recognition of the rights of indigenous peoples lies in the definition of what makes a distinct group “indigenous.” Professor Erica-Irene Daes, longtime chairperson–rapporteur of the United Nations Working Group on Indigenous Populations, thought a formal definition should not be adopted. Instead she suggests a list of factors relevant to understand the term “indigenous.” They are:

- (a) *Priority in time*, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinctive collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>15</sup>

The Canadian academic, Will Kymlicka, says that the position taken by the United Nations is “surprisingly simple.” It regards indigenous peoples as entitled to “accommodation.”<sup>16</sup> Minorities, by contrast, it regards as having rights to integration and non-discrimination.

---

15. U.N. Comm’n on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Working Paper by the Chairperson–Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous people,”* ¶ 69, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (emphasis added).

16. Will Kymlicka, *The Internationalization of Minority Rights*, 6 INT’L J. CONST. L. 1, 3 (2008).

It is possible that the increased international attention to the position of indigenous peoples may spur national governments to reconsider priorities within their own legal orders. But it is not clear that there will be real advantage for the peoples long recognized as indigenous under established relationships in post-colonial societies in this recent development. And certainly the governments of the older former British colonies seem skeptical about the direction being taken by the United Nations and its application to their circumstances.

When the General Assembly voted overwhelmingly to adopt a Declaration after twenty-five years of negotiation over the rights of native peoples to protect their lands and cultures, the four countries that voted against the motion were Australia, Canada, New Zealand, and the United States. It is interesting to note in passing that the British representative also expressed reservations about the very concept of “collective human rights in international law,” taking the view that international law recognized human rights as *individual* rights.<sup>17</sup> Collective rights, on the other hand were “bestowed at the national level.” This position seems to be contrary to the view expressed by Justice Joseph Story and relied on in British colonial practice that customary international law conferred obligations on colonial powers to respect the property rights of the inhabitants.<sup>18</sup> But it is the reasons expressed by the four countries that voted against the Declaration that are of particular interest.

The United States and Canada voted against the Declaration in part because of concerns about its looseness of expression, but more substantively because it was thought to cut across the arrangements their jurisdictions had already entered into with their indigenous peoples. The Canadian representative said that the provisions requiring free, prior, and informed consent before dealing with indigenous peoples were “unduly restrictive” and that the recognition of interests in land failed to acknowledge that there were a range of rights and possibly “put[] into question matters that had been settled by treaty” in Canada. The U.S. representative pointed to the solution adopted in the United States that Indian tribes are “political entities with inherent powers of self-government as first peoples.” It therefore said it had a “government to government” relationship with Indian tribes by which it promoted tribal self-government over a broad range of internal and local affairs “including determination of membership, culture, language, religion, education, information, social welfare, economic activities, and land and resources management.”

The reasons of Australia and New Zealand for not supporting the Declaration similarly reflected domestic preoccupations. The Australian representative expressed concern that the proposal went beyond supporting and encouraging “the full engagement of indigenous peoples in the democratic decision-making process” and could impair “the territorial and political integrity of a State with a system of democratic representative Government.” The security of land tenure, and the primacy of domestic laws—including the Native Title Act,<sup>19</sup> enacted after the

---

17. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007).

18. See Paul McHugh, *Aboriginal Title in New Zealand Courts*, 2 CANTERBURY L. REV. 235, 238–39 (1984); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 3–7 (1833).

19. Native Title Act, 1993 (Austl.).

*Mabo*<sup>20</sup> decision—were also cited. Nor did Australia accept an obligation to consult with indigenous peoples about laws affecting them because that “would apply a standard for indigenous peoples that did not apply to others in the population.” “Australia could not accept a right that allowed a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative Government.” Australia did not accept that indigenous customary law (which it considered was not “law” properly so described) should be “in a superior condition to national law.” Given that the incoming government in Australia, which took office a few months ago, said in its election manifesto that it intended to join the Declaration, it may be that these attitudes are shifting.<sup>21</sup>

New Zealand opposed aspects of the Declaration on the basis of human rights and rule-of-law concerns. The New Zealand representative said that indigenous rights in New Zealand were of profound importance and integral to New Zealand’s identity as a Nation State and as a people. New Zealand was described as “unique” by reason of its “founding document,” the Treaty of Waitangi. Its indigenous minority was said to be “one of the largest and most dynamic indigenous minorities in the world.” New Zealand however, had difficulty with four provisions which were “fundamentally incompatible with New Zealand’s constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all its citizens.” It was of particular concern that the provisions were said to imply “that indigenous peoples had rights that others did not have” or suggested rights of “veto over a democratic legislature” and “different classes of citizenship.” This suggests caution about the very concept of indigeneity.

The anxieties expressed by New Zealand may in part reflect the inevitable uncertainties in a country without a written constitution. In such a system caution in relation to any obligation that might impinge upon the constitution is understandable. The New Zealand concerns may also reflect the ambiguity of the status of the Treaty of Waitangi in domestic law and any promise to be inferred from it as to the priority to be accorded to Māori. Similarly, the Australian statements can in part be put down to the fear of disruption to existing land tenure, which caused such political storm when the High Court of Australia in the 1990s in the *Mabo* and *Wik*<sup>22</sup> cases rejected the assumption of *terra nullius* upon which Australian titles to land had been based. So some of the concerns expressed can be put down to local preoccupations and political realities. But I think beyond such particular self-interest—which may or may not be enduring over time—remain substantial questions about the usefulness of an international concept of indigeneity within national legal orders, and worries about preferential treatment and the implications for human rights and, especially, equality of treatment of all citizens.

In the international community the starkness of the distinction between minorities and indigenous peoples is suspect. “Homeland minorities” assert similar claims to indigenous people in many countries without a colonial past but in which there have

---

20. *Mabo v. Queensland II*, (1992) 175 C.L.R. 1.

21. As this speech was being edited for publication, the Australian government formally endorsed the Declaration. See *Experts Hail Australia’s Backing of U.N. Declaration of Indigenous People’s Rights*, U.N. NEWS CENTRE, Apr. 3, 2009, <http://www.un.org/apps/news/story.asp?NewsID=30382&Cr=indigenous&Cr1>.

22. *Wik Peoples v. Queensland*, (1996) 187 C.L.R. 1.

been successive waves of immigration. Examples include the Kurds, Kashmiris, Catalans, and Tamils—peoples around whom some of the more pressing ethnic conflicts in the world are happening. There is inconsistency between nations in the treatment of the same peoples. For example, while Norway and Finland treat the Sami people as indigenous, Sweden regards them as a national minority. The additional concern expressed by the international order for the “indigenous” is encouraging minorities to reposition themselves under the label. Conversely, there are indications that new immigrant groups may be less willing to be content with integration and assimilation and seek for themselves separate identity and autonomy in internal matters.

Our national legal orders do not need these strains of definition and international politics if they are to conscientiously address claims, the justice of which arises out of our own histories and traditions and which are already acknowledged, if only in part. Building on those histories may be a surer foundation than what is a highly contestable abstract concept. Identifying who are the indigenous peoples according to original occupation is questionable, as Locke, Blackstone, and Nozick have suggested in relation to property and sovereignty.<sup>23</sup> Indeed, Jeremy Waldron suggests that such a concept not only raises “serious problems of exclusion” which he says are inherently “creepy” in their underlying assumption of legitimacy, but also entail “considerable dangers in exposing modern distributions of power and property to the arcane details of recondite historical and prehistorical inquiry.”<sup>24</sup>

A more modest principle of prior occupancy is also problematical. It raises issues of timing and relativity and can apply only on a prima facie basis which must be adjusted to meet developing expectations and other claims to redistribution of power or property. Waldron’s conclusion is that the general discourse of indigeneity is more volatile and less helpful in solving the problems of national legal orders than paying closer attention to “our own legal and ideological resources.”<sup>25</sup> So, although the international movement may prod domestic orders to do better, on this view the future is more likely to require closer attention to our domestic traditions.

### III. COMPARATIVE LAW

What of comparative domestic approaches? It is clear that there is often much to learn from other jurisdictions, particularly if they have similar historical origins. But it is necessary to be careful. All of us have had different histories and experiences that have shaped our law and politics.

One experience common to all jurisdictions is that the original path followed in relation to the property of indigenous peoples on contact cannot readily be undone. Too many people quickly obtain vested interests in the status quo. In the United States, a brief flirtation in the late seventeenth century with the idea that the Indians lacked capacity to sell land was swiftly repudiated by the settlers who had already acquired property from the Indians.<sup>26</sup> In Australia, the tragic dispossession of

---

23. See Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT’L L. 55, 68–73 (2003).

24. *Id.* at 80.

25. *Id.* at 82.

26. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 10–48 (2005).

possibly more than a million Aborigines under the *terra nullius* doctrine gave every landowner in Australia an interest in maintaining it. It is not surprising that the political storm that met the High Court of Australia's recognition that the common law should have recognized aboriginal interests and that their interests are not inconsistent with the grazing licenses that cover so much of Australia<sup>27</sup> led to legislation that sets up a limited basis for native title claims, grounded in traditional and uninterrupted use.<sup>28</sup> It may be dangerous for the same approach to be used as a model in countries where the issues are not comparable.

In New Zealand, there has been less scope for disappointment of settled expectations. The relatively prompt investigation by the Crown of all pre-Treaty sales meant that no European-held land was held post-Treaty except from the Crown. Except for those pre-Treaty purchases confirmed on investigation, all land available for purchase by Europeans had been converted into land held in fee of the Crown either by direct Crown purchase from Māori or, after the setting up of the Land Court, by conversion of native property interests into title held in fee of the Crown before such sale. The effectiveness of these mechanisms, however, led to the loss of tribal lands and eroded the practical ability to meet aspirations of self-government. These are the principal points of distinction between New Zealand's response and that of the United States. Failure to appreciate these differences has led at times to misuse of American reasoning in New Zealand case law in relation to the nature of native property interests.

#### *A. The Nature of Aboriginal Property*

When Britain was considering annexing New Zealand in 1839 it was in part because of plans by the New Zealand Company to set up large settlements. The New Zealand Company was well-aware of the decision of the U.S. Supreme Court in *Johnson v. M'Intosh*<sup>29</sup> and quick to recognize how the notion that native tribes had only a right of occupation and use of Crown lands suited the land needs of their organized settlement program. The approach in *Johnson* was not the approach of the Colonial Office, which consistently with its normal practice, intended the protection of property according to native custom. The Treaty implemented that policy. The New Zealand Company however continued to press for a more limited notion of occupation rights, as a moral responsibility only on the title of the Crown. When the government in the United Kingdom changed to one more sympathetic to the notions of John Locke—that recognition of property rights should be confined to cultivated land—steps were taken in the late 1840s to bring in a policy of waste lands. Under it, lands not cultivated were to be treated as surplus to native requirements and the property of the Crown, free to be allocated by Crown grant to settlers. Fortunately for Māori, that initiative was seen by the Governor of the day to be likely to bring about war. Māori were then too numerous for the government to be able safely to undertake such a course.

---

27. See *Mabo v. Queensland II*, (1992) 175 C.L.R. 1.

28. Native Title Act, 1993 (Austl.).

29. 21 U.S. (8 Wheat.) 543 (1823).

In the early years, New Zealand therefore did not adopt in relation to land the view of *Johnson* put forward by the New Zealand Company that with sovereignty the state obtained property, qualified by the use rights of the native people. Nor was the approach the same as that applied in Canada by which the Crown obtained “substantial and paramount estate” although encumbered by the occupation rights of the Indian inhabitants.<sup>30</sup> Rather, in New Zealand the radical title received by the Crown was a notional one (part of its sovereign powers), enabling it to grant Crown title on investigation and not a property interest.

The ideas expressed in *Johnson* were not acted on in the 1840s, but they remained highly influential. *Worcester v. Georgia* (in which a different emphasis is apparent) seems not to have been cited in New Zealand. In 1877 the Court of Appeal, relying on *Johnson*, held that Māori had insufficient social organization upon which to found property rights recognizable by the new legal order.<sup>31</sup> In such circumstances, it was said:

[T]he supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.<sup>32</sup>

This approach was repudiated by the Privy Council in *Nireaha Tamaki v. Baker*, which said that it was “rather late in the day” for it to be said there was no customary law of the Māori of which the courts of law could take cognizance.<sup>33</sup> But the local judges and politicians did not let it go. They remained of the view that Māori proprietary interests were merely rights to occupation against a property interest obtained by the Crown with sovereignty under the Treaty. The Crown observed Māori interests as a matter of grace, because they were binding only on the conscience of the Crown. The Treaty of Waitangi was treated as a pact of no significance in domestic law. In a celebrated rebellion by the New Zealand judges to another rebuke from the Privy Council, Chief Justice Stout asserted in a public sitting of the court to voice the protest of the judges and the profession that “[a]ll lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant.”<sup>34</sup>

The full implications of this misapplied imported doctrine may not ultimately have been of great direct significance in relation to Māori land. That was because of the efficient program of land purchases undertaken by the Crown in the 1850s and then the conversion of customary property into Crown-granted title by the Land Court. After the setting up of the Māori Land Court in the 1860s, there were

---

30. See *St. Catherine's Milling and Lumber Co. v. R.*, [1888] 14 App. Cas. 46, 55 (P.C.) (appeal taken from Can.).

31. See *Wi Parata v. Bishop of Wellington*, [1877] 3 N.Z. Jur. (N.S.) 72, 77 (S.C.). This, interestingly, was the view taken in the *Webster* arbitration. See *William Webster Claim, No. 31*, (Anglo-Am. Claims Trib. Dec. 12, 1925), in 20 AM. J. INT'L L. 391, 393–94 (1926).

32. *Wi Parata*, [1877] 3 N.Z. Jur. (N.S.) at 78 (Prendergast, C.J.).

33. (1901) N.Z.P.C.C. 371, 382 (Davey, L.).

34. *Wallis v. Solicitor-General*, (1903) N.Z.P.C.C. 23 app. at 732.

considerable incentives and pressure on Māori to convert their customary tenure (whatever it was) into fee lands held of the Crown. But in the meantime, it may be that the tough line taken by the New Zealand courts in applying *Johnson* could have affected the terms of land purchases and the attitude of the settler government in dealings with Māori, to their detriment.

The conflation of sovereignty with property continued to influence the shape of legislation. Legislation in 1909 prevented the assertion of Māori customary property against the Crown<sup>35</sup> and denied native proprietors access to the courts to eject trespassers (leaving it to the Crown to take steps to protect the proprietors under a provision which “deemed” the land to be Crown land).<sup>36</sup> The legislation was substantially the product of Sir John Salmond, perhaps New Zealand’s most famous jurist and the author of widely regarded works on jurisprudence and torts, well received in the United States and in England. Salmond was the sort of person who presented his arguments as though there were no other point of view. He considered that the Crown’s proprietary interest was burdened with the native interest, but thought that was a political obligation for Parliament to address.<sup>37</sup> That has been an enduring thread in New Zealand thinking from the New Zealand Company onwards. Modern commentators in this tradition regard accommodation for the indigenous New Zealanders as a political claim, rather than a legal one.

As Solicitor General at a time when Māori fishing rights were being litigated, Salmond advanced the view that the acquisition of sovereignty extinguished such property interests in favor of the Crown. In relation to fishing and foreshore lands the argument was eventually largely successful. In the *Ninety-Mile Beach* case Māori asserted property in foreshore land as a defense to breach of the fishing regulations.<sup>38</sup> The Crown’s argument in the case was that the Crown’s duty to protect Māori customary rights of occupation was a moral duty, not a legal one, until the Crown granted title. To *recognize* property before such title was granted would be to deny the sovereign power. The Court of Appeal held that the foreshore land (which had not been the subject of Crown grant through investigation by the Māori Land Court) was vested in the Crown.

The *Ninety-Mile Beach* case foreclosed indirect court recognition of customary property. (Direct claim was still prevented under legislation that continued the 1909 prohibition on assertion of customary interests against the Crown.)<sup>39</sup> It was not until 2003, after a new Māori Land Act had repealed the prohibition on claiming customary property against the Crown,<sup>40</sup> that the case was revisited.<sup>41</sup> The then Court of Appeal held that Māori could not be precluded from bringing claims to have customary proprietary interests in foreshore and seabed from being determined. It held that the transfer of sovereignty did not affect customary property. It was preserved by the common law until extinguished in accordance with

---

35. Native Land Act, 1909, § 84 (N.Z.).

36. *Id.* § 88.

37. ALEX FRAME, SALMOND: SOUTHERN JURIST 125–26 (1995).

38. *In re The Ninety-Mile Beach*, [1963] N.Z.L.R. 461 (C.A.).

39. Native Land Act, 1931, § 112 (N.Z.); Māori Affairs Act, 1953, § 155 (N.Z.).

40. Te Ture Whenua Māori Act, 1993 (N.Z.).

41. *See Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643 (C.A.).

law.<sup>42</sup> In respect of foreshore and seabed lands, subsequent legislation now prevents property interests being recognized but provides for compensation and remedies by way of reserves and shared management of particular fishing areas.<sup>43</sup>

### *B. Self-government Claims also Arise in Different Contexts*

Although claims for inherent sovereignty are made in many post-colonial societies by native peoples, the responses are very different. In the United States, a residual sovereignty in Indian nations has meant that any limitation of tribal self-government has to be justified in law.<sup>44</sup> In Canada, by contrast, the case law to date requires self-government rights to be established by the band asserting them as custom on the test that such regulation is “integral to the distinctive culture,”<sup>45</sup> a test that is also applied to claims for tribal properties.<sup>46</sup>

Where space for self-government is preserved, demarcation issues of the sort raised in U.S. case law arise.<sup>47</sup> The legal system needs to identify what limits prescribed by its laws restrict the ability of the community to govern itself. This raises questions about the fundamental values in the legal system, such as observance of human rights standards. They may be more difficult to address in Canada than in the United States. In the United States the possession of limited sovereignty by Indian tribes permits preferences to be seen as political accommodations, rather than racial ones.<sup>48</sup> And the “plenary” power of Congress has allowed, if controversially, line-drawing in respect of fundamental values.<sup>49</sup> The position of the indigenous Hawaiians is less easily addressed within this framework however.<sup>50</sup> As the case law dealing with application of reservation laws to non-members shows, there remain conflict-of-laws issues that are not always straightforward.

Claims of inherent rights to self-government, by reason of indigeneity, are more difficult to put forward in New Zealand because of the degree of integration of the communities and the loss of communal territories. Claims to a measure of inherent internal sovereignty run into the meaning of the Treaty of Waitangi and whether it was effective to cede sovereignty without limit. Empowerment by political

---

42. In this the Court followed the views expressed in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.), and *William Webster's Claim*, No. 31, (Anglo-Am. Claims Trib. Dec. 12, 1925), in 20 AM. J. INT'L L. 391 (1926).

43. Section 13 of the Foreshore and Seabed Act, 2004, vests the public foreshore and seabed in the Crown.

44. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831).

45. *R. v. Pamajewon*, [1996] 2 S.C.R. 821, ¶¶ 24–25 (Lamer, C.J.) (quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46).

46. See *Van der Peet*, [1996] 2 S.C.R. 507, ¶ 74.

47. See, for example, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and more recently *United States v. Lara*, 541 U.S. 193 (2004), in relation to criminal jurisdiction and *Montana v. United States*, 450 U.S. 544 (1981), and more recently, *Nevada v. Hicks*, 533 U.S. 353 (2001), in relation to civil jurisdiction.

48. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (holding that affirmative action in relation to Indian tribes is a political preference, not a racial one because of the “unique legal status of Indian tribes”).

49. See Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that tribes and tribal officials retain sovereign immunity in federal court for claims brought under the Indian Civil Rights Act of 1968).

50. See *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that Hawaii cannot limit voting rights to “native Hawaiians” for the election of nine trustees in a statewide election).

settlement is not unthinkable (as some of the more limited attempts at autonomy in the past suggest).<sup>51</sup> And there are calls for *marae* or tribal courts to deal with minor criminal matters. But such ideas run into the limits provided by basic values, particularly human rights standards, and by rule of law considerations. The statements made by the New Zealand representative in relation to the United Nations Declaration show rule-of-law and equality concerns are a real issue for New Zealand.<sup>52</sup> In non-federal constitutions used to strong unitary government, claims for self-government lead to fears of dismemberment of the state and violation of basic constitutional principles.

As some Canadian judges have been careful to point out, self-government arises in two different ways.<sup>53</sup> First, it may be inherent and political; a claim to stand outside the wider polity for particular purposes and to a greater or lesser extent. This is the approach it seems to me adopted in the United States. It may be that such accommodations will be rare elsewhere for the future. They have generally arisen at the start of settlement. They may no longer be feasible where the indigenous groups do not occupy distinct territories and where urbanization gives rise to indigenous claims outside tribal organization. A pluralistic response raises difficult issues of identification of indigeneity and the general rights held by individual members of the group as part of the wider polity, including rights to equal treatment and human rights. So I do not think we can expect the American model to spread, except perhaps in relation to remote indigenous groupings where separatism is available, as may be the case in regions of South America, or where a more modest accommodation of local custom in local courts is feasible, as in some of the jurisdictions of the Pacific.

But claims to self-government may also be property-based and derivative. Where property is held communally, some legal ordering by the community which possesses the property rights is necessary and inevitable.<sup>54</sup> Where property is held under custom, the interests are regulated by custom and administered by the group. Canada seems to be developing such principles for such autonomy in administration of property. At present they may be hampered by the insistence of the Supreme Court to date that the regulation must be “integral to the distinctive culture” at the time of contact and maintained since.<sup>55</sup> Such an approach runs the risk of freezing custom and preventing realization of the aspirations of the group. Much regulation now necessary was unnecessary at contact because of abundance. The Supreme Court decision in *Delgamuukw* suggests, however, that evolution of custom must be permitted in respect of property rights in land which are exclusive.<sup>56</sup> And it may be that the same approach will extend to tribal regulation. The matter is developing.

---

51. See, e.g., Māori Councils Act, 1900 (N.Z.) (establishing elected, self-governing councils to control the health and welfare and moral well-being of the Māori).

52. See Press Release, *supra* note 17.

53. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 111 (Lamer, C.J.); *Campbell v. British Columbia*, 79 B.C.L.R. (3d) 122, ¶¶ 137–43 (B.C.S.C.) (Williamson, J.).

54. See Kent McNeil, *Judicial Approaches to Self-Government Since Calder: Searching for Doctrinal Coherence*, in LET RIGHT BE DONE: ABORIGINAL TITLE, THE CALDER CASE, AND THE FUTURE OF INDIGENOUS RIGHTS 129, 140–41 (Hamar Foster et al. eds., 2007); see also *Campbell*, 79 B.C.L.R. (3d) 122, ¶ 114.

55. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 46.

56. See *Delgamuukw*, [1997] 3 S.C.R. 1010, ¶¶ 118–24 (Lamer, C.J.).

There is however more doubt about the native title process in Australia, which requires aboriginal claimants to establish the survival of pre-contact interests, traditionally maintained.<sup>57</sup> The approach means that the greater the injury to the tribe in the past in deprivation of the ability to maintain their traditions and culture, the smaller the surviving bundle of rights they are able to assert.

In New Zealand, it is possible that Article II of the Treaty of Waitangi, in promising *te tino rangatiratanga* of *property* to Māori was describing a right of self-government derived from property, rather than a freestanding inherent right to political self-government. The Waitangi Tribunal has said of the terms of Article II that it would have conveyed to Māori that they were protected not only in their possessions but in “the mana [authority] to control them and then in accordance with their own customs and having regard to their own cultural preferences.”<sup>58</sup> Again, because of our history and the destruction of communally owned property, resurrecting self-government according to customary precepts, even in relation to tribal property, may not be feasible. Māori social organization has been substantially undermined. Although modern settlements are now conferring large properties upon tribal groups, modern property-holding mechanisms such as corporations and trusts are being employed. They may leave little scope for traditional self-government unless the methods are adapted. These developments lie in the future.

#### IV. THE FUTURE

Shall I look into the future? It is clear that in New Zealand we will need to address a number of issues. They include the scope for *rangatiratanga*, or self-government, and how tribal interests are properly translated into modern property forms. But I want to touch on two issues, the status of the Treaty of Waitangi and the relevance of law.

##### A. *The Status of the Treaty of Waitangi*

The orthodox view of the legal status of the Treaty of Waitangi is that it remains an unincorporated treaty in domestic law. To the extent it is recognized in statutes, it has some direct effect but is not the source of independent rights and obligations. Sir Kenneth Keith, a distinguished international lawyer, now a member of the International Court of Justice, raised a number of questions about this orthodoxy more than thirty years ago.<sup>59</sup> He pointed out that, to the extent that recognition of indigenous property on acquisition of new territory is a principle of customary international law, the Treaty may be declaratory of customary international law and applicable as part of the common law.

More directly confronting the orthodoxy, he has questioned whether the authorities denying the domestic effect of treaties are appropriate in considering a treaty of cession. He points to considerable injustice if such a treaty is neither

---

57. See Native Title Act, 1993, § 62(2)(e) (Austl.).

58. REPORT OF THE WAITANGI TRIBUNAL, *supra* note 14, ¶ 10.2.

59. Kenneth J. Keith, *International Law and New Zealand Municipal Law*, in THE A.G. DAVIS ESSAYS IN LAW 130, 146 (John F. Northey ed., 1965).

enforceable in national law or in international law (on the basis that the previously sovereign body has lost its sovereignty by the treaty). He asks why the Treaty of Waitangi cannot be enforced as a contract.<sup>60</sup>

The modern statement principally relied upon in denying the domestic effect of the Treaty is that of Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*.<sup>61</sup> He said there that a treaty does not have domestic effect if it *alters* municipal law.<sup>62</sup> A treaty of cession, it might be argued, does not alter municipal law, but is constitutive of it. It is possible that such an argument may point in the same direction as the claim by Sir William Martin that the Treaty of Waitangi qualifies the sovereignty acquired by the British Crown.<sup>63</sup> That suspicion is earthquake inducing in New Zealand.

It may be that the status of the Treaty can be left unresolved. That might be the preferable course. As one of our great judges once put it in referring to the status of the Treaty, “[A] nation cannot cast adrift from its own foundations.”<sup>64</sup> And there is some real attraction in a pact all regard as fundamental, but which can be invoked in different ways to meet evolving conditions. To Māori, it has been a sacred pact and perhaps tying it down would diminish its authority. But if constitutional reform is ever in prospect, it is hard to see that the status of the Treaty can be avoided.

### B. *The Place of Law*

There is a strong strand of New Zealand thinking about indigenous issues that the Treaty of Waitangi is principally a political pact and that addressing the place of the indigenous people who entered into it is a political exercise in which law has little part to play. This is reminiscent of the approach taken in some of the nineteenth and early twentieth century cases. But it is also a serious stand-alone argument.

There may be a large measure of truth in the view that adjusting the interests of the wider state and its indigenous peoples must always be an intensely political interest, even where there are rights, such as in treaties or other agreements which are in recognizable legal form and may have some legal force. But I do not think it follows that law has no role. There are two main reasons. The first arises out of the circumstance that dealings with indigenous peoples in post-colonial societies has almost always been based on law. As Stuart Banner makes clear in relation to the native Indians of the United States, no settler acquiring land from Indians in the seventeenth and eighteenth centuries thought he was acting outside the law:

[E]very land transfer of any form included elements of *law* and elements of *power*. No non-Indian acquiring Indian land thought himself unconstrained by Anglo-American law. Whites always acquired Indian land within a legal framework of their own construction. Law was always present, but so was power. The more powerful whites became relative to Indians, the more they were able to mold the legal system to produce outcomes in their favor—more sales, of

---

60. *Id.*

61. [1937] A.C. 326 (P.C.).

62. *Id.* at 347–48.

63. See SIR W. MARTIN, D.C.L., THE TARANAKI QUESTION 10 (1860).

64. *Te Runanga O Wharekauri Rekoku, Inc. v. Attorney-General*, [1993] 2 N.Z.L.R. 301, 308–09 (Cooke, P.).

larger tracts, at lower prices than would have existed had power relationships been more equal.

From the Indian's perspective, the overarching story from the early seventeenth to the early twentieth century is thus one of decline. In the seventeenth century when Indians and whites were close to equally powerful, transactions in Indian land often increased the well-being of both sides.<sup>65</sup>

Law therefore was not meaningless. Land was taken according to law, although the law was fashioned by the settlers and was increasingly adverse to native interests. This experience was relived in New Zealand, despite the initial hopes that their aboriginal inhabitants could be spared the calamities which, by 1840, were well understood to have come to the Indians of North America. Challenging the legal authority is a claim to legitimacy. Legitimacy is a substantial prize. It is enormously powerful, even if ultimately the accommodation to meet the underlying claim must be political. That is demonstrated in New Zealand by the litigation in the 1980s.

Secondly, the deliberative processes and necessary justification of judicial method are critical in themselves in explaining the claims of indigenous peoples to the wider polity. The quasi-judicial processes of the Waitangi Tribunal and the 1980s litigation in New Zealand were pivotal in a revolution in attitude towards our indigenous peoples. Legal method requires justification for what has been done and tells the stories the wider polity needs to hear. So I expect recourse to law to continue.

## CONCLUSION

In the end, however, the place of indigenous peoples in our societies depends on their vision for themselves. One of my Māori colleagues, the Chief Judge of the Māori Land Court, thinks it is time to move beyond this period we are in of "transitional justice."<sup>66</sup> Remedying past wrongs and providing reparation are necessary steps, but not sufficient ones. Joe Williams suggests that moving forward, indigenous peoples must build on their own identity if they are to avoid continuing to make the reality of the settlers the vision of the First People. Similar thoughts have been expressed by Professor John Borrows, a Canadian Indian.<sup>67</sup> He looks to an interdependent future between indigenous peoples and the wider community. Such interdependence reflects the more complicated world in which most indigenous people now live, where many live outside traditional communities, have intermarried with the settlers and raised families, and work within the very bureaucracies that indigenous peoples complain about.

All of us have different histories and I have tried to tell you something of the way New Zealand has addressed the just claims of its First Peoples. In the end, the future lies with their vision of themselves, and it may be with building new relationships with the wider political communities of which they are part.

---

65. BANNER, *supra* note 26, at 4.

66. Chief Judge Joe Williams, *Confessions of a Native Judge: Reflections on the Role of Transitional Justice in the Transformation of Indigeneity*, LAND, RIGHTS, LAWS: ISSUES OF NATIVE TITLE, June 2008, at 10.

67. JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 138–58 (2002).

