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CONFLICT BETWEEN INDIGENOUS PEOPLE AND THE STATE

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[1] The theme of this session is “conflict between indigenous people and the state”. The topic is large. I intend to be selective in what I cover and will stay close to the jurisdiction I know best, New Zealand. I want to offer some general reflections on how conflicts between indigenous people and the state arise today and how they are addressed in democratic societies under the rule of law.

The role of law

[2] The role of law in resolving conflicts between the state and indigenous populations is itself a subject which is contested. There are those who think accommodation for indigenous populations which goes beyond securing freedom from discrimination is an intensely political matter in which law has little or no role. One New Zealand commentator has expressed the view that many New Zealanders, for example, are likely to take the view that in New Zealand the size of the Maori population (which is about 15%) and the political power they have means that accommodation of their claims should be sorted out by politicians – those “who understand policy and politics, principle and pragmatism—not judges”.¹

[3] There is 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 recognisable legal form and which may have some legal force. But I do not think it follows that law has no role. There are two main reasons.

[4] The first arises out of the circumstance that dealings with indigenous peoples 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 17th and 18th centuries thought he was acting outside the law.² Indeed, the claims to sovereignty made by colonising powers over vast swathes of territory were themselves mostly justified by law. In New Zealand the Crown’s authority to govern stems from an acquisition of sovereignty through the Treaty of Waitangi. Law then

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¹ Matthew Palmer “Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution” (2006) 29 Dalhousie LJ 1 at 34.

² Stuart Banner *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard University Press, Cambridge (MA), 2005) at 4.

mattered. To have law on your side is a claim to legitimacy. Those who feel a sense of injustice go to law.

[5] 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. In New Zealand, in my professional lifetime there has been a revolution in how the claims of Maori are viewed. The quasi-judicial processes of the Waitangi Tribunal and major litigation in the 1980s brought about a new attitude towards our indigenous people after decades in which their claims had been thought to be preposterous. The cases told the stories the wider polity needed to hear.

What is the law by which indigenous claims are judged?

[6] In many jurisdictions the first question is as to the law to be applied to indigenous claims. Is the law of an indigenous society part of the general law and which law prevails in cases of conflict? In some jurisdictions, particularly in Africa and the Pacific, indigenous law is constitutionally recognised. Even then there are disagreements about the limits placed on it by human rights and other generally applicable norms.

[7] In New Zealand, Maori law or tikanga cannot prevail against statutes. But that is not to deprive it of legal significance.

[8] First, tikanga can influence the interpretation of statutes. In a 1987 decision, the Water and Soil Conservation Act 1967 was interpreted to allow Maori cultural values relating to water to be taken into account, a breakthrough in recognition of Maori values in the general law.³ A little later, the High Court held that when assessing “the welfare of the child” under the Guardianship Act 1968, “the special position of a child within a Maori whanau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child”.⁴ It reasoned that “since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute”.⁵

[9] Indigenous law can also be adopted by the common law, which was introduced into most colonial societies only to the extent consistent with local conditions.⁶ New Zealand conditions included a developed Maori society

³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

⁴ *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 185.

⁵ At 184.

⁶ In New Zealand, the laws of England applied only “so far as applicable to the circumstances of the ... colony”: English Laws Act 1858, s 1; and English Laws Act 1908, s 2. The effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988.

regulated by norms acknowledged by the Colonial Office to have the attributes of law. So, in an early 20th century case a claim by the Crown to be entitled to whalebone (in England a Crown right which derived from an ancient perquisite of the Queen to use whalebone for corsets) was held to be inconsistent with Maori custom and inapplicable in New Zealand.⁷ In another, custom applied to permit lavish tangi (funeral) expenses, commensurate with the tribal standing of the deceased, to be refunded from the estate by the Public Trustee.⁸ And in a recent case in the Supreme Court we had to decide, in application of the common law of New Zealand, whether the tikanga of the tribe of a deceased should determine the place of his burial or whether the executor (the non-Maori wife of the deceased) had the right to decide the matter.⁹

[10] Where indigenous usage is relied upon, there is disagreement about whether (as is the case with custom in English law¹⁰) it must be of immemorial usage and frozen in development at the time of contact or assumption of sovereignty. The emerging view now appears to be that indigenous law can evolve in the same way as common law evolves.¹¹ And that it is a system of law.

Indigenous claims arise from very different circumstances

[11] It is necessary to begin by considering the special position of indigenous peoples. The first point to be made is the obvious one that there is tremendous variety in the circumstances of indigenous people. At a Commonwealth Law Conference there is much common experience which has shaped the position today of indigenous populations in different member states. The most obvious influence arises out of similar experiences of British colonisation and settlement and the way in which they have impacted on indigenous communities. But conflicts between indigenous peoples and the states to which they belong also arise in societies which have not experienced colonisation. "Homeland minorities" assert similar claims in countries without a colonial past but in which there have been successive waves of immigration.¹² The Kurds, Kashmiris, Catalans and Tamils are examples. It is no accident that some of the more significant flashpoints

⁷ *Baldick v Jackson* (1910) 30 NZLR 343.

⁸ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

⁹ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. Claire Charters says about the *Takamore* case that the Supreme Court "sidestepped the potential to give effect to tikanga as a law of the land". It took an "accommodation approach" to development of the common law, avoiding difficult questions of to whom tikanga would apply. She raises the question whether the Court was reluctant to look at legal pluralism because of its challenge to parliamentary omnipotence: Claire Charters "Maori Rights: Legal or Political?" (2015) 26 PLR 231 at 236.

¹⁰ See *Halsbury's Laws of England* (5th ed, 2012, online ed) vol 32 Custom and Usage at [6].

¹¹ In New Zealand, the Law Commission in *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001) has expressed the view at [10] that: "Tikanga Maori should not be seen as fixed from time immemorial, but as based on a continuing review of fundamental principles in a dialogue between the past and the present."

¹² See Will Kymlicka "The internationalization of minority rights" (2008) 6 Int J Const Law 1.

around the world at the moment have arisen out of their struggles for distinctiveness and self-determination.

[12] Among states which share a background of colonisation there are significant differences in the history of dealings with indigenous peoples and in the legal orders which affect both the nature of the conflicts and the ways in which they are addressed. Those differences mean that cross-jurisdictional borrowing of solutions requires some care.

[13] The treatment of native property in land in 19th century colonial New Zealand following the Treaty of Waitangi, for example, was different from the way in which Indian interests were seen in the Thirteen Colonies in pre-Revolutionary America in the two preceding centuries. In New Zealand it was acknowledged from the start that Maori were proprietors of the entire territory ceded in sovereignty to Queen Victoria and that the Queen obtained no proprietary interest with sovereignty until the land was acquired by purchase or according to law.¹³ This position can be contrasted with that in New South Wales where in 1833 the Supreme Court described the indigenous inhabitants as “wandering tribes ... living without certain habitation and without laws”,¹⁴ and the Crown was treated as acquiring property in law with sovereignty.¹⁵ As recently as 1971 it was held in the Supreme Court of the Northern Territory that there were no aboriginal rights to land under traditional law or custom which could be recognised at common law.¹⁶

[14] The different experience of indigenous peoples may mean that unexpected comparisons are more apt than those that have arisen from outwardly similar colonisation. It is worth considering for example whether the circumstances and aspirations of Australia’s aboriginal peoples mean that the issues they confront in matters of internal government today are more comparable with the issues with which the indigenous populations of Colombia or the Pueblo Indians of New Mexico are grappling.¹⁷ So at a Commonwealth Law Conference in looking at this topic it is important not to be blinkered by the familiarity of association.

[15] I do not want to push the point about difference too far. Convergence can be seen to be occurring in a number of jurisdictions in which attitudes to property or to self-government were formerly very different. Until recently Maori in New Zealand may have seemed to be in a more fortunate position

¹³ In *R v Symonds* (1847) NZPCC 387 (SC), Chapman J said (at 390) that “it cannot be too solemnly asserted that [native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers”.

¹⁴ *MacDonald v Levy* (1833) 1 Legge 39 (NSWSC) at 45.

¹⁵ *Attorney-General v Brown* (1847) 1 Legge 312 (NSWSC); and *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404.

¹⁶ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 244 per Blackburn J.

¹⁷ A connection explored in an extremely interesting paper by Jean Jackson: “Rights to Indigenous Culture in Colombia” in Mark Goodale and Sally Engle Merry (eds) *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press, Cambridge, 2007) 204 at 225–226.

than the indigenous peoples of other jurisdictions in that they were acknowledged from the outset to have full and exclusive rights of property in their land and to have sufficient political organisation to regulate their own societies through customs having the attributes of law. But these foundational principles were not always observed in New Zealand as I will come on to explain.

[16] In the meantime, legal developments in other jurisdictions have closed some apparent gaps. The decisions of the Canadian Supreme Court, especially in *Calder*,¹⁸ *Guerin*,¹⁹ *Delgamuukw*²⁰ and *Tsilhqot'in Nation*,²¹ and of the High Court of Australia in *Mabo (No 2)*²² and *Wik*,²³ suggest some convergence in recognition of native proprietary interests. In *Tsilhqot'in Nation*, the Supreme Court of Canada held that the aboriginal title there recognised conferred “ownership rights similar to those associated with fee simple”.²⁴ The Crown “radical title” did not include any beneficial interest. In *Mabo (No 2)*, the High Court made a declaration that the Meriam people were entitled to possession, occupation, use and enjoyment of the lands of the Murray Islands. The decision entailed acceptance that colonisation and the acquisition of sovereignty did not extinguish pre-existing property interests according to the law and custom of the Meriam people and that these rights were protected at common law but could be defeated by legislation or by land grants by the Executive. In Canada, Australia and New Zealand, the courts have accepted the strictures of the Privy Council that common law property analogies may not be adequate to reflect interests according to custom.²⁵

¹⁸ *Calder v Attorney-General of British Columbia* [1973] SCR 313.

¹⁹ *R v Guerin* [1984] 2 SCR 335.

²⁰ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

²¹ *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

²² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²³ *Wik Peoples v Queensland* (1996) 187 CLR 1.

²⁴ At [73] per McLachlin CJ. Set out in full, she expressed the view that aboriginal title “confers ownership rights similar to those associated with fee simple including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.” This appears to adopt the view earlier expressed by Lamer CJ in *Delgamuukw* at [112]–[113] that the description of the Privy Council in *St Catherine's Milling & Lumber Company v The Queen* (1888) 14 App Cas 46 (PC) of Indian interests as personal and usufructuary may mislead (see also LeBel J's views in *R v Marshall* 2005 SCC 43, [2005] 2 SCR 220 at [135] that “usufructuary” title “is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands”). These cases are discussed by Kent McNeil *Indigenous Law and Aboriginal Title* (Osgoode Hall Law School Legal Studies Research Paper No 2, August 2016) available at <ssrn.com/abstract=2825097>. Noteworthy also are the comments of Judson J in *Calder v Attorney-General of British Columbia* [1973] SCR 313 at 328, picked up in *Guerin* at 381–382 by Dickson J. It should be noted that the idea that Maori property interests are a burden on the Crown's underlying title surfaced from time to time in New Zealand too, and is illustrated in the minority opinion of William Young J in *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17.

²⁵ See *Amodu Tijani v The Secretary of Southern Nigeria* [1921] 2 AC 399 (PC) at 402–404.

[17] Further convergence can be seen in a recent New Zealand case which applied Canadian and Australian case law in finding that the Crown owed fiduciary duties to Maori when dealing with their property interests.²⁶ It followed Canada and Australia in rejecting the doctrine of political trust which had immunised the Crown from legal responsibility because of its sovereign duties to all.²⁷

[18] Despite the scope for convergence and the similarity in the aspirations of indigenous societies, different time frames and different solutions may well appeal in the different jurisdictions. Questions of self-government and tribal autonomy may well take different paths where indigenous peoples control territories over which their authority is acknowledged. Unlike Canada, for example, there has not been a history of Maori reserves in New Zealand, although the model of distinct territories administered by Maori under their customs remained a prospect held out by the constitution of New Zealand and remains as something that might have been.

[19] A background of peace treaties or treaties for land surrender (such as are familiar in North America) may set up a different framework for political and legal engagement between the colonising power and the indigenous populations than a single national treaty such as the Treaty of Waitangi which cedes sovereignty in return for guarantees of “full exclusive and undisturbed possession” of property. In New Zealand, the Treaty of Waitangi has been a base for political and legal engagement between the Crown and Maori.

[20] In my remarks I will give you an indication of where we are at the moment in New Zealand. But first, I want to say something about the claims made by indigenous populations.

Indigenous interests

[21] The issues raised by indigenous peoples today are strikingly similar. The claims for sufficient autonomy and authority to enable their cultures to live and prosper in the modern states of which they are a part no longer seem as preposterous as they once did, even in unitary states with no federal model of power sharing. There is sufficient commonality in the

²⁶ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17.

²⁷ In Canada and Australia fiduciary responsibilities arose out of the burden of the native interests in land on the Crown's own title. Crown title burdened with the native interests in itself set up a relationship of dependency, especially arising out of dealings in the land, in which equitable duties are readily recognised. Although there had been a number of New Zealand cases since the 1980s which have dangled the prospect of recognition of fiduciary duties owed by the Crown, the matter did not squarely arise for determination until the recent decision of the Supreme Court in *Wakatu*. That case concerned pre-Treaty European dealings in land, which required confirmation by Commission of Inquiry that the purchases were on “equitable terms” before the land was cleared of native title and vested in the Crown. The Crown was then able to grant some or all of it to the European purchasers. In *Wakatu* it was held that Crown title was burdened by the obligation to fulfil the terms of the transaction cleared as equitable, which required reservation of one-tenth of the land granted for the benefit of the Maori proprietors.

experiences and needs of indigenous people to suggest that it is wise to be open to the ideas expressed in other countries and other legal systems when considering our own responses. This is apparent in the United Nations Declaration on the Rights of Indigenous Peoples.²⁸

[22] In the work which preceded the Declaration, the factors relevant to indigeneity were identified as arising out of:²⁹

priority in time;
cultural distinctiveness;
self-identification; and
experiences of marginalisation, dispossession and discrimination.

[23] It is worth remembering that the Declaration was originally opposed by Australia, Canada, New Zealand and the United States – four former British colonies with indigenous populations. Although they have since accepted the Declaration, New Zealand in indicating acceptance has made the point that it is seen as a statement of “aspirations”, not rights.³⁰ Nevertheless, the Declaration is a useful indication of the areas of contest between modern states and indigenous peoples in relation to which we can expect that there is likely to be movement.

[24] The Declaration affirms the right of indigenous peoples to be equal and to be different. It is concerned with freedom from discrimination but it is also concerned with addressing urgently the historic injustices suffered by many indigenous peoples through colonisation, dispossession of lands, territories and resources, with associated loss of the right to development in accordance with their own needs and interests. It expresses the expectation that through the control of lands, territories and resources indigenous peoples will be enabled to maintain their culture and tradition and develop in accordance with their own aspirations. It supports treaties and agreements between indigenous peoples and states and the importance of self-determination in the context of indigenous peoples. It recognises that in exercising their right to self-determination, indigenous peoples have the right to “autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”.³¹ It looks to the strengthening of the distinct institutions of indigenous people “while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State”.³²

[25] In addition to providing for self-government, states are expected to co-operate “in good faith” with indigenous peoples “in order to obtain their

²⁸ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

²⁹ *Working Paper by the Chairperson-Rapporteur Mrs. Erica-Irene A. Daes, on the concept of “indigenous people”* E/CN.4/Sub.2/AC.4/1996/2 (1996) at [69].

³⁰ See (20 April 2010) 662 NZPD 10229.

³¹ Article 4.

³² Article 5.

free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.³³

[26] States are required to give legal protection to lands, territories and resources in recognition that is to be conducted with due respect to the “customs, traditions and land tenure systems of the indigenous peoples concerned”.³⁴ They are also required to establish, in conjunction with the indigenous peoples concerned, processes for recognition and adjudication of their rights relating to lands, territories and resources.³⁵ They have rights to protection of the environment of their lands and territories and to fair redress for adverse impact.³⁶

[27] Where land, territories and resources have been taken from them or damaged, indigenous peoples are recognised to have the right to redress by restitution. If restitution is not possible, they are entitled to “just, fair and equitable compensation”.³⁷

A little history

[28] When in 1839 the British Colonial Office despatched 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 prompted by the need to avoid in New Zealand repetition of “the calamities by which the aborigines of American and African colonies have been afflicted”.³⁸ New Zealand was therefore not to be annexed “unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained”.³⁹

[29] It is interesting to note of this instruction that it pre-supposes a level of social organisation in which established “usages” would determine the validity of cession. This may be a point of distinction with a number of other jurisdictions.⁴⁰

[30] What is more, Maori were according to the instructions, to be “carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals”. The

³³ Article 19.

³⁴ Article 26.

³⁵ Article 27.

³⁶ Article 29.

³⁷ Article 28.

³⁸ Letter from Lord Glenelg to Lord Durham of 29 December 1837 in *Report from the Select Committee on New Zealand* (3 August 1840) at 148–149, reproduced in *British Parliamentary Papers: Colonies – New Zealand* (Irish University Press, Shannon (Ireland), 1968) vol 1.

³⁹ Instructions from Lord Normanby to Captain Hobson of 14 August 1839 in *Correspondence with the Secretary of State relative to New Zealand* (W Clowes & Sons, London, 1840) 37 at 38.

⁴⁰ Although later in New Zealand history the capacity of Maori to enter into the Treaty was doubted by the Courts: see for example *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

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” with the exception of customs “in conflict with the universal laws of morality”.⁴¹

[31] In New Zealand there was massive immigration from the end of the 1840s which swamped the Maori population. Representative government was achieved in 1853. Although Maori had become British subjects under the Treaty, the franchise was based on property ownership and communally held land did not qualify. Few Maori were enfranchised until the 1890s. Before then, land wars in the 1860s had been precipitated by government land purchases which were disputed or opposed. There were substantial confiscations of tribal lands as a result of the “rebellions”. Policies of assimilation followed in which there was substantial denial of culture. Maori religions were suppressed and native marriage and adoption were not recognised.

Political distinctiveness

[32] The New Zealand Constitution Act 1852 allowed for the gazetting of Maori districts in which Maori custom would operate as law provided it was not “repugnant to the general principles of humanity”.⁴² That provision was not repealed until 1986 but no districts were gazetted and loss of tribal heartlands made it impossible of fulfilment. Although legislation provided for tribal courts in minor matters from early in the 20th century they were not provided. Limited control given to tribal councils and village committees in matters of sanitation, liquor control, health and education (proposed to blunt Maori claims for more extensive political autonomy) did not survive.⁴³

[33] Claims for a measure of autonomy have been made throughout New Zealand history. “Parliaments” were held in New Zealand before the Treaty by tribes in a confederation who had declared their independence (an independence recognised by the British Crown). During the Land Wars parliaments were held by loyalists in 1869 and 1879. They later continued to be called for by Maori tribes. In 1884, Tawhiao, the second Maori King, led a Maori delegation to London to petition the Queen to “grant a Government to your Maori 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”.⁴⁴

[34] When the franchise was extended to all adult Maori it was for four Maori seats. Today the separate seats continue for those Maori who enrol on the Maori Roll. The number of Maori seats is determined by those who

⁴¹ Despatch from Lord Stanley to Mr Shortland dated 21 June 1843, available at <paperspast.natlib.govt.nz/newspapers/NENZC18450628.2.11>.

⁴² New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 71.

⁴³ The Maori Councils Act 1900 gave limited authority to eleven tribal councils (and below them, village committees) in respect of these matters.

⁴⁴ See “Despatches from the Secretary of State to the Governor of New Zealand” [1885] I AJHR A2 at 5.

enrol. In a proportional representation system such as applied in New Zealand since 1996, the Maori seats have at times had considerable impact. Maori participation in Parliament has allowed issues affecting Maori to be in the public arena. Nevertheless the claims to self-determination and better autonomy remain.

Native title and Maori land

[35] In 1877 the New Zealand Supreme Court decided there was no customary law of Maori of which the courts could take cognizance.⁴⁵ 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. Much recent litigation has been concerned with correcting the damage caused by this revisionism.

[36] Although the Privy Council tried to correct the position at the turn of the 20th century (saying it was “rather late in the day” to suggest that native property could not be recognised in New Zealand courts by evidence as to the custom on which it was held),⁴⁶ the local view endured until 2003 when it was corrected by the Court of Appeal in *Ngati Apa*.⁴⁷

[37] From the 1860s Maori customary title was brought within a system of ownership investigated and administered by the Native Land Court which replaced the customary title by Crown grants.⁴⁸ The Crown grant extinguished native title. Maori were incentivised to exchange native title for Crown grants. From 1909 those holding land according to native custom were prevented from asserting their title against the Crown.⁴⁹ Nor could they bring actions for ejectment or trespass without the intervention of the Attorney-General.⁵⁰

[38] Substitution of Crown title for customary land through the Native Land Court from the 1860s rapidly achieved individualisation of title, ignoring overlapping interests and substantially undermining tribal society. With the exception of areas of foreshore land, there are now no significant areas of land held in native title left. The claim to native title considered in the 2003 decision of the Court of Appeal – *Ngati Apa* – was made in relation to foreshore land that had not been investigated through the Maori Land Court.

[39] That claim had been able to be brought because the legislation that had prevented native title being asserted against the Crown (a significant

⁴⁵ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

⁴⁶ *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577.

⁴⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁴⁸ The Native Land Court was established by the Native Lands Acts of 1862 and 1865.

⁴⁹ Native Land Act 1909, s 84.

⁵⁰ Section 88.

Maori grievance for almost a century) was repealed.⁵¹ When the Court of Appeal held in 2003 that the claim for investigation of customary title to foreshore land could be taken to the Maori Land Court, Parliament removed the right to have the claim investigated and legislated that the foreshore land was vested in the Crown.⁵²

[40] The legislation led to a political storm. A change of government led to changed legislation.⁵³ The new legislation provides protected customary rights and customary marine title instead of native title. In *Ngati Apa* the Court of Appeal had accepted that the only criteria for establishing entitlement on investigation of title were those established according to “tikanga Maori”.⁵⁴ That is not the solution adopted in the legislation which has followed.⁵⁵ It adopts criteria similar to those used in the Canadian cases and adopted in the Australian native title legislation. They require proof of sufficiency, continuity, and exclusivity.⁵⁶

[41] The former Chief Justice of the High Court of Australia, Chief Justice French, has pointed out the substantial evidential hurdle in Australia for claimants for native title recognition in showing continuity and exclusivity.⁵⁷ He also points out that those indigenous peoples who have suffered the greatest loss will face the greatest hurdle:⁵⁸

If by accident of history and the pressure of colonisation there has been dispersal of a society and an interruption of its observance of

⁵¹ The stipulation in s 84 of the Native Land Act 1909 that customary title could not be asserted against the Crown was carried over into s 112 of the Native Land Act 1931 and then s 155 of the Maori Affairs Act 1953. The Maori Affairs Act 1953 was repealed by Te Ture Whenua Maori Act 1993. See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [46].

⁵² Foreshore and Seabed Act 2004, s 13.

⁵³ The position is now as set out in the Marine and Coastal Area (Takutai Moana) Act 2011. That Act provides in s 11 that the common marine and coastal area has a “special status” and that “[n]either the Crown nor any other person owns, or is capable of owning, the common marine and coastal area”.

⁵⁴ See at [14], [49], [88], [101] and [205].

⁵⁵ The Marine and Coastal Area (Takutai Moana) Act 2011 allows Maori to apply for protected customary rights and customary marine title. Under s 51 a protected customary right is one that has been (a) exercised since 1840; and (b) continues to be exercised ... in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and (c) is not extinguished as a matter of law. Customary marine title requires that the area be held in accordance with tikanga and that it has been “exclusively used and occupied ... from 1840 to the present day without substantial interruption” (s 58). “Tikanga” is defined in the 2011 Act as “Maori customary values and practices” (s 9).

⁵⁶ As pointed out by Jacinta Ruru “Lenses of Comparison Across Continents: Understanding Modern Aboriginal Title in *Tsilhqot’in Nation* and *Ngati Apa*” (2015) 48 UBC Law Rev 903 at 931–933.

⁵⁷ Robert French “Native Title – A Constitutional Shift?” (JD Lecture Series, University of Melbourne Law School, 24 March 2009). The native title process in Australia is particularly difficult. It requires aboriginal claimants to establish the survival of pre-colonial interests, traditionally maintained. That 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. See also Native Title Act 1993 (Cth), s 62(2)(e).

⁵⁸ At 32.

traditional law and custom, then the most sincere attempts at the reconstruction of that society and the revival of its law and custom seem to be of no avail.

[42] Although it is early days yet, the same experience may arise under the New Zealand foreshore legislation. Certainly, informed commentators take the view that most Maori are likely to prefer to enter into direct negotiations with the Crown rather than undertake the expensive and exhausting process of establishing the connection required by the statute.⁵⁹

[43] Of course, extinguishment of title to land does not mean that there is a loss of connection to the land. This is a point that has been made in relation to aboriginal connection to country in Australia by Chief Justice French.⁶⁰ And in New Zealand that continuing connection is accepted to give Maori rights of participation and to be consulted in the management and development of natural resources.⁶¹

Waitangi Tribunal

[44] Since 1975 a specialist permanent commission of inquiry, the Waitangi Tribunal, has been established to enquire into breaches by the Crown of the “principles” of the Treaty of Waitangi.⁶² From the mid-1970s there had been widespread protests about the loss of Maori land accompanied by calls to “ratify” the Treaty of Waitangi. It was in response to this agitation that the Parliament set up the Waitangi Tribunal to recommend to the government what steps it should take to remedy breaches of the principles of the Treaty.

[45] The Waitangi Tribunal started slowly. It was not until it published its first major report in 1983⁶³ that the claims became accessible to a wider audience. As a result of years of disappointment in litigation, Maori 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 about fishing rights, made

⁵⁹ One leading academic, Richard Boast, has said of this legislation that: “What [the Act] offers may seem to Maori to be less appealing than what they might obtain by negotiation with the Crown. Customary marine title can be recognised either by judicial determination or by negotiation. Maybe the real point of the legislation is to encourage Maori to opt for the latter, likely to be the preference of iwi and hapu in any case.” See Richard Boast “Foreshore and Seabed, Again” (2011) 9 NZJPIL 271 at 283.

⁶⁰ Robert French “Native Title – A Constitutional Shift?” (JD Lecture Series, University of Melbourne Law School, 24 March 2009) at 20.

⁶¹ The Resource Management Act 1991 requires those managing the use, development, and protection of natural and physical resources to recognise and provide for “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”: s 6(e).

⁶² Treaty of Waitangi Act 1975.

⁶³ Waitangi Tribunal *Motunui–Waitara Report* (Wai 6, 1983).

accessible by the Waitangi Tribunal, was a revelation.⁶⁴ The Waitangi Tribunal reports provided a bridge for non-Maori into the values and traditions of Maori and in particular their spiritual association with land and waters.

[46] Against this background when the Government launched a major restructuring of government activities which entailed transfer of Crown land assets to State Owned Enterprises and privatisation of the fisheries, litigation was launched to prevent the Crown transferring the lands, forests and fisheries assets to stop it divesting itself of the capacity to provide for redress.⁶⁵ Eventually the litigation led to substantial settlements. The decisions of the Court of Appeal also brought the Treaty of Waitangi out of mothballs and placed us in the comparative legal framework being advanced by indigenous peoples in other former colonial societies.

[47] The Tribunal observes Maori kawa in its hearings and sits to hear claimant evidence on marae. It was originally set up as a recommendatory commission of inquiry, to assist the Crown in political responses to its Treaty obligations. As part of a settlement of litigation it obtained powers to order return of certain categories of land (transferred from Crown ownership as part of a restructuring of land and forestry assets in 1989).⁶⁶ But it has never exercised the jurisdiction (despite some judicial criticism of its failure to do so) and is clearly reluctant to.⁶⁷

[48] From 1985 the jurisdiction of the Waitangi Tribunal was extended to historic breaches and to exploring questions of redress for them through recommendations of the Tribunal.⁶⁸ This led to a change in focus for the Tribunal and, in response, government policy (now maintained by successive governments), has been to enter into negotiations with large tribal groupings⁶⁹ to secure economic redress either following findings of breach in the Tribunal or, increasingly, without such formal findings having been obtained.

⁶⁴ See for example *Regina v Taylor and Williams* (1981) 34 OR (2d) 360 (CA) and *Simon v The Queen* [1985] 2 SCR 387, both cited in Waitangi Tribunal *Muriwhenua Fishing Claim Report* (Wai 22, 1988).

⁶⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) [*Lands Case*]; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests Case*]; and *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) [*Fishing Rights Case*].

⁶⁶ Settlement of the *Lands Case* resulted in the addition to the Treaty of Waitangi Act of ss 8A, 8B, 8C and 8E, and settlement of the *Forests Case* resulted in the further addition of ss 8HB, 8HC, 8HD and 8HF: see *Attorney-General v Mair* [2009] NZCA 625 at [102].

⁶⁷ Technically the Tribunal has made a relevant interim recommendation on one previous occasion (in the *Turangi Township Report*, Wai 84, 1995), though ultimately this did not crystallise into a binding order as the Crown and claimants reached agreement within the 90-day window the Crown has to settle a claim before the Tribunal's interim recommendation becomes binding: see *Attorney-General v Haronga* [2016] NZCA 626, [2017] 2 NZLR 394 at [72].

⁶⁸ By virtue of the Treaty of Waitangi Amendment Act 1985, s 3.

⁶⁹ Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (March 2015) available at <www.ots.govt.nz> [*Red Book*] at 39.

Economic and cultural redress through settlement

[49] Thirty years on, there has been a substantial transfer of resources from the Crown to Maori. Although there have been inquiries and settlements with Maori in response to petitions and claims throughout our history, the current process of Treaty settlement has been on a scale not before seen. Significant resources have been transferred both in pan-tribal settlements arising out of Maori action to restrain privatisation initiatives in the late 1980s and in settlement with large tribal groupings which have gathered pace in the last twenty years. One thoughtful commentator, Richard Boast, has questioned whether “mainstream Pakeha New Zealand” has “any idea” of the scale of the transfer of economic clout to Maori incorporations.⁷⁰

[50] There is an expectation that, from the economic base provided in reparation, Maori iwi can themselves provide for their future development and be enabled to assert their own authority over their resources and culture. This is conceived by some to be an approximation in modern circumstances of the claim to tribal self-government and autonomy that has been part of Treaty claims since 1840.

[51] One of the effects of the emphasis on providing tribes with an economic base has been that some contemporary Treaty issues have had less focus. The importance of these contemporary claims to ensure that Maori participate in governmental decisions affecting them in the future may re-emerge as a focus once the historic Treaty claims are resolved. (Ironically, some recent forays into such contemporary translation of the Treaty into modern conditions have attracted criticism from those who have come to see the Tribunal as concerned only with historic grievances.)

[52] Resolution of the historic claims is likely to raise new legal problems for the legal order in the management of the substantial assets obtained by the iwi and in the distribution of benefits. In addressing these strains the role of tikanga or indigenous law remains to be worked through.

[53] Elements of settlement generally include apologies for past wrongs as well as financial redress and return or co-management of land features (especially mountains or rivers) or taonga of particular importance to the claimant group. So for example two recent settlements have recognised that land and rivers of great cultural significance have themselves legal personality to better represent the relationships for which those features are important to their own tribal identity.⁷¹ In another settlement the greenstone resources of the South Island were returned to the ownership

⁷⁰ Richard Boast “The Waitangi Tribunal and Transitional Justice” (2006) 4 Human Rights Research Journal 1 at 5.

⁷¹ Te Urewera Act 2014; and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

of Ngai Tahu.⁷² In addition to these settlements with distinct tribal groupings, there have been a number of pan-tribal settlements obtained when the Crown privatised its interests in commercial fisheries, aquaculture and forestry.⁷³

[54] The Waitangi Tribunal is no longer at the centre of the Treaty settlement process. Settlements are conducted with large iwi groups and in general settle district-wide claims. Settlements are conducted with mandated negotiators and assets transferred are provided to “post-settlement governance entities” which mirror commercial organisations and which must demonstrate transparency and financial probity. These are not traditional organisations. They may be required to act in ways which are not consistent with tikanga. And the settlement process is limited by Crown policies. There are criticisms that the focus on certainty of settlement and the approach adopted leaves insufficient space for Maori law-making processes. One commentator, Dr Carwyn Jones, says that the Crown’s desire for finality means it is “not interested in delivering mechanisms for an ongoing articulation of Maori rights based on Maori legal traditions, or even based on a continuing interaction between Maori and state legal systems”.⁷⁴ He says the system encourages movement away from tikanga-based law-making. He says that the parameters set by the Crown constrain Maori law-making authority in the settlement process and post-settlement governance:⁷⁵

This model provides a process for identifying and defining discrete rights, but not for recognizing and managing overlapping powers of government and law-making authority in an ongoing relationship.

[55] Similar concerns have been voiced about the work of the Native Title Tribunal in Australia.⁷⁶

[56] The interface of political and judicial methodology requires care. The Waitangi Tribunal’s effectiveness “rests on the efficacy of the political process”.⁷⁷ If the Tribunal is out of step with the political sentiment its

⁷² Ngai Tahu (Pounamu Vesting) Act 1997.

⁷³ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Central North Island Forests Land Collective Settlement Act 2008; and Maori Commercial Aquaculture Claims Settlement Act 2004.

⁷⁴ Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, Vancouver, 2016) at 97.

⁷⁵ At 97.

⁷⁶ See Robert French “Speaking in Tongues: Courts and Cultures” (2008) 17 JJA 203 at 204–206. It is interesting that Chief Justice French in Australia has acknowledged that after a reversal of one of his decisions in the High Court when he was President of the Native Title Tribunal, he recognised that the considerations which had influenced him “were those of the administrator, the urgent need to get the process moving and to establish its credibility in the face of ongoing attacks”.

⁷⁷ Jessica Andrew “Administrative Review of the Treaty of Waitangi Settlement Process” (2008) 39 VUWLR 225 at 243.

recommendations can be ignored with relative impunity.⁷⁸ That sets up pressures. It has led to what some see as “troubling incoherence in the process as a whole” arising out of the political imperative that the government “wants to complete as many settlements as it can in order to convince the public of its ability to manage and resolve these matters”.⁷⁹

[57] Certainly the courts are increasingly being asked to intervene in the process. So, a recent decision of the Court of Appeal has held that the Tribunal erred by treating its power to make binding recommendations as a remedy of last resort and by failing to consider making binding recommendations where the statutory prerequisites to do so were met.⁸⁰

[58] Nevertheless, there has been something of a revolution in local government and resource management decisions. It was unthinkable in the mid-1980s when local bodies and planning tribunals denied the relevance of Maori cultural and spiritual connection to waters, mountains and landforms of significance. The Marine and Coastal Area (Takutai Moana) Act 2011 is part of a wider movement, as transformative in its way as the transfer of economic wealth under the Treaty settlement processes, which includes iwi as partners in local and regional government.⁸¹ As Richard Boast has commented, this is an “increasingly important dimension” of New Zealand public and environmental law.⁸² And it confers a position of special authority on iwi with connection to specific territories and natural features. It is seen in the co-management regimes with local authorities which have resulted from Treaty claims to rivers and other natural resources.

[59] It is too early to say how the settlement processes and the systems of management for tribal assets put in place under them will affect Maori society. A number of challenges to the settlement processes have been brought to the Waitangi Tribunal and to the Courts. Particularly vexing have been claims relating to mandate and the treatment of overlapping claims, which underestimates the overlapping nature of cultural interests.⁸³ The policy of dealing only with large natural groups is said to have prejudiced smaller iwi, hapu and whanau.⁸⁴ Such prejudice may create fresh grievances which will one day have to be addressed. Carwyn Jones concludes that the steps in the Treaty process are not neutral. They are he says “designed to give effect to particular Crown objectives”.⁸⁵

⁷⁸ As Jessica Andrew comments at 243–245. The Crown rejected the Tribunal’s recommendations in its *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) and its *Report on the Management of the Petroleum Resource* (Wai 796, 2003).

⁷⁹ Richard Boast “The Waitangi Tribunal and Transitional Justice” (2006) 4 Human Rights Research Journal 1 at 10.

⁸⁰ *Attorney-General v Haronga* [2016] NZCA 626, [2017] 2 NZLR 394.

⁸¹ See Richard Boast “Foreshore and Seabed, Again” (2011) 9 NZJPIL 271 at 281.

⁸² At 282.

⁸³ Jessica Andrew “Administrative Review of the Treaty of Waitangi Settlement Process” (2008) 39 VUWLR 225 at 233. See also Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, Vancouver, 2016) at 111–113.

⁸⁴ As described by Jessica Andrew at 257.

⁸⁵ Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, Vancouver, 2016) at 114.

Consequently the treaty settlement discourse becomes coloured by both the idea of Crown sovereignty and the concept of symbolic reparation. These characteristics and the Crown's specific requirements of representation, accountability, and transparency for [post-settlement governance entities] create friction, if not actual conflict, with Maori legal traditions. This gives rise to issues of mandate, membership, and dispute resolution and highlights tensions in Maori legal traditions.

[60] Although through the settlement process tribal groupings have obtained substantial assets and have enhanced their political influence,⁸⁶ Maori remain over-represented in all statistics which measure social under-achievement.⁸⁷ They are imprisoned at a rate that is far greater than the non-Maori population.⁸⁸ They lag in achievement of educational and employment attainment. Their health is consistently below the health of the general population. Whether the transfer of assets through the Treaty settlement process can address these matters remains an open question.

Self-government

[61] Claims to self-government remain. They are common in many societies with indigenous peoples. The responses to such claims vary. 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.⁸⁹ In Canada by contrast, to date the case law has required self-government rights to be established as custom on the test that the regulation by custom is "integral to the distinctive culture".⁹⁰ In New Zealand, the 1987 Lands case saw the Court exploring partnership as a concept useful in considering the principles of the Treaty of Waitangi.⁹¹ But this has not been further developed and seems unlikely to meet the claims for a measure of autonomy.

⁸⁶ Maori have always had a separate political presence. Since the 1860s they had a guaranteed four electoral seats: Maori Representation Act 1867. From 1975 they were entitled to enrol either on the General Roll or the Maori Roll at their option. Since electoral reform in the 1990s, the number of Maori seats has been adjusted to reflect the number enrolled on the Maori Roll. The advent of MMP has also provided opportunity for the inclusion of Maori Members of Parliament on the party list.

⁸⁷ Lisa Marriott and Dalice Sim *Indicators of Inequality for Maori and Pacific People* (Victoria University of Wellington, Working Paper in Public Finance 09/2014, August 2014).

⁸⁸ Policy, Strategy and Research Group of the Department of Corrections "Over-representation of Maori in the criminal justice system – An exploratory report" (September 2007) <www.corrections.govt.nz>.

⁸⁹ *Cherokee Nation v Georgia* 30 US 1 (1831); and *United States v Wheeler* 435 US 313 (1978).

⁹⁰ *R v Pamajewon* [1996] 2 SCR 821 at [24]–[25] per Lamer CJ quoting *R v Van der Peet* [1996] 2 SCR 507 at [46] per Lamer CJ.

⁹¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) [*Lands Case*], in particular at 664 per Cooke P.

[62] Where space for self-government is preserved, demarcation issues of the sort raised in US case law arise.⁹² As the case law dealing with application of reservation laws to non-members shows, there remain conflict of laws issues which are not always straightforward. They were illustrated in New Zealand in the litigation about place of burial.⁹³

[63] Self-government raises two different issues. It may be a claim to stand outside the wider polity for particular purposes and to a greater or lesser extent. This sort of claim – if a claim to stand substantially outside the general legal order – may not be feasible where the indigenous groups do not occupy distinct territories and where urbanisation gives rise to indigenous claims outside tribal organisation. So its importance is likely to be limited in many societies, certainly in mine. On the other hand, considerable autonomy in internal matters or shared authority in the manner we are now seeing develop in New Zealand in relation to natural features such as rivers may be able to be relinquished to indigenous groups to respond to preferences for autonomy and priority without too much strain, if the wider political body is prepared to afford it.

[64] Claims to self-government may also be property-based.⁹⁴ Where property is held communally some legal ordering by the community which possesses the property rights is necessary and inevitable as Kent McNeil has pointed out.⁹⁵ Where property is held under custom the interests are regulated according to the custom administered by the group. This recognition may be hampered by the insistence in some cases that the regulation must be “integral to the distinctive culture” at the time of contact and maintained since.⁹⁶ Such approach runs the risk of freezing custom and preventing realisation of the aspirations of the group. The Supreme Court decision in Canada in *Delgamuukw* suggests that evolution of custom must be permitted in respect of property rights in land which are exclusive.⁹⁷

[65] Resurrecting self-government according to customary precepts even in relation to tribal property may be difficult. Maori social organisation has been damaged. Although modern settlements now confer substantial property upon tribal groups, they employ modern property holding mechanisms. The extent to which scope for traditional self-government is being retained is unclear.

⁹² See for example *Oliphant v Suquamish Indian Tribe* 435 US 191 (1978) and *United States v Lara* 541 US 193 (2004) relating to criminal jurisdiction; and *Nevada v Hicks* 533 US 353 (2001) in relation to civil cases. See also *Santa Clara Pueblo v Martinez* 436 US 49 (1977).

⁹³ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁹⁴ So, the Waitangi Tribunal has said of the terms of Article 2 that it would have conveyed to Maori that they were protected not only in their possessions but in “the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences”: Waitangi Tribunal *Motunui–Waitara Report* (Wai 6, 1983) at [10.2].

⁹⁵ Kent McNeil “Judicial Approaches to Self-Government since Calder” in Hamar Foster, Heather Raven and Jeremy Webber (eds) *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007) 129.

⁹⁶ *R v Van der Peet* [1996] 2 SCR 507 at [46] per Lamer CJ.

⁹⁷ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [118]–[124] per Lamer CJ.

Conclusion

[66] In the end the place of indigenous peoples in our society depends on their vision for themselves. Remedying past wrongs and providing reparation may be necessary steps but they are not the end. In New Zealand Justice Joseph Williams has suggested that moving forward, indigenous peoples must build on their own identity if they are to avoid continuing to be confined by the reality the settlers imposed on them.⁹⁸ Similar thoughts have been expressed by Professor John Borrows in Canada.⁹⁹ These indigenous thinkers look to a future in which the relationship between indigenous peoples and the wider community reflects the more complicated world in which they now live, often outside traditional communities, and with substantial intermarriage and often employment in the very bureaucracies they complain about.

[67] A Maori academic, Claire Charters, has suggested that although New Zealand courts have made some advances to protect some Maori rights, especially land rights, they have been less comfortable with Maori governance rights and the principles of the Treaty of Waitangi.¹⁰⁰ Overall, she says, the courts continue to work within the orthodoxy of the sovereignty of parliament and that Maori rights are for the most part still addressed in the political rather than legal domain. She says the principal problem with this is “Maori remain a minority with few legal protections of their rights as minorities or Indigenous peoples in that space. Correspondingly, New Zealand’s legal system remains structurally antagonistic to recognition of Maori legal rights to, for example, self-determination or legal pluralism”.¹⁰¹

[68] In writing of the steps taken in Colombia under its 1991 Constitution to grant political autonomy in respect of their communities and territories to native populations, Daniel Bonilla described how “for the first time in the history of the country”, the difference of indigenous populations was seen as something valuable, rather than as “a historical burden to be destroyed”.¹⁰² I think in New Zealand we have travelled a long way down that road. Although I would not want to be too romantic about it, opportunities for adaptation of the general legal order have been taken. There is national pride in the distinctiveness of our native culture. There is of course good and not so good in this process of adaptation. It can diminish indigenous authority and distort cultural precepts. But if the process of indigenisation still falls short, well this is a journey that is not yet over.

⁹⁸ Joseph Williams “Confessions of a Native Judge” (2008) 3(14) Land, Rights, Laws: Issues of Native Title at 10.

⁹⁹ John Borrows *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002).

¹⁰⁰ Claire Charters “Maori Rights: Legal or Political?” (2015) 26 PLR 231.

¹⁰¹ At 236.

¹⁰² Daniel Bonilla “The Principle of Political Unity and Cultural Minorities’ Self-Government” (2005) 17 Fla J Int’l L 525 at 582.
