Māori Constitutional Rights in Aotearoa New Zealand: Historical Context, Contemporary Challenges, and the Path to Constitutional Transformation

INTRODUCTION

New Zealand, a country of approximately 5.3 million people as of 2024, is home to the Māori people, the Indigenous inhabitants of the land.[1] Māori make up about 17% of the population, numbering around 875,300 as of 2021.[2] This paper provides an overview of the state of play with respect to Māori rights, including with a focus on historical context, contemporary developments, mechanisms to address historical grievances and the movement for constitutional transformation.

THE CONTEXT: HISTORICAL BACKGROUND

Since time immemorial until the mid 19th Century, Aotearoa was governed by tangata whenua (Indigenous people) in accordance with tikanga Māori (customary laws). Renowned constitutional scholar, Dr Moana Jackson, described tikanga as "both a law and a discrete set of values. As a practical law, it influenced everything from the political organisation of iwi and hapū [Māori community groupings] to the social interactions of individuals. As a set of values, it summed up what was important in the Māori world view – it is the "ought to be" of Māori existence."[3]

Though the underlying philosophies and cosmology of Māori law were common, there was no centralised tikanga that applied uniformly across all Māori communities, rather each community or polity had their own tikanga. This is due to the concept of 'mana' or authority. Each hapū | community or polity has its own mana or authority that is derived from their ancestors and from the places they occupy and care for.[4] It is not culturally appropriate during peace time for one group to impose its mana or authority over another group, and so every group had their own tikanga. In this way, Aotearoa's pre-colonial constitutional structure can be described as pluri-national.

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[1] Statistics New Zealand: https://www.stats.govt.nz/information-releases/national-population-estimates-at-30-june-2024-2018-base/
[2] Statistics New Zealand: https://www.stats.govt.nz/information-releases/te-kupenga-2018-provisional-english/
[3] He Whakaaro Here Whakaumu Mō Aotearoa, the report of Matike Mai Aotearoa (January 2016) at 41: https://nwo.org.nz/resources/report-of-matike-mai-aotearoa-the-independent-working-group-on-constitutional-transformation/
[4] He Whakaaro Here Whakaumu Mō Aotearoa, the report of Matike Mai Aotearoa (January 2016) at 42: https://nwo.org.nz/resources/report-of-matike-mai-aotearoa-the-independent-working-group-on-constitutional-transformation/

Today, New Zealand is a constitutional monarchy, with King Charles the Third as the Head of State of the Realm of New Zealand, represented locally by the Governor General.[5] New Zealand's constitutional system is based on the English Westminster model of government, characterized by parliamentary sovereignty and an almost absolute mono-legalism and a lack of a written constitution with "higher law" status. This means that the legislature is the ultimate legal power and can make and unmake any law it passes. It is not subject to judicial review and its laws cannot be overturned irrespective of whether they breach human rights or Indigenous peoples' rights.[6] Moreover, New Zealand's constitutional arrangements are found in various sources, including statutes, common law, and constitutional conventions.[7] It can be difficult to understand how New Zealand's constitution operates as a result particularly for identifying which norms are "constitutional", and how to hold government to account when it contravenes constitutional law.

Consistently with the Westminster model, and a lack of legal constraints on Parliament, the New Zealand Bill of Rights Act 1990, which incorporates human rights protections, is subordinate to other legislation.[8] This means that Parliament can make any law it chooses, even if that law contradicts human rights norms or Indigenous peoples' rights.[9] The only protection against human rights abuse is, then, New Zealanders' – unenforceable- commitment to human rights and Indigenous peoples' rights. When human rights and, especially, Māori rights are inconsistent with the interests of the non-Māori majority they can be easily overridden, as has happened on many occasions.[10] In other words, Māori must advocate and operate in a political, rather than exclusively legal domain, to protect their rights.

Te Tiriti o Waitangi (the Treaty of Waitangi), signed in 1840 between Māori chiefs and the British Crown, is still considered the founding constitutional document of New Zealand. Te Tiriti guaranteed Māori sovereignty (tino rangatiratanga) which had been affirmed and recognised by the British Crown in 1835 with the signing of He Whakaputanga o Te Rangatiratanga o Niu Tireni (the Declaration of Independence 1835), but this promise has not been honoured. It also granted the Crown authority to regulate incoming settlers. In fact, the Crown, now represented by the New Zealand government, assumed full legal power to impose its laws over the territories of Aotearoa | New Zealand within the following decades and the settler population overtook the Māori population.

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[5] Office of the Governor General: https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution/constitution

[6] For more on this, see Claire Charters "Wakatu in Peripheral View: Māori-Rights Based Judicial Review of the Executive and the Courts' Approach to the United Nations Declaration on the Rights of Indigenous Peoples" [2019] (1) NZ L Rev 85.

[7] Office of the Governor General, above n 3.

[8] Claire Charters "Responding to Waldron's defence of legislatures: why New Zealand's parliament does not protect rights in hard cases" *New Zealand law review* 4 (2006): 621–663.

[9] Ibid.

[10] Ibid; For example, see Foreshore and Seabed Act 2004 and the findings of discrimination made by the United Nation's International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195.

In practice, New Zealand's colonisation process effectively applied the doctrine of discovery, despite the existence of Te Tiriti o Waitangi. By the 1870s, New Zealand' High Court found that "No body politic existed capable of making cession of sovereignty, nor could the thing itself exist."[11] Thus, under that case, te Tiriti is not a valid treaty and did not legally effect the Crown's legal sovereignty. The judges explicitly relied on case law on the law of discovery.[12]

Te Tiriti itself is not enforceable in courts unless its principles are incorporated into specific legislation.[13] There are some examples of this.[14] Currently, the New Zealand government is seeking to remove Te Tiriti from legislation and reinterpret it in a way that is entirely inconsistent with the text of Te Tiriti and its recognition and protection of Māori rights.[15]

The impact of colonisation on Māori has been devastating. Māori lost approximately 95% of their land and their sovereignty has never been meaningfully recognised.[16]

Māori people refer to themselves as 'tangata whenua' meaning 'people of the land', in recognition that Papatūānuku – our Earth Mother – is our mother and giver of life. For Māori, our entire identity, spirituality, worldviews and laws arise from our relationship with the land. This meant the dispossession of land for Māori through colonisation was devastating spiritually, physically, psychologically and economically.

By 1860, Māori held about 80% of the land in New Zealand's North Island. However, by 2000, this had drastically reduced to only about 4 per cent.[17] This massive loss of land occurred through various means, including confiscation, unfair purchases, and land taken for public works. However, the main cause of Māori land loss has been successive "native land legislation", now called Te Ture Whenua Māori Act. Under previous iterations of that legislation, Māori title was individualised and then made accessible for sale. Colonised and increasingly impoverished Māori, also severely diminished as a result of viruses that arrived with settlers, had no other choice but to give up their lands. An ongoing consequences is that many tribes, and Māori individually, now lack the economic potential of their lands, further aggravating the poverty and social and economic deprivation we face relative to other New Zealanders.

Today, Māori face significant disparities in various areas of life compared to the non-Māori population. In the criminal justice system, Māori are heavily overrepresented, making up 57%

[11] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NZ) SC 72 at 78 per Prendergast CJ.

[12] Such as *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); and *R v Symonds* (1847) NZPCC 387.
[13] Charters, Claire, and Tracey Whare. "Shaky Foundations." *World policy journal* 34.4 (2017): 11–14.
[14] For example, section 4 of the Conservation Act 1987 reads "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".
[15] For example, the NZ First Party's 'Treaty of Waitangi Deletion Bill' introduced to Parliament in 2006; and see the ACT Party's proposed 'Treaty Principles Bill' at www.treaty.nz which is being drafted as this paper was being written.
[16] NZ History: https://nzhistory.govt.nz/media/interactive/maori-land-1860-2000
[17] NZ History: https://nzhistory.govt.nz/media/interactive/maori-land-1860-2000

of adults in prison despite being only 17% of the total population.[18] Home ownership rates among Māori are significantly lower than those of European New Zealanders, with only 31% of Māori owning their homes compared to 57.9% of Europeans.[19] Child poverty is another area of concern, with Māori children more likely to experience material hardship than their non-Māori counterparts.[20]

CONTEMPORARY DEVELOPMENTS IN THE RECOGNITON OF MĀORI RIGHTS

Before the election of the current National-NZ First and ACT coalition government in October 2023, there had been progress in the recognition of Māori rights within the New Zealand legal system.

In recent years, there had been increasing recognition of tikanga Māori (Māori customary law) by the courts. However, it's important to note that tikanga Māori is still considered subordinate to state law and can be overridden by clear legislative intent.[21] The doctrine of aboriginal title, which recognizes some Māori customary rights to land and resources based on their prior occupation and use, has also been affirmed in New Zealand courts, and also under legislation. For example, the Marine and Coastal Act (Takutai Moana) Act 2011 provides a process for the recognition of tribal customary titles in the foreshore and seabed. However, this title is lesser than a private title and, what's more, these rights can also be extinguished by clear legislative action.[22]

From the 1970s, there has been a Māori cultural renaissance. New Zealand's rejuvenation of te reo Māori|the Māori language is world-renowned. It was driven by our kuia|our Māori mothers and grandmothers and eventually received support from the New Zealand government. As another example, the Māori new year celebrations of Matariki was recognised as a public holiday by the Labour Government in 2022[23] and the national kapa haka|Māori performing arts championships known as Te Matatini was granted millions of dollars in government funding in 2023.[24] There is a sense that New Zealand is comfortable with supporting cultural rights but not political rights to self-determination or robust rights to our traditional lands, territories and resources. Further, aspects of Māori culture remain under

[18] Statistics New Zealand: https://www.justice.govt.nz/assets/Documents/Publications/He-Waka-Roimata-Report.pdf
[19] Statistics New Zealand: https://www.stats.govt.nz/reports/te-pa-harakeke-maori-housing-and-wellbeing-2021#overview

[20] Statistics New Zealand: https://www.stats.govt.nz/information-releases/child-poverty-statistics-year-ended-june-2020/
[21] Charters, "Recognition of Tikanga Māori and the Constitutional Myth of Monolegalism: Reinterpreting Case Law" in Joseph, Robert, and Richard Benton, eds. *Waking the Taniwha : Māori Governance in the 21st Century*. Wellington: Thomson Reuters, 2021, at 611.
[22] Ibid.
[23] Te Kāhui o Matariki Public Holiday Act 2022.
[24] RNZ News: https://www.rnz.co.nz/news/te-manu-korihi/490176/absolutely-over-the-moon-te-matatini-gets-large-funding-boost-in-budget-2023

perpetual threat, including language preservation. If political support wanes, so too will measures to protect our cultural rights and our cultural heritage.

In terms of economic development, the Treaty settlement process, outlined below, ongoing since the late 1980s, has provided some cultural and financial redress, including the return of some lands to Māori ownership. However, it has been criticised for not addressing issues of Māori self-determination and for being ultimately controlled by the Crown.[25]

ADDRESSING HISTORICAL GRIEVANCES

New Zealand has established several mechanisms to address historical and ongoing Māori grievances.

The Waitangi Tribunal, established in 1975, is a permanent commission of inquiry that hears claims brought by Māori relating to Crown actions which breach the promises made in the Treaty of Waitangi both historically and today.[26] It has undertaken reports with respect to grievances of particular iwi and within specific territorial areas and with respect to specific laws and policies, such as in relation to criminal justice.[27]

While the Tribunal's recommendations are not binding on the government, they can influence policy and negotiations.[28]

In highly political matters, especially when Māori rights are perceived to undermine non-Māori interests, the government often ignores the recommendations of the Waitangi Tribunal. This occurred in the case of the foreshore and seabed when the Tribunal's found that the extinguishment of Māori rights in the foreshore and seabed constituted a breach of Te Tiriti o Waitangi.[29] There are numerous other examples. For example, the current government has committed to go ahead with its legislative override of Te Tiriti o Waitangi and its meaning despite a scathing report from the Waitangi Tribunal and recommendations that the proposed bill be dropped.[30]

The Waitangi Tribunal has a very limited power to recommend the return of land to Māori. It can only do so where Māori traditional land was transferred from the Crown to "state-owned enterprises" post the late 1980s and the traditional owners of that land put a memorial on the

[25] Charters, Claire, The Elephant in the Court Room: An Essay on the Judiciary's Silence on the Legitimacy of the New Zealand State (February 19, 2020). Max Harris and Simon Mount (eds) The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand (Auckland, Lexis Nexis, 2019)., Available at SSRN: https://ssrn.com/abstract=3541310.
[26] Treaty of Waitangi Act 1975.
[27] See: https://www.waitangitribunal.govt.nz/about/
[28] Charters and Whare, "Shaky Foundations", above n 11.
[29] Waitangi Tribunal "Report on theCrown's Foreshore and Seabed Policy" WAI1071 (2004).
[30] Waitangi Tribunal "Ngā Mātāpono The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and the Treaty Clause Review Policies" WAI 3300 (2024).

title to that land at the time when it was transferred. The Tribunal has rarely made such awards and, in the most recent case, Parliament legislated over that recommendation to prevent the return of that land.

The Treaty settlement process, ongoing since the late 1980s, involves negotiations between the Crown and Māori groups to address historical grievances. This process has provided some cultural and financial redress, including the return of some lands to Māori ownership. Under long-standing policy, the Crown does not return land currently held in private title meaning that very little of Māori traditional territories are returned in fact i.e., only where it is held in Crown ownership and the Crown deems it surplus to its requirements.

There have been some innovative legislative developments that grant more rights to Māori over their traditional lands and resources, like the granting of legal personhood to forests and rivers. Notable examples include the Te Urewera Act 2014, which removed the national park status from Te Urewera and recognized it as a legal entity with its own rights, giving the Tūhoe people a significant role in its governance.[31] Similarly, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 recognized the Whanganui River as a legal person, acknowledging its importance to local Māori.[32] More recently, in 2023, the Taranaki Mounga settlement granted legal personhood to Mount Taranaki and the ranges surrounding it, further advancing the recognition of Māori connections to their ancestral lands.[33] These settlements represent a significant shift in recognizing Māori worldviews and relationships with the natural environment within the legal framework. While legal personhood is an innovative approach to enabling Māori concepts of management over the land, it still exists within the legislative process meaning Parliament can still extinguish those rights unilaterally should it choose.

Some claim that the treaty settlement process is seriously flawed in that the "restitution" provided is so little, for example with respect to the (failure to) return of traditional territories, and constitutes ongoing colonisation of Māori in "translating" Māori rights into financial awards.[34] On the other hand, some tribes, such as Ngāi Tahu, have been commercially successful and have utilised that success to support some of their people, including in cultural renaissance.

New Zealand courts have only a very limited power to return traditional territories to Māori. In theory, they could do so if Māori can meet the legal tests to establish common law "aboriginal title". The authors are not aware of any such awards. Further, the Marine and Coastal Areas (Takutai Moana) Act provides courts with a power to recognise tribal "customary marine titles". These titles do not equate to ownership and do not prevent public access or use of those areas.

[31] Te Urewera Act 2014.
[32] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
[33] Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill.
[34] See: Mutu, Margaret. "The Treaty Claims Settlement Process in New Zealand and Its Impact on Māori." *Land (Basel)* 8.10 (2019): 152.

The Māori Land Court has some powers to regulate and designate the very little land that remains in Māori ownership.[35] The courts are discussed in more depth in the following section.

DEVELOPING JURISPRUDENCE

While it played a role, historically, in the tremendous loss of Māori land in Māori ownership, today the Māori Land Court is another important institution, dealing specifically with Māori land issues. It has jurisdiction over the status, ownership, management and use of Māori land.[36] The regular court system, including the High Court, Court of Appeal, and Supreme Court, can also hear cases related to Māori rights and has played a significant role in developing jurisprudence in this area. Several landmark cases illustrate this:

1. In Attorney-General v Ngati Apa (2003), the Court of Appeal held that the Māori Land Court had jurisdiction to determine whether the foreshore and seabed had the status of Māori customary land. This decision recognized that Māori customary rights had not been extinguished by previous legislation, marking a significant development in the recognition of aboriginal title in New Zealand.[37] However, as discussed earlier, the government passed legislation overriding these aboriginal title rights and replaced them with lesser rights.[38]

2. The Supreme Court case Paki v Attorney-General (No 2) (2014) addressed Māori customary rights to riverbeds. The Court found that the common law presumption of Crown ownership of riverbeds (the ad medium filum aquae rule) did not automatically apply to New Zealand rivers bordering Māori land, recognizing the potential for Māori customary title to riverbeds.[39]

3. In Takamore v Clarke (2012), the Supreme Court grappled with the intersection of tikanga Māori and state law in a dispute over burial rights. The Court recognised the relevance of tikanga Māori in such matters, even though it ultimately decided the case based on common law principles that were inconsistent with the tikanga in play.[40]

4. The Proprietors of Wakatū v Attorney-General (2017) case in the Supreme Court dealt with Crown obligations arising from early land purchases. The Court held that the Crown owed fiduciary duties to Māori in relation to these transactions, expanding the scope of Crown responsibilities to Māori.[41]

[35] Te Ture Whenua Māori Act 1993.
[36] Te Ture Whenua Māori Act 1993.
[37] Attorney-General v Ngati Apa [2003] NZCA 117.
[38] Foreshore and Seabed Act 2004; Marine and Coastal Area (Takutai Moana) Act 2011.
[39] Paki v Attorney-General (No 2) [2014] NZSC 118.
[40] Takamore v Clarke [2012] NZSC 116.
[41] Proprietors of Wakatū v Attorney-General [2017] NZSC 17.

5. In Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board (2021),[42] the New Zealand Supreme Court affirmed the significant role of tikanga Māori in decision-making under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The Court held that tikanga Māori must be treated as "applicable law" and that tikanga-based customary rights and interests constitute "existing interests" that must be taken into account. This includes kaitiakitanga and rights claimed under the Marine and Coastal Area (Takutai Moana) Act 2011. The Court emphasized that tikanga as law must be considered where appropriate to the circumstances of a consent application, and that these considerations should be viewed from both Pākehā and Māori perspectives. This ruling represents a significant recognition of tikanga Māori within New Zealand's state legal system.

These cases demonstrate how the regular court system has incrementally developed jurisprudence that recognizes and incorporates Māori customary rights and tikanga Māori within the framework of state law. However, it's important to note that these developments occur within the context of parliamentary supremacy, meaning that legislative action can still override court decisions in this area, and that, in many instances, the existing government is in effect seeking to do so.

NEW ZEALAND AND INTERNATIONAL INDIGENOUS PEOPLES' RIGHTS

In the international context, New Zealand was one of only four states that voted against the Declaration on the Right of indigenous Peoples (the UN Indigenous Peoples' Declaration) in the General Assembly in 2007. Bowing to international and domestic pressure, it eventually endorsed the Declaration in 2010. International human rights treaties are non-binding in New Zealand unless they are incorporated into domestic legislation. Like other international human rights instruments, the Declaration is not directly enforceable in domestic law unless Parliament enact it into law. While international human rights law can influence court decisions and public policy in New Zealand, ultimately domestic legislation takes precedence due to the principle of parliamentary supremacy.[43] Only the International Covenant on Civil and Political Rights (ICCPR) is fully incorporated into our domestic as part of the Bill of Rights Act 1990 and it has been used to influence some policy and law as the courts try to interpret the Act consistently.

From 2019 – 2022, under the previous Labour government, there was an attempt to draft a national plan of action for the realisation of the UN Indigenous Peoples' Declaration.[44] The process was innovative in that it involved a partnership between the government, the New

[42] Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board [2021] NZSC 127.
[43] Charters, "Responding to Waldron's defence of legislatures", above n 6.

[44] Charters, Claire et al. *He Puapua : Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa, New Zealand*. Final report. Wellington: Te Puni Kōkiri, 2020.

Zealand Human Rights Commission and the National Iwi Chairs Forum|National Tribal Chairs Forum. Efforts focused especially on elaborating a 20 year plan to realise Māori self-determination, rights to our lands, territories and resources, to culture, to equality and participation in state government. The government dropped the plan when it determined that political support for it was waning.

LOOKING FORWARD: RECOGNITION OF MĀORI SOVEREIGNTY|TINO RANGATIRATANGA?

In recent years, there has been growing recognition and debate about the fundamental legitimacy of New Zealand state sovereignty over Māori. The Waitangi Tribunal has found that northern chiefs did not cede sovereignty to the British Crown in 1840, challenging the basis of the state's authority.[45] This has led many scholars and Māori leaders to argue for fundamental constitutional transformation to properly recognize Māori self-determination and rights.

Māori scholars and leaders advocate for constitutional transformation in New Zealand based on several key arguments. Central to these is the call for genuine recognition of tino rangatiratanga (Māori self-determination) as guaranteed in Te Tiriti o Waitangi. They argue that the current constitutional structure, rooted in a history of colonization and injustice and in concepts of Parliamentary sovereignty, fails to adequately address historical wrongs or contemporary disparities between Māori and non-Māori. There are calls for a pluralistic legal order that recognizes tikanga Māori (Māori customary law) as equal to state law, rather than subordinate to it. Many advocate for power-sharing arrangements that ensure Māori have a significant role in decision-making at all levels of government.

Furthermore, there are arguments for entrenching Māori rights in a supreme constitutional document that cannot be easily overridden by Parliament, addressing the current issue of parliamentary supremacy. Advocates point to international standards, such as the UN Indigenous Peoples' Declaration, as benchmarks for constitutional reform. The Matike Mai Aotearoa report proposed several models for a new constitution, including the creation of separate spheres of authority for the Crown and Māori, with a joint decision-making sphere for matters of common concern.[46] Ultimately, these arguments reflect a desire for fundamental change that goes beyond incremental reforms, aiming to create a constitutional framework that truly reflects New Zealand's bicultural foundation and provides for Māori self-determination within a just and equitable nation.

CONCLUSION

[45] Te Paparahi o Te Raki (Northland) inquiry (Wai 1040); and, Charters, "The Elephant in the Courtroom", above n 23.

[46] *He whakaaro here whakaumu mō Aotearoa : the report of Matike Mai Aotearoa - the independent working group on constitutional transformation.* (2016). Matike Mai Aotearoa.

In conclusion, while there has been progress in recognizing some Māori rights within New Zealand's legal and constitutional framework, significant challenges remain. The current system, based on parliamentary supremacy and state sovereignty, places limitations on the full realization of Māori rights and self-determination. Many argue that addressing the historical injustices and current disparities faced by Māori requires more than incremental change – it calls for a fundamental reimagining of New Zealand's constitutional structure.[47] The ongoing debate around these issues reflects the complex and evolving nature of Indigenous rights in New Zealand, as the country grapples with its colonial past and seeks to build a more equitable future.

[47] Charters, "The Elephant in the Courtroom", above n 23.

AUTHOR BIOGRAPHIES

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