INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES

INSTITUTE FOR THE STUDY OF HUMAN RIGHTS
COLUMBIA UNIVERSITY

Wilton Littlechild and Elsa Stamatopoulou (Eds.)

INDIGENOUS PEOPLES' ACCESS TO JUSTICE, INCLUDING TRUTH AND RECONCILIATION PROCESSES

Institute for the Study of Human Rights

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THE ISSUES OF THE CRIMINAL JUSTICE SYSTEM AND OF RESOURCES IN AOTEOROA/NEW ZEALAND

Valmaine Toki

Within the seven regions, recognized by the United Nations, various jurisdictions have acknowledged Indigenous rights within their respective constitutions. Although not explicit, some constitutional provisions, such as those included in the Norwegian Constitution, when read together with other articles, provide tentative opportunities for the implementation of an Indigenous legal system and an Indigenous court. Some Constitutions, such as that of Ecuador, are more explicit in providing constitutional recognition of an Indigenous legal system as well as rights to nature and, the interim Constitution of Nepal, courts for Indigenous Peoples.

United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)

The pivotal article within the Declaration, Article 3, articulates that;[1]

> 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.

Article 5 states that;[2]

> Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

1 Article 3, United Nations Declaration on the Rights of Indigenous Peoples.
2 Article 5, United Nations Declaration on the Rights of Indigenous Peoples.

Article 5 informed by article 3 provides convincing grounds for the implementation of existing Indigenous legal systems.

Whilst some have incorporated the rights articulated in the Declaration on Rights of Indigenous Peoples, such as Congo; others, such as Chile and Bangladesh, are not so progressive. Indigenous Peoples within jurisdictions including the United States already, arguably, enjoy a level of self governance and established Tribal Courts. However, the incorporation of Indigenous rights within domestic Constitutions would support any initiative to establish an Indigenous Court.

Countries including Canada, Australia and the United States have stepped towards implementing an Indigenous Court.[3] In parts of Malaysia, Native Courts have been established primarily to deal with breaches of native law and customs.[4] These courts apply native laws and customs.[5] In addition, African Indigenous courts, also deal exclusively with Indigenous law.[6] In terms of their success, the anecdotal evidence is positive, however like the Rangatahi Courts (Youth Court held within a traditional forum) in New Zealand most are relatively new initiatives and reliable statistical information is absent.

Notwithstanding this provision, in New Zealand, the doctrine of parliamentary sovereignty[7] extinguishes, replaces and limits this right. Upon the signing of the English text of the Treaty, with Maori (the Indigenous Peoples of Aotearoa/New Zealand), the English superimposed upon Maori their legal, political and social systems. Within this broader context of self-determination, this article examines two issues facing the Maori: the criminal justice system and the issues of resources.

3 For example, Koori Courts in Australia, Gladue and Cree Courts in Canada.
4 Ramy Bulan, Associate Professor Director, Centre for Malaysian Indigenous Studies, *Indigenous Peoples and the Right to Participate in Decision Making in Malaysia.* Discussion paper prepared for International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making, Chiang Mai, Thailand, 20–22 January 2010. See also presentation given to the International Expert Seminar on Access to Justice Including Truth and Reconciliation Processes, University of Columbia, New York 27 February – 1 March 2013.
5 Bulan, *Ibid.*
6 However the Traditional Courts Bill has caused controversy. See Sipho Khumalo *Activists berate Traditional Courts Bill*, April 12, 2012 The Mercury, South Africa.
7 Section 3(2) of the Supreme Court Act 2003 (NZ).

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A. The criminal justice system in Aotearoa/New Zealand

Upon colonisation, the existing legal, political and social systems for Maori were subsumed into the English system. The Maori value-based systems were not encouraged, or recognized, by colonial rule. This resulted in a changing world for Maori. So, began the marginalisation and alienation of Maori.

In New Zealand, all crime is codified[8] and thus it is not possible to be charged with a criminal offence under common law. A crime is defined as an offence for which the offender may be proceeded against by indictment.[9] A breach of the legislation results in various forms of punishment ranging from community service to imprisonment.

With respect to criminality and offending a review by the Justice Department noted that the consequential problems of colonisation, in part, are manifested in statistics[10] indicating that Maori of all age groups from 14 and older are overrepresented as offenders and more likely to be victims of violent offences than are New Zealand Europeans.[11]

The Law Commission concurred with this finding, observing that Maori are disproportionately represented in court proceedings, with higher rates of criminal offending and incarceration than other ethnic groups when measured as a proportion of the total population.[12] A relatively recent report from the Department of Corrections also noted that Maori are overrepresented at every stage of criminal justice process.[13] Though forming just 12.5% of the general population aged 15 and over, 42% of all criminal apprehensions involve a person identifying as Maori, as do 50% of all persons in prison. For Maori

8 See section 9 Crimes Act 1961 (NZ) Offences not to be punishable except under New Zealand Acts.
9 Section 2 NZ Crimes Act 1961 (NZ).
10 Australia Ministry of Justice, *Responses to Crime*, Annual Review Ministry of Justice. November 1999 (Canberra: AMJ, 1999).
11 *Ibid*, at p. 7.
12 Law Commission, Report (NZLC R53) Justice: The experiences of Maori women, Te Tikanga o te Ture : Te Matauranga o nga Wahine Maori. (Wellington: LC, 1999).
13 Strategy and Research Group Department of Corrections, Over-representation of Maori in the criminal justice system An exploratory report policy. (Wellington: SRGDC, 2007) p. 6.

women, the picture is even more acute: they comprise around 60% of the female prison population. There are currently 4000 Maori in prison, six times the number one might otherwise expect. Thus, there is a "…practical need to address the overrepresentation of Maori at all stages of the criminal justice system, based on the serious economic and social cost to the government, Maori communities and individuals, and society in general."[14] And, considering a possible initiative the Report further notes:[15]

> "The **relatively high rates of offending by Maori** and Pacific Peoples and **the need for culturally appropriate responses** point to the importance of both fostering diverse approaches to offending by these two groups and identifying those approaches **that show most promise of reducing their over-participation in the criminal justice system as both offenders and victims**" (my emphasis).

This indicates that Maori offend against the criminal code at rates higher than those for any other ethnic group in New Zealand and that there is consideration for diverse approaches to reduce the overrepresentation in the criminal justice system as both an offender and a victim. This position is similar to that of other Indigenous[16] Peoples in many post-colonial countries, including Australia and Canada. Jim McLay, the Permanent Representative of New Zealand recently reported;[17]

> "**Despite many positive developments, we remain realistic about the challenges**. We recognise that Maori are overrepresented in the criminal justice system, that Maori women and children experience a greater prevalence of domestic violence and that Maori face a higher number

14 *Ibid*, at p. 94 & p. 97.

15 *Ibid*, at p. 7.

16 Indigenous Peoples is a term commonly used to describe any ethnic group who inhabit the geographic region with which they have the earliest historical connection. See also Caecilie Mikkelsen (ed) The Indigenous World 2013 (Eks-Skolens Trykkeri IWGIA, Copenhagen, 2013).

17 Jim McLay statement to the Third Committee, 68th session of the United Nations General assembly under Item 66 Rights of Indigenous Peoples 21 October 2013 (GA/SHC/4074). Available http://www.un.org/News/Press/docs//2013/gashc4074.doc.htm

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> of health problems. **The New Zealand Government is committed to addressing these issues by improving social and economic conditions for Maori**" (my emphasis).

So what has been done?

The term tikanga (correct procedure, custom, habit) has been included within legislation however only half provide a definition of tikanga (correct procedure, custom, habit) and refer to concepts such as culture and custom. The references are more descriptive than definitive.[18] This undermines consistency and intention of the legislative provision.

The preamble to the Children, Young Persons, and their Families Act 1989 (CYPF) is to:

> "advance the well-being of families and the well-being of children as young persons as members of...whanau, hapu, iwi...make provisions for whanau, hapu, iwi...and the matters to be resolved where possible by their own... whanau, hapu, iwi..."
>
> Section 13 refers to principles and that the primary role for caring and protecting the child or young person lies with the whanau (extended family), hapu (sub tribe) or iwi (tribe). Various programmes such as Family Group Conferencing[19] are also provided for in the CYPF Act that acknowledge and support the participation of whanau (extended family).[20]

Family Group Conferences

A Family Group Conference (FGC) is a meeting where a young person who has offended, their family, victims and other people meet to discuss how to assist the young person to take responsibility for their

18 See Fiona Wright, *Law, Religion and Tikanga Maori* (2007) 5 *NZJPIL* at 261–299.
19 The immense contribution of Judge Mick Brown and Judge Fred McElrea to the area of Youth Offending and the Family Group Conference initiative has been invaluable. It was their pioneering approach that led to these reforms.
20 Specifically Part Two of the Act and ss 256 Procedure and 258 Functions.

actions and implement practical ways that the young person can make amends.[21] The objective is to reach a group consensus on an outcome.

Involving the victim in the process and encouraging mediation of concerns between the victim, the offender and their families is a means to achieve reconciliation, restitution and rehabilitation.[22] The FGC allows for the participation of whanau (extended family) and iwi (tribe). Furthermore, there is provision for the FGC to be held on a Marae (although this term relates to the courtyard, area in front of the whare nui, more generally this term refers to the traditional meeting house or whare nui).

The success of the FGC and adoption of the FGC by other jurisdictions is to be applauded and adds weight to the case for an Indigenous court. However, notwithstanding the inclusion of a marae setting, unlike the Rangatahi Courts there is no impetus to connect the offender with their cultural identity. Furthermore, although tikanga (correct procedure, custom, habit) may be implicit there is no explicit mention of "tikanga" (correct procedure, custom, habit) within the CYPF Act 1989.

The express recognition of Indigenous law/tikanga (correct procedure, custom, habit) Maori within the justice system varies from recognition of Maori customs and values[23] to rejecting claims based on lack of jurisdiction.[24] Within the criminal justice system this is further limited to incorporation into programmes by the Corrections Department.[25]

21 See also Ministry of Justice *The Family Group Conference in Youth Justice*. Available http://www.justice.govt.nz/publications/global-publications/y/youth-crime-action-plan-full-report/making-a-difference-how-the-youth-crime-action-plan-will-work-in-the-community/the-family-group-conference-in-youth-justice.

22 Youth Court of New Zealand, *Family Group Conferences*, Available also at http://www.justice.govt.nz/courts/youth/about-the-youth-court/family-group-conference#footnotes

23 T Bennion (ed) Ngati Hokopu ki Hokowhitu v Whakatane District Council. Maori Law Review. July (2003), 2 – 8.

24 R v Toia CRI 2005 005 000027 Williams J HC Whangerei 9 August 2006. See also Hunt v R [2011] 2 NZLR 499 at para [82] [85] for discussion breach of tikanga, this claim was rejected by the Court.

25 For example, Te Whanau Awhina. See also domestic violence programmes at http://www.justice.govt.nz

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Programmes

The Department of Corrections has recently evaluated two programmes.[26] Firstly, Te Whare Ruruhau o Meri; this programme offers a Whanau Reconciliation Support Service in recognition that many women want to return to their partners and the Service needs to support them to do so, while providing them with the best possible opportunity to be free from violence. Secondly, Tu Tama Wahine o Taranaki; this programme provides a group programme for Maori respondents.

An exciting initiative between Te Whare Whakaruru Hau (Maori Women's Refuge in Hamilton) and prisoners within the Maori Focus Units has organically developed. This initiative permits the members of the Maori Focus Units to perform work tasks, such as gardening and furniture removal, within the environs of Te Whare Whakaruruhau. Although still in its early days, and under close scrutiny and monitoring, the "relationship" between these two vehicles has anecdotally provided a "healing" process for the prisoners in the Maori Focus Units. Through this relationship, the participants within the Maori Focus Units who provide this assistance become "more aware" of the difficulties and trauma faced by the victims of domestic violence.

The Domestic Violence (Programmes) Regulations 1996[27] specify that Maori values and concepts are to be taken into account. Three key principles evident in these programmes are; the use of te reo (Maori language), that they are kaupapa-driven (ground rules) and, the provision of healing both the individual and the collective. This incorporation of tikanga (correct procedure, custom, habit) led to a favourable review by the Justice Department.

A recent evaluation of the Corrections Department's community-based Tikanga Maori programmes shows that offenders with a heightened awareness of their Maori heritage are more likely to choose offence-free lifestyles.[28] By encouraging offenders to

26 *Ibid.*
27 See Regulation 27 and also 28.
28 See Department of Corrections, Underpinning the Department's five-year Strategic Business Plan is the recognition that "to succeed overall we must succeed for Māori offenders." (2010). http://www.corrections.govt.nz.

increase their cultural knowledge and to reconnect with whanau (extended family), the report finds that Tikanga Māori programmes are changing lives. For Maori, the learning of pepeha (oral speech usually denoting your genealogy) and whakapapa (genealogy, lineage, descent) is about reaffirming a connection with their tribes, their ancestors, and their history.[29]

The Ministerial Review for Tikanga Maori Programmes ("TMP") has confirmed that TMPs:[30]

a) are motivational programmes incorporating principles that acknowledge Te Reo, Tikanga Maori solutions and whanau (extended family) involvement;

b) are programmes tailored to Maori offenders to motivate them to address the underlying causes of their offending behaviour;

c) have been operating nationally (male) offenders and locally (women) within the Public Prisons Service and the Community Probation Service;

d) are well structured, and incorporated a range of active, passive and interactive teaching methods such as haka, waiata and korero to help increase responsivity:

e) are consistent with Corrections legislation.

One particular initiative which provides for assistance prior to release from prison is, Whare Oranga Ake; this involves the establishment of kaupapa Maori centres to reintegrate Maori prisoners back into their communities. This initiative by Minister Sharples has attracted $19.8 million to build and run two 16-bed Whare Oranga Ake units in Auckland and the Hawkes Bay.[31]

29 *Ibid.*
30 Department of Corrections, Report on Tikanga Maori Programmes. (Wellington: DC, 2010), www.ssc.govt.nz.
31 Department of Corrections, Whare Oranga Ake. (Wellington: DC, 2011), www.corrections.govt.nz.

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Tikanga Maori Programmes.

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It is acknowledged that initial teething problems are inevitable, however this should not stifle the enormous benefit this offers to prisoners re-integrating into society. Integration has been identified as a problem with prisoners not wanting to return to their dysfunctional families and peer groups.[32]

Whilst such initiatives and reports may be applauded, these programmes are the exception rather than what is generally available for Maori. Mainstream programmes offered by providers[33] lack this content and often contribute to the disproportionate offending rates of Indigenous Peoples, particularly for women. The Human Rights Commission has also suggested that many of these programmes that are focused on individual victims and offenders, rather than on broader relationships, may be unlikely to satisfy the ambitions of those who seek the introduction or extension of programmes based on tikanga Maori.[34] In seeking appropriate programmes or systems, the Human Rights Commission suggests legislative backing.

A recent announcement by the Minister for Maori Affairs calls for a review of the criminal justice system stating:[35]

> "**For most Maori, justice in New Zealand is not positive; it is a system that is unfair, biased and prejudiced…the justice system**, including the police, courts and corrections, **systematically discriminates against Maori**" (my emphasis).

32 Department of Corrections, *Maori focus leads to positive gain* (Wellington: DC, 2010), www.corrections.govt.nz

33 Such as Preventing Violence in the Home programme. The Montgomery House violence prevention programme is a joint project between the New Zealand Department of Corrections and the New Zealand Prisoners' Aid and Rehabilitation. The programme is an 8-week group based intervention established upon social learning and cognitive behavioural principles. Due to concerns the programme now includes a Te Whare Tapa Wha aspect that seeking to address te taha tinana (physical), te taha hinengaro (psychological), te taha wairua (spiritual), and te taha whanau (familial) needs of all residents. See The Montgomery House violence prevention programme, www.corrections.govt.nz

34 Human Rights Commission, Submission to the Justice and Electoral Select Committee on the Victims' Rights Bill, (Wellington: HRC, 2001) p. 9., www.hrc.co.nz.

35 Neil Reid, Harawira's departure not handled well – Sharples (1 October 2011), www.stuff.co.nz/national

What is at stake for the future?

Despite these initiatives the statistics reveal that the Criminal Justice System is not working. So, should we continue to look for answers within our current paradigm? Do the answers lie with our colonisers? Or should we seek answers within our own Indigenous legal system, a realisation of the right of self-determination? If we pursue self-governing models, how would an Indigenous criminal justice system look? Such a system would be Marae based, where community would take responsibility and the offender take responsibility and provide accountability.

Justice Heath[36] opines that there are two options. First, that tikanga Maori, or custom, is incorporated as part of the common law and second that where both parties are Maori, tikanga Maori should be the chosen method of resolving disputes.[37] These two options can be accommodated by firstly overhauling the entire judicial system and parallel systems of adjudication developed, which take into account Maori custom.[38] Second, the existing framework could be modified enabling Maori concepts and customs to operate.[39] Although optimistic about the future it is unsurprising that Justice Heath favours the second option citing political acceptability as opposed to the recognition of Indigenous and original rights. In my opinion this is an opportunity lost to meaningfully address the lack for Maori of access to a fair justice system.

To support the thesis, a return to an Indigenous criminal and legal system through the realisation of self-determination, there is another element to consider that is intrinsic to the essence of Indigenous Peoples. This is realization of the inter-related the rights related to resources, including the right to own, use, develop and control their resources.[40]

36 Honourable Justice Heath is a High Court Judge in New Zealand.
37 Heath, P., *One law for all – Problems in applying Maori custom law in a Unitary State* (2010–2011) Vols 13–14 Yearbook of New Zealand Jurisprudence. p. 197.
38 Heath, *ibid*, p. 199.
39 Heath, *ibid*, p. 199.
40 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49, article 26.

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B. The issue of resources

The rights related to resources held by Indigenous Peoples are intrinsic to Indigenous Peoples by virtue of the special relationship they have with their environment. This right not only includes control, management and use rights, consistent with articles 26 to 29, 31 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, but also extends to ownership such as an Indigenous Right to Foreshore Seabed and an Indigenous right to water.

Foreshore Seabed

For Maori, their right to the Foreshore and Seabed is undeniable. Doctrine such as native title, aboriginal title[41] and tikanga Maori support this claim. Following an application by Maori to the Waitangi Tribunal for recognition of this right, the Waitangi Tribunal[42] stated that the Treaty of Waitangi recognised and guaranteed te tino rangatiratanga over the foreshore and seabed as at 1840 and recommended that the New Zealand Government "have a longer conversation" or "use other tools in the toolbox," before passing legislation vesting the foreshore and seabed in the Crown.[43]

There are many positive values of the Waitangi Tribunal, which is held up as a model for reconciliation and truth. However, the Waitangi Tribunal only provides recommendations, which are not binding on the Crown. Despite this recognition by the Waitangi Tribunal and the doctrine supporting Maori right to the foreshore and seabed, the New Zealand Government ignored their recommendations and the legislation was passed alienating Maori from their whenua (land, in this instance the foreshore and seabed).[44]

41 Attorney-General v Ngati Apa [2003] 3 NZLR.
42 Waitangi Tribunal Report Wai 1071, p. 28.
43 See R Boast, *Foreshore and Seabed,* (Lexis Nexis, Wellington, 2005) p. 57
44 Foreshore Seabed Act 2004. It is acknowledged that this legislation has since been repealed and replaced by Coastal Marine Area (Takutai Moana) Act 2011, however this new piece of legislation provides for a "lesser" right for Maori upon an application.

Water

The Indigenous Peoples' Right to Water is an issue of current interest in New Zealand. The New Zealand Maori Council, in conjunction with ten co-claimant hapu (sub tribe) and iwi (tribe), filed an urgent claim, in February 2012, with the Waitangi Tribunal in response to action by the New Zealand Government to sell off 49 percent of State assets owned by State Owned Enterprise power companies (SOEs) such as Mighty River Power, Meridian Energy, and Genesis Energy. As it appeared to the Waitangi Tribunal that the imminent sale of shares in SOEs could result in 'irreversible prejudice to Maori interests if they were carried out without first protecting the Crown's ability to recognise Maori rights in water or remedy breaches of those rights,'[45] the claim was heard under urgency.

The questions posed to the Waitangi Tribunal were:

> Do Maori have commercial proprietary interests in water protected by the Treaty of Waitangi?
>
> If yes, will the sale of up to 49 percent of shares in State-owned power-generating companies affect the Crown's ability to recognise those rights and remedy their breach?

On 24 August 2012, the Waitangi Tribunal came to the view, 'after hearing the evidence and submissions of the parties, that there is a nexus between the asset to be transferred (shares in the power companies) and the Maori claim (to rights in the water used by the power companies), sufficient to require a halt if the sale would put the issue of rights recognition and remedy beyond the Crown's ability to deliver.'[46] The Waitangi Tribunal found that Maori still have residual proprietary rights in water and the Crown will breach the principles of the Treaty of Waitangi if it goes ahead with the intended share sale.

Citing the example of Lake Omapere in Northland the Waitangi Tribunal recalled the 'historical claims made by Maori for legal recognition of their proprietary rights in water noting that Maori have unique customary rights and authority asserted over their water bodies

45 Waitangi Tribunal Report 2358.
46 Waitangi Tribunal Report 2358.

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in 1840 (and still assert today).'[47] This claim by Maori was viewed as once again a request to the 'State to recognise and protect Maori proprietary rights in water and water bodies.'[48] If a framework could not be agreed upon to recognise these rights, it was suggested by Maori that compensation be available.

Maori relied on article 2 of the Treaty of Waitangi that guaranteed them the 'full, exclusive and undisturbed possession' of their properties (in English) and te tino rangatiratanga (full authority) over their taonga (treasured possessions) (in te reo Maori).

The common law doctrine of native title, aboriginal title, customary title, international law, tikanga Maori, the first law of Aotearoa, New Zealand[49], case law[50] and previous Waitangi Tribunal's recommendations[51] provided further avenues of recognition for this right to water.[52] The precedents set by the 1896 Maori Land Court decision to vest Poroti Springs in six Maori owners, and the determination by the Maori Land Court that Maori owned Lake Omapere also provided compelling grounds for an Indigenous right to water.

The Crown's position however was that Maori have legitimate rights and interests in water, but no one owns water and therefore the best way forward is not to develop a framework for Maori proprietary

47 Waitangi Tribunal Report 2358.
48 Waitangi Tribunal Report 2358.
49 See Ani Mikaere, *The Treaty of Waitangi and Recognition of Tikanga Maori* in Michael Belgrave, Merata Kawharu and David Williams (ed) Waitangi Revisited Perspectives on the Treaty of Waitangi. (Oxford University Press, Victoria, 2005) pp. 331–332.
50 See discussion in Attorney General v Ngati Apa [2003] 3 NZLR 641, which provides that the law should recognise customary rights in accordance to Maori custom. When discussing sovereignty and absolute ownership, Tipping J notes at [204], "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…"
51 See the Waitangi Tribunal Te Ika Whenua Rivers Report. (Wai 212, 1998) where: "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." See also Waitangi Tribunal The Whanganui River Report. (Wai 167, 1999).
52 Jacinta Ruru, *Introducing Why it Matters: Indigenous Peoples, the Law and Water* (2010) 20 Water Law. p. 221.

rights, but to strengthen the role and authority of Maori in resource management processes. On that basis, Crown decided to proceed with the sale in spite of the Waitangi Tribunal recommendations to the contrary. As with rights to the foreshore and seabed, the Crown chose to ignore the recommendations from the Waitangi Tribunal.

Maori appealed to the Supreme Court. A decision of the Court in February 2013 dismissed the appeal from the New Zealand Maori Council, on behalf of Maori, to block the Mighty River Power partial privatization. The full court of five Supreme Court judges was unanimous in its findings that enabled the New Zealand Government to proceed with the sale of up to 49 percent of Mighty River Power. The Court concluded "that the partial privatization of Mighty River Power will not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Maori interests" and dismissed the appeal.

The commodification of this Indigenous right to water, a right sourced from various threads, without meaningful engagement with Maori, lies contrary to doctrines, principles and precedents. The New Zealand Government's commodification of water as a property right, through legislation,[53] without recognition of any original or native title right to water, is in breach of this right. Indigenous Peoples are often side-lined 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.[54]

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, ecosystems and livelihoods,

53 Examples of this arise in the Water and Soil Conservation Act 1967 and the Resource Management Act 1991, which allows the Crown to assert rights over water without consultation with Māori.

54 See Attorney General v Ngati Apa, where the New Zealand Government, despite the findings in this case, passed legislation, the Foreshore Seabed Act 2004, to vest the foreshore and seabed in the Crown, denying Maori the right of due process. This legislation has now been repealed.

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causing harm. Any reference to indigenity is overridden by competing considerations.[55]

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

Conclusions

The right to self-determination is imperative as is the mandatory inclusion of Indigenous Peoples as decision makers, particularly when the substantive issue is an Indigenous right. This is the case whether the context is access to justice systems, particularly Indigenous justice systems, or access to other rights, including those related to resources. The thrust of self-determination is to enable Indigenous Peoples the human right to be in control of their destinies and to create their own political and legal organisation of their territories, which will not necessarily amount to separate statehood: however, the possibility remains.

Glossary of Terms

Hapu	Sub tribe
Iwi	Tribe, extended kinship, nation, people
Kai	Food
Kaitiaki	Guardian
Karakia	Prayer
Kaumatua	Maori elderly man or woman
Kaupapa	Ground rules

55 Sections 6(e), 7(a) and 8 of the Resource Management Act 1991 recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga (s 6(e)); have particular regard to kaitiakitanga (s 7(a)), and take into account the principles of the Treaty of Waitangi (s 8). However, these sections are but one issue to be taken into account by the decision-makers when determining the purpose of the Act.

Kawa	Customs and protocol
Kuia	Maori elderly woman, grandmother
Mana	Power, prestige
Marae	Courtyard, area in front of the whare nui
Mihi	Maori speech of greeting
Pepeha	Oral speech usually denoting your genealogy
Rangatahi	Youth
Tangata Whenua	People of the Land, local people
Taonga	Treasure/treasured possessions
Te Reo	Maori language
Turangawaewae	Place to stand, rights of residence
Tikanga	Correct procedure, custom, habit,
Tino rangatiratanga	Full Authority
Whakapapa	Genealogy, lineage, descent
Whanau	Extended family, family group
Whare Nui	Traditional meeting house, large hui