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Does recognition of Māori Rights under te Tiriti / the Treaty amount to racial discrimination against non-Māori?

I: Introduction

An unfortunate common thread woven throughout contemporary politics is that recognising Māori rights under te Tiriti is discriminatory against non-Māori. This notion has been ever present in Aotearoa, with politicians by the likes of Don Brash promoting this concept in his famous Orewa Rotary Club speech in 2004.[1] However, this idea has reached a climax in the contemporary National Party-led coalition government, forming a raft of reforms of legally recognised Māori rights under te Tiriti. This essay debunks this idea and comprehensively analyses why recognition of Māori rights under te Tiriti does not racially discriminate against non-Māori.

The essay begins in part II by defining "discrimination" within Aotearoa's legal context as a group or individual being treated both differently and unfairly. Part III of the essay then proceeds to analyse how Māori rights under te Tiriti emanate through the operation of treaty principles. It then displays how Māori rights awarded under these principles are not discriminatory, as they lack the ingredient of unfairness that the legal definition requires. The essay concludes in part IV by critiquing the use of "principles" to define Māori rights under te Tiriti. Instead, it draws on Māori scholarship to claim that recognition of rights through this method actively discriminates against Māori.

II: Defining Discrimination in Aotearoa's Legal Context

In order to display why recognition of Māori rights under te Tiriti is not discriminatory against non-Māori, there needs to be an understanding of what is meant by the term "discrimination." A plain dictionary definition of discrimination is "the practice of treating

[1] Cindy Towns, Nathan Watkins, Arapera Salter, Patricia Boyd, and Lianne Parkin *"The Orewa Speech: Another threat to Māori Health?"* (2004) 117(1205) The New Zealand Medical Journal 1 at 1.

one person or group of people less fairly or less well than other people or groups."[2] What is evident in the plain reading of the definition is the emphasis on unfairness.

This same emphasis is seen in the legal definition of discrimination in Aotearoa. Section 19(1) of the New Zealand Bill of Rights Act 1990 stipulates that everyone in Aotearoa has a right to freedom from unlawful discrimination on the grounds set out in the Human Rights Act 1993.[3] The Human Rights Commission, which works under the Human Rights Act 1993, defines unlawful discrimination as "when you are treated differently and unfairly compared to others because of a personal characteristic such as your race, sex, or age."[4] Therefore, on a legal interpretation of discrimination there is also the presence of an element of unfairness.

This is further qualified by reference to section 19(2) of the New Zealand Bill of Rights Act 1990 (NZBORA), which makes exceptions for positive discrimination, which is differential treatment to assist groups of persons disadvantaged because of prior discrimination. In light of the legal interpretations, it is clear that treating a group of people differently from others in and of itself is not discriminatory. Instead, it is whether this treatment is charged with unfairness.

Therefore, as this essay shows, the recognition of Māori rights under te Tiriti is not discriminatory. Often, the manifestation of these rights can take the form of targeted schemes or policies that lead to different treatment of Māori as opposed to non-Māori. However, on every metric, these policies are not discriminatory, as they lack the nature of unfairness and often fall within the exception of positive discrimination in NZBORA.[5]

III: How Māori Rights Under te Tiriti / the Treaty are Recognised in Aotearoa and Why it is Not Discriminatory

With an understanding of what "discrimination" means in Aotearoa's legal context, Māori rights under te Tiriti can be assessed against this definition. This section begins in Part A with

[2] "Discrimination" Collins Dictionary https://www.collinsdictionary.com/dictionary/english/discrimination.
[3] Human Rights Act 1993, s 21(1).
[4] "What is unlawful discrimination" Te Kāhui Tika Tangata Human Rights Commission https://tikatangata.org.nz/human-rights-in-aotearoa/what-is-unlawful-discrimination.
[5] New Zealand Bill of Rights Act 1990, s 19(2).

an explanation of how Māori rights under te Tiriti are recognised through the operation of treaty principles. Part B then uses the examples of Māori conservation / commercial interests and Māori healthcare to display where these principles have been applied. In doing so, the essay compares the adverse statistical outcomes of Māori in both areas to display how the recognition of rights under te Tiriti is not discriminatory.

A. The Recognition of Māori Rights Through Treaty Principles

The treaty documents that describe the rights of Māori were signed on 6 February 1840 at Waitangi.[6] The two documents created two individual treaties, namely, te Tiriti o Waitangi, written in Te Reo Māori, and the Treaty of Waitangi in English.[7] They are seen as two different treaties, as the differing translations between the two texts create different meanings of the rights guaranteed under them.[8] Therefore, an issue arises when trying to construe the rights guaranteed under the two treaty documents.

The principles of the Treaty of Waitangi were developed to reconcile this issue and were first mentioned in the Treaty of Waitangi Act Preamble.[9] This legislation established the Waitangi Tribunal, a permanent commission of inquiry to investigate and make recommendations on the breaches of Te Tiriti o Waitangi and the Treaty of Waitangi.[10] In making recommendations, the Waitangi Tribunal has authority to determine the meaning and effect of the two texts.[11] Therefore, the principles are a means to reconcile the differences between the two texts and apply the treaty to contemporary circumstances.[12]

B. How Treaty Principles Recognise Māori Rights Under te Tiriti

The treaty principles incorporation into legislation and subsequent interpretation by the courts has allowed for Māori rights under te Tiriti to be recognised in law.[13] Two areas where the rights of Māori under te Tiriti are recognised are conservation / commercial interests and healthcare. The low statistical outcomes for Māori in each area display how recognition of

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[6] Evelyn Stokes, *"The Treaty of Waitangi and the Waitangi Tribunal: Māori claims in New Zealand"* (1992) 12(2) Applied Geography 176 at 176.
[7] Stokes, above n 6, at 176.
[8] Stokes, above n 6, at 177.
[9] Christopher Burns, Maia Hetaraka and Alison Jones "*Te Tiriti o Waitangi: The Treaty of Waitangi, Principles and Other Representations"* (2024) The New Zealand Journal of Educational Studies 1 at 3.
[10] Treaty of Waitangi Act 1975, s 6.
[11] Burns, Hetaraka and Jones, above n 9, at 3.
[12] Burns, Hetaraka and Jones, above n 9, at 3.
[13] Burns, Hetaraka and Jones, above n 9, at 3.

these rights under te Tiriti is not discriminatory, as they seek to rebalance the inequities Māori face in these contexts.

I. The application of treaty principles to conservation and commercial interests

Two treaty principles, namely the principle of active protection and the right to development, have been applied to uphold the rights of Māori under te Tiriti concerning conservation and commercial interests. The principle of active protection is seen as a duty by the Crown to protect the interests of Māori in contemporary society.[14] Under the principle of the right to development, Māori are said to have a right to develop both their use of resources and to develop as a people.[15] This right pertains not only to resources traditionally used in 1840 when the treaty was signed but to new resources that have arisen since then in partnership with the Crown.[16]

Māori have utilised these principles to enact their rights in the commercial / conservation space. An example is seen by the application of the principle of active protection in *Ngai Tahu Maori Trust Board v Director-General of Conservation*.[17] In this case, Ngāi Tahu sought to challenge the granting of a permit to another business in Kaikoura to engage in whale watching.[18] The iwi based its claim on the application of the treaty principles referenced in section 4 of the Conservation Act 1987, arguing that they were entitled to a period of non-competition and the right to consent to new permits.[19] The court in *Ngāi Tahu* ultimately held that the principles of active protection, good faith, reasonableness, and acting honestly applied in this case and need be interpreted broadly.[20] As such, the decision was referred back to the director-general, who was instructed to take into account the protection of the commercial interests of Ngāi Tahu.[21]

The principle of active protection and right to development was also recognised to uphold Māori rights in the similar case *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation*.[22]

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[14] Meredith Gibbs *"The Right to Development and Indigenous Peoples: Lessons from New Zealand"* (2005) 33(8) World Development 1365 at 1368.
[15] Gibbs, above n 14, at 1369.
[16] Gibbs, above n 14, at 1369.
[17] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).
[18] At 553.
[19] At 553.
[20] At 560.
[21] At 561.
[22] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 (SC).

In this case, Ngāi Tai Trust objected to the granting of concessions to Fullers and Motatapu Island Restoration Trust, as the Department of Conservation did not take into account the right for Ngāi Tai Trust to exercise manaakitanga and kaitiakitanga in its traditional rohe.[23] This right arose from the principles of partnership, active protection, right to development, and redress.[24] In reviewing the decision, the court held that the interests of Ngāi Tai Trust were not adequately taken into account, and did not allow the decision to grant the concessions to stand.[25]

In both of these cases, the principles of the treaty meant Māori commercial and conservation interests were treated differently than the interests of non-Māori. However, this treatment is not unfair. Māori are one of the most disadvantaged groups in New Zealand.[26] Economically speaking, they face higher unemployment and lower levels of income.[27] Moreover, through various legislative measures, the loss of Māori land has been devastating, such that it only comprises five percent of the total land area of Aotearoa.[28] It is evident on both of these metrics that Māori are disadvantaged as compared to non-Māori in the commercial and conservation space. Therefore, recognising Māori rights to commercial and conservation interests is a measure of redressing these inequities and does not qualify as unfair treatment against non-Māori.

II. The application of treaty principles in healthcare

A similar situation is seen concerning Māori rights to healthcare under te Tiriti. The Waitangi Tribunal was commissioned to investigate failures of the Crown in respect of Māori health in the Wai 2575 *Hauora* report.[29] An inquiry was deemed necessary by the Tribunal due to the shocking state of Māori healthcare spurred on by colonisation.[30] In making its investigation, the Tribunal identified the principles of partnership, active protection, equity, and options as being particularly applicable to the inquiry.[31] In applying these principles, the Tribunal found

[23] At [61].
[24] At [62].
[25] At [98].
[26] Gibbs, above n 14, at 1369.
[27] Gibbs, above n 14, at 1369.
[28] Rowan Ropata Macgregor Thom and Arthur Grimes *"Land Loss and the intergenerational transmission of wellbeing: The experience of iwi in Aotearoa New Zealand"* (2022) 296 Social Science & Medicine 1 at 3.
[29] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 15.
[30] Waitangi Tribunal, above n 29, at 20.
[31] Waitangi Tribunal, above n 29, at 27.

that the Crown acted inconsistently with them in administering primary healthcare.[32] As a result, the Tribunal recommended, amongst other measures, that the Crown explore the concept of a stand-alone Māori primary health authority to redress the inequity Māori faced in the health sector.[33]

In response to these recommendations, the then Labour government reformed the health sector and launched Te Aka Whai Ora, an independent Māori Health Authority.[34] At the basis of this health sector reform was te Tiriti o Waitangi, in particular that these new institutions were to give effect to the Treaty principles.[35] Moreover, this reform to the health sector was to give effect to Māori tino rangatiratanga over health implementation and outcomes.[36]

With the recognition of Māori rights under the treaty principles and implementation of Te Aka Whai Ora, Māori attained differential treatment compared to non-Māori concerning healthcare. However, this differential treatment lacks the element of unfairness that is required for it to be discriminatory. As presented to the Waitangi Tribunal, Māori as an ethnic group has, on average, the poorest health status of any ethnic group in Aotearoa.[37] Moreover, the Tribunal made clear this was an active result of breaches against te Tiriti o Waitangi.[38] Therefore, this differential treatment seeks to redress the imbalance Māori face and lacks the element of unfairness necessary for it to be deemed discriminatory against non-Māori.

Despite this, prominent opposition arose to these reforms on the very basis it is discriminatory towards non-Māori.[39] As a result, Te Aka Whai Ora is to be disestablished on 30 June 2024 under the Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill. This bill, enacted by the National Party-led coalition government, was justified by the Health Minister Dr. Shane Reti as the need to have one system to improve health outcomes

[32] Waitangi Tribunal, above n 29, at 161.
[33] Waitangi Tribunal, above n 29, at 165.
[34] Annabel Ahuriri-Driscoll, Sarah Lovell, Deborah Te Kawa, Lindsey Te Ata o Tū MacDonald, and Kareen Mathias *"The future of Māori healt is here – The 2022 Aotearoa New Zealand Health Reforms"* (2022) 28 The Lancet Regional Health – Western Pacific 1 at 1.
[35] Ahuriri-Driscoll, Lovell, Te Kawa, Te Ata o Tū Macdonald, and Mathias, above n 34, at 1.
[36] Ahuriri-Driscoll, Lovell, Te Kawa, Te Ata o Tū Macdonald, and Mathias, above n 34, at 1.
[37] Waitangi Tribunal, above n 29, at 18.
[38] Waitangi Tribunal, above n 29, at 161.
[39] Ahuriri-Driscoll, Lovell, Te Kawa, Te Ata o Tū Macdonald, and Mathias, above n 34, at 1.

for all, including Māori, and focussing on community-led Māori health programmes.[40] However, the government misunderstands the extensive evidence of Māori health inequities that derive from such a "one size fits all approach" to healthcare.[41] It further, blatantly disregards the fact that this approach has been found in the Tribunal to breach the rights of Māori under te Tiriti.[42] Therefore, even though recognition of Māori rights under te Tiriti concerning healthcare does not satisfy any legal definition of discrimination, there remains a prominent perspective that it is nonetheless discriminatory.

IV: The Contemporary Recognition of Māori Rights Under te Tiriti / the Treaty Through Treaty Principles Discriminates Against Māori

As established through the examples of commercial / conservation interests and healthcare, recognising rights under te Tiriti by applying treaty principles is not discriminatory against non-Māori. Due to the disparities Māori face in these areas, it is evident that differential treatment based on recognising rights under te Tiriti is not unfair. However, there remains an issue with contemporary political discourse getting caught up in the notion that non-Māori are being discriminated against by recognition of Māori rights. This is because it distracts from the actual reality, which is that the use of treaty principles in themselves to recognise Māori rights under te Tiriti actively discriminates against Māori.

Prior to te Tiriti o Waitangi, He Whakaputanga o te Rangatiratanga was signed and is seen by many hapū in the north as the original founding constitutional document of Aotearoa.[43] Acknowledged by the British, this document declared the sovereignty of rangatira and the many hapū throughout the country.[44] After this te Tiriti o Waitangi was signed, which did nothing more than affirm the rights in He Whakaputanga, and devolve governance over British immigrants to the Crown.[45] However, the issue was that the English translation of te

[40] Hon Dr Shane Reti "Reshaping the health system to bring Māori health closer to home" (27 February 2024) Beehive.govt.nz https://www.beehive.govt.nz/release/reshaping-health-system-bring-m%C4%81ori-health-closer-home.
[41] Waitangi Tribunal, above n 29, at 161-165.
[42] Waitangi Tribunal, above n 29, at 161-165.
[43] Margaret Mutu *"'To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony"* (2019) 49(sup1) 4 at 6.
[44] Mutu, above n 43, at 6.
[45] Mutu, above n 43, at 6.

Tiriti not only mistranslated these rights, but that te Tiriti proceeded to be ignored by the Crown for a significant period thereafter.[46]

Ani Mikaere points out that these two documents are not the source of Māori rights; instead, they merely describe the rights Māori already possessed.[47] Moreover, te Tiriti and He Whakaputanga are the only documents that justifiably establish the modern state of Aotearoa, as it accurately described the realities of 1840 and was signed by predominantly more rangatira.[48] Therefore the operation of the treaty principles, by ignoring the primacy of te Tiriti o Waitangi and instead trying to reconcile te Tiriti with the fraudulent English version is a constitutional cop-out by the Crown.[49]

This means that the operation of treaty principles to give rise to Māori rights under te Tiriti actively discriminates against Māori. It ignores the fact that under He Whakaputanga and te Tiriti o Waitangi, Māori are guaranteed to remain sovereign over their land and resources.[50] As a result, Māori are treated differently and unfairly to other groups when it comes to their constitutional rights. Māori sovereignty, as guaranteed by the founding constitutional documents of Aotearoa, is ignored, while those who are non-Māori enjoy a set of constitutional rights fabricated by the application of treaty principles. Therefore, if any group is being discriminated against by the contemporary methods of recognising rights under te Tiriti it is Māori.

V: Conclusion

This essay has offered a comprehensive account of why recognition of Māori rights under te Tiriti and the Treaty are not discriminatory against non-Māori. It began in part II by analysing how a legal definition of discrimination requires differential treatment and unfairness. In part III, the essay discussed how Māori rights under te Tiriti are applied through treaty principles. Māori commercial / conservation interests and Māori healthcare were two examples of where these principles applied to give rise to Māori rights under te Tiriti. In both these examples,

[46] Mutu, above n 43, at 4.
[47] Ani Mikaere *Colonising Myths - Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2013) at 74.
[48] Mikaere, above n 47, at 81.
[49] Mikaere, above n 47, at 81.
[50] Mutu, above n 43, at 6.

Māori face vast inequities compared to non-Māori. As such, the essay established that the differential treatment afforded by the principles is not unfair and, therefore, not discriminatory.

The essay then critically analysed how the use of treaty principles to affirm Māori rights under both treaty documents ignores the primacy and full sovereignty Māori are awarded under te Tiriti. The essay draws on Māori scholarship to highlight that the use of these principles in denying Māori their sovereignty actively discriminates against Māori. Therefore, it points out the fact that in spending so much time arguing why non-Māori are not being discriminated against, it ignores the real issue, which is that Māori are the group actively facing discrimination by the use of treaty principles.