

RIGHTS TO WATER AN INDIGENOUS RIGHT?

BY VALMAINE TOKI*

The United Nations Declaration on the Rights of Indigenous People (“the Declaration”) was adopted by the United Nations General Assembly in September 2007 with a majority of 143 states in favour.¹ Since then Australia, New Zealand, Canada and the United States have also signalled their support for the Declaration.

Notwithstanding this endorsement, the New Zealand Government qualified their support by holding reservations to two articles; art 26 (the right to land and resources) and art 19 (the rights of obtaining free prior and informed consent)². The current position of the New Zealand Government is, the orthodox view, that the Declaration is soft law, aspirational in nature and not binding on domestic legislation. The New Zealand Government recently reiterated the reservations they held to certain articles and deferred to the existing legal system as overriding any international obligation.³

An Indigenous right to water is currently being debated in New Zealand. Various threads exist to support such a right. The Declaration, is but one thread that, clearly articulates these rights. Article 32 of the Declaration provides that:

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, *water* or other resources (emphasis added).

At art 25, this states how:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, *waters* and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (emphasis added).

These two articles can be read together with the key article of the Declaration asserting self-determination for Indigenous peoples:⁴

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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1 Yes: 143, No: 4, Abstentions: 11, Non-Voting: 34, Total voting membership: 192. The abstaining countries were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine; another 34 member states were absent from the vote. Colombia and Samoa have since endorsed the document. “Declaration on the Rights of Indigenous Peoples” United Nations: Permanent Forum on Indigenous Issues <<http://social.un.org>>.

2 (20 April 2010) 662 NZPD 10229; Hansard (debates) “Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples – Government Support” (20 April 2010) New Zealand Parliament <www.parliament.nz>.

3 Letter from Hon Chris Finlayson MP (Minister of Arts, Culture and Heritage; Attorney-General; Treaty of Waitangi Negotiations) to Te Hiku Forum regarding the United Nations Declaration on the Rights of Indigenous People and Treaty of Waitangi settlements (11 August 2011).

4 United Nations Declaration on the Rights of Indigenous People, art 3.

These articles collectively provide that Māori people as Indigenous peoples have the right to maintain and strengthen their distinctive relationship with their traditionally owned water, and the Government is required to consult and cooperate with Māori to obtain their free and informed consent prior to the approval of any development, utilisation, or exploitation of water.

If Māori sought recourse to the rights articulated within the Declaration, certain obstacles exist. The first obstacle is New Zealand's reservations to, or selective endorsement of, the Declaration. This is clearly a hurdle. However, holding reservations to a morally aspirational international instrument is the antithesis of what it seeks to achieve, questioning the validity of New Zealand's selective endorsement of the Declaration. Māori may be able to point to this, and also note that it is unclear whether selective endorsement is valid.

A second hurdle will be the non-binding nature of the Declaration. Case law from comparative jurisdictions provides support for the application of the Declaration in a domestic setting. For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:⁵

Given the Government's support of the Declaration on the Rights of Indigenous Peoples ... which embodies the general principles of international law relating to Indigenous peoples ... *the Government will not disregard the Declaration* (emphasis added).

Belize is a common law jurisdiction. If reliance was placed on the Declaration, in a New Zealand Court, this decision provides persuasive authority to support, for example, the current water claim for Māori.

Recognised and supported by the United Nations member states, the Declaration contains norms that are already binding in international law. So, the Declaration provides an additional international instrument for Indigenous peoples when their rights, such as the right to self-determination or a right to maintain their relationship with their traditionally owned waters, have been breached. Indigenous peoples can now argue that not only have international treaties been broken, but a breach of a right in the Declaration has occurred.⁶

Affirming rights derived from human rights principles such as self-determination and the right to traditionally owned waters, the Declaration does not create any new rights but is the only international instrument that views Indigenous rights through an Indigenous lens. The Declaration seeks to recognise these basic human rights for Indigenous peoples and contextualises these rights in light of their particular characteristics and circumstances.

The Declaration provides a benchmark, as an international standard, against which Indigenous peoples may measure state action. State breach of this standard provides Indigenous peoples with a means of appeal in the international arena.⁷ In the event of a breach any redress would be uncertain; however, it would be reasonable to consider that it would provide fertile grounds for meaningful dialogue between the two parties.

On 9 August 2012, the United Nations Secretary, General Ban Ki-moon proclaimed:⁸

On this International Day, I pledge the full support of the UN system to cooperate with indigenous peoples, including their media, to promote the full implementation of the Declaration.

5 *Cal v Attorney General of Belize* (2007) Claim Nos 171 and 172 of 2007 (Belize SC) at 132 per Conteh CJ.

6 Valmaine Toki "Indigenous Rights – Hollow Rights" (2011) 19 Wai L Rev 29 at 42.

7 At 42.

8 "International Day of the World's Indigenous Peoples" (9 August 2012) United Nations <<http://www.un.org>>.

In light of the current support within the international arena for the basic human rights articulated in the Declaration, it is incumbent on the New Zealand Government to meaningfully engage with Māori to respect and recognise these rights.

In addition to the Declaration's judicial enforcement of historical treaties, the common law doctrine of native title, aboriginal title, customary title and international law provide further avenues of recourse for this right to water.⁹ Notwithstanding these various avenues of recourse – tikanga Māori, the first law of Aotearoa, New Zealand,¹⁰ case law¹¹ and the Waitangi Tribunal's recommendations¹² provide further support for such a right. The precedents set by the 1896 Māori Land Court decision to vest Poroti Springs in six Māori owners, and the determination by the Māori Land Court that Māori owned Lake Omapere are difficult to ignore.

The commodification of this right, a right sourced from these various threads, without meaningful engagement with Māori lies contrary to these doctrines, principles and precedents. The New Zealand Government's commodification of water as a property right, through legislation,¹³ without recognition of any original or native title right to water, is in breach of this right. Indigenous peoples are often sidelined when it comes to issues of information, consultation and development of water policies; the New Zealand Government utilising the principle of parliamentary sovereignty to justify the alienation of these rights through legislation.¹⁴

The current legislation implemented by the New Zealand Government does not include a meaningful Indigenous perspective to water. Instead, we see examples of mismanagement and over-allocation to intensive agricultural practices and extractive industries such as mining. This results in polluted waterways and ecosystems, and harm to livelihoods. Any reference to indigeneity is overridden by competing considerations.¹⁵

9 Jacinta Ruru "Introducing Why it Matters: Indigenous Peoples, the Law and Water" (2010) 20 Water Law 221.

10 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Maori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Victoria, 2005) at 331–332.

11 *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) provides that the law should recognise customary rights in accordance to Māori custom. When discussing sovereignty and absolute ownership, Tipping J notes that the "Crown's ownership is and never has been absolute in this respect. It is and always has been subject to the customary rights and usages of Maori": *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [204].

12 Commenting on the Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998): "The Tribunal ... made a number of recommendations to the Crown relating to the recognition of Te Ika Whenua's residual rights in the rivers, the management and control of the rivers, the vesting of certain parts of the riverbeds in the claimants, and the compensation owed to them for the loss of title resulting from the application of the *ad medium filum aquae* rule." "Te Ikawhenua Rivers Report: Report Summary" Waitangi Tribunal <<http://www.waitangi-tribunal.govt.nz>>. For another example, see Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).

13 Examples include the Water and Soil Conservation Act 1967 and the Resource Management Act 1991, which allowed the Crown to assert rights over water without consultation with Māori.

14 Despite the ruling of *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (CA), the New Zealand Government passed the Foreshore and Seabed Act 2004. This vested the foreshore and seabed in the Crown, and denied Māori the right of due process. The Act has now been repealed.

15 For example, the Resource Management Act 1991 recognises and provides for the relationship of Māori, their culture and traditions, with their: ancestral lands, water, sites, wahi tapu, and other taonga (s 6(e)); has particular regard to kaitiakitanga (s 7(a)); and takes into account the principles of the Treaty of Waitangi (s 8). These sections, however, are but one issue to be taken into account by decision-makers when determining the purpose of the Act.

The current claim by the New Zealand Māori Council through the Waitangi Tribunal seeks to establish proprietary use rights, a lesser right, as opposed to ownership rights to traditionally owned water.

Drawing together all our threads, it would seem prudent, and long overdue, that the New Zealand Government engages with Māori to secure their free, prior and informed consent to allocate these proprietary use rights meaningfully.