

Politics, Indigenous Rights and Resource Ownership: Māori Customary Rights to the Foreshore, Seabed and Fresh Water in New Zealand

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Abstract

Māori customary rights to natural resources are a contentious issue between Māori and the New Zealand government and between Maori and non-Māori. The values and principles inherent in a treaty signed in 1840 between Māori and the British Crown have been undermined by the government's refusal to allow Māori the right to go to the courts to determine proprietary rights to the foreshore, seabed and fresh water. Discriminatory Crown actions highlight the argument that when an injustice occurs then reparations should be made. The United Nations has chided the New Zealand government for its discriminatory behaviour and failure to provide guaranteed redress but it has had little effect.

Keywords: Indigenous peoples; Maori (New Zealand people); Indigenous peoples--Civil rights; Water; Right of property

Introduction

Political relationships between the indigenous peoples of New Zealand (Māori) and Pākehā (non-Māori) continue to be contentious because the values, meanings and principles of an 1835 Declaration¹ and an 1840 Treaty² signed by Māori and the British Crown are not being upheld. The importance of the role of Te Tiriti o Waitangi/the Treaty of Waitangi³ in New Zealand politics is evident in references to the principles of the Treaty of Waitangi in numerous pieces of legislation, in treaty settlements that have been negotiated between the Crown and various tribes (iwi) since the 1990s, and in the ongoing role of the Waitangi Tribunal.⁴ While collective

¹ The Declaration of Independence/He Whakaputanga o te Rangatiratanga o Nui Tirenī recognises the sovereign authority of Māori chiefs of New Zealand.

² Te Tiriti o Waitangi provided the British Crown with governing rights but in the Treaty of Waitangi, the British Crown claimed sovereignty.

³ Te Tiriti o Waitangi is the document signed by Māori. Te Tiriti o Waitangi differs in significant parts from The Treaty of Waitangi both in interpretation and intent. Hence throughout this paper both treaties will be cited rather than preferencing the English language version unless the English version is to be specifically addressed.

⁴ A commission of inquiry looking into Māori claims relating to Crown actions that breach the promises made in the Treaty of Waitangi. (See <https://www.waitangitribunal.govt.nz>.)

responsibility underpins Māori understandings of justice, individual responsibility is the premise of the western liberal thought that permeates New Zealand politics and the New Zealand Westminster system of government. Because of this, historical and contemporary dynamics between Māori and the Crown, and between Māori and non-Māori, are based on differing political understandings and differing ideological perspectives. Māori property rights to natural resources are a contentious issue today because of differing cultural values and understandings between Māori and non-Māori. The underlying principle of Article 11 of the Treaty of Waitangi is to protect Māori resources (both tangible and intangible) for as long as Māori wish to retain those resources. Māori have never relinquished their customary title to fisheries and waters (both fresh water and seabed), but the Crown has legislated to deny Māori the right to go to court to determine their customary title to freshwater, fisheries and the foreshore.

When, in 1975, the Waitangi Tribunal was set up as a commission of inquiry to investigate Crown breaches of the principles of the Treaty of Waitangi, and when, in the 1980s, the government sold off state-owned assets as part of a radical economic reform program, Māori property and customary rights became pertinent because of unresolved ownership rights that were ‘guaranteed’ to Māori in Article 11 of the English version of the Treaty of Waitangi. As a direct result of the selling off of Crown owned assets (forests, fisheries, lands, railway lands and other ‘public good’ assets) the Courts, government agencies and government have either been negotiating with Māori over disputed ownership claims or the government has been privatising ownership and control of the disputed natural and physical resources. It is the Crown’s ‘assumption of ownership’ that Māori are challenging in the Courts. Western political thinking provides that when an injustice occurs and rights are violated, then reparations must be made. In 2004, the New Zealand government determined that in the interest of the ‘public good’, ownership of the foreshore and seabed must be vested in the Crown, and that Māori could not be allowed to go to court to determine whether the foreshore and seabed are customary property.⁵ In 2011, new legislation abolished Crown ownership rights and instead provided that ‘common marine and coastal areas’ were incapable of being owned by anyone.⁶ The Crown now asserts that no-one owns water and that any commercialisation of water (for example, the privatising of power generating companies⁷ or the taking of billions of litres of fresh artesian water for export as bottled water⁸) requires a ‘resource consent’, which the Crown argues is not a property right as the grantee will have usage rights for a defined period of time. Māori argue they are being dispossessed of existing property/resource rights which the Crown in 1840 recognised and guaranteed in Article 11 of the Treaty of Waitangi. The current position of New Zealand government provides public ownership of the foreshore and seabed and allows fresh water to be taken and used for commercial activities without reparation to Māori. Māori reaction has been vocal and visible, while also restrained and peaceful, but ethnic tension has heightened and a polarised nation has emerged. Using ownership of the foreshore and seabed and commercial access to fresh water as a case-study, this piece will discuss issues of justice and racism, and how the current political climate is changing the reparation discourse.

Customary Title

In June 2003, the Court of Appeal of New Zealand ruled that Māori should be allowed the opportunity to prove in court their customary rights to the foreshore and seabed.⁹ In essence,

⁵ Foreshore and Seabed Act 2004, New Zealand (2004).

⁶ Te Takutai Moana Act 2011, s9(1) 11 s 6,12 (2011).

⁷ see Waitangi Tribunal (wai2358, 2012)

⁸ see <http://www.stuff.co.nz/national/94118515/fight-to-charge-water-bottlers-heats-up>

⁹ Ngāti Apa and others v. Attorney-General. New Zealand Law Reports 3, CA173/01.

the Court was saying that Māori customary title may exist in some form to some areas of the foreshore and seabed. Implicit in the ruling is that Māori customary title applies not only to land, but to the foreshore and seabed as well, and that customary title may well continue to exist subsequent to the signing of te Tiriti o Waitangi/the Treaty of Waitangi and the Crown's acquisition of sovereignty. The government's immediate response was to indicate to the public that it would protect Crown ownership of the foreshore and seabed with new legislation to ensure that Māori would not have an ownership title to the foreshore and seabeds.

That legislation¹⁰ came into effect in January 2005, despite vociferous criticism from a number of sectors of New Zealand society and explicit disapproval from the United Nations Committee on the Elimination of Racial Discrimination.¹¹ Reactions to the court decision and the government's response were diverse and controversial. Government spokespeople, politicians, lawyers, political commentators, academics and activists all contributed to contradictory (and often times erroneous) public understandings of the decision and its implications. Māori, on the one hand, argued that the government legislation was racist because it denied Māori the right to go court and the right to determine whether or not they do indeed have customary title to the foreshore and seabed. On the other hand, by way of the media, a public perception was quickly fostered that Māori were seeking exclusive ownership of the foreshore and seabed and that the general public would be denied access to the beaches and recreational fishing grounds. Māori claims to customary title appeared to clash with the resolve to preserve effective public access to the beaches and recreational fishing grounds. The issue polarised the nation along racial lines and the controversy and misunderstandings it fostered continue to divide the people.

In western democratic polities issues of equality are generally underpinned with ideologies of individualism and nationhood which clash with the collective tribal rights to customary resources that Māori claim as indigenous peoples and signatories to te Tiriti o Waitangi/the Treaty of Waitangi. Māori have been seeking clarification from the Courts that property rights arising from customary title are protected, but the repealed 2004 legislation and its replacement 2011 Takutai Moana legislation have extinguished those common law rights. Only continuous and ongoing tribal usage rights are recognised. Māori believe that such actions are unjust, and this injustice is compounded by government's refusal to recognise Māori proprietary rights which is a lack of acknowledgement that, at the very least, expropriating property rights demands restitution by way of reparative justice. It is argued that the protection of Māori property rights arises from common law practice that evolved prior to English law being imported into New Zealand and that the resource and property rights guaranteed to Māori in Article 11 of te Tiriti o Waitangi/the Treaty of Waitangi should be honoured. Arguments that suggest Māori seek special treatment and that Māori would deny the general public access to the beaches and profit from the commercialisation of fresh water, coupled with claims that social policies which target ethnicity rather than need discriminate against non-Māori¹² are indicative of the poor state of race relations in New Zealand.

Talking Past Each Other

Underlying much of the support for the Crown's action to legislate ownership of the foreshore and seabed, firstly as property of the Crown then subsequently as a common, 'no-ownership' public marine and coastal space that can never be sold, is the long-held perception by most of the general public that the beaches, foreshore, sea and fresh water are public property.

¹⁰ Foreshore and Seabed Act 2004, New Zealand (2004).

¹¹ United Nations General Assembly 2005

¹² see Don Brash, "Nationhood". An Address by Don Brash Leader of the National Party to the Orewa Rotary Club," (27 January 2004); Jamie Whyte, "Race Has No Place in Law," news release, 29 July, 2014.

Therefore, everyone has a free right of access, and free usage including free recreational fishing and shellfish and seafood gathering rights (within certain limits) as well as free usage of freshwater even when the usage of fresh water has a commercial aspect. That perception was fostered by the democratic ideals on which British sovereignty in New Zealand was based, with notions of egalitarianism and everyone seemingly having equal rights and equal opportunities as a core value. It was an ideal that was articulated and advanced at the signing of te Tiriti o Waitangi/the Treaty of Waitangi in 1840, when the British representative Captain Hobson made the statement 'He iwi tahi tātou'. This was commonly interpreted as 'We are all one people'. It encapsulated the generally held conviction of the new settlers and the colonial office that Māori would amalgamate¹³ into the British model of representative government based on western liberal ideals of democracy. The presumption of 'we are all one nation, all one peoples and everyone must be treated equally' has been constantly reinforced by the government and underpins government policies of assimilation, integration, devolution and mainstreaming from the 1850s until today.¹⁴The New Zealand government continually reminds its citizens that the State is sovereign, that its power is indivisible and that it is concerned with nation-building by constructing and maintaining an imagined community of people with equal rights, a universal citizenship.

Government promotes a strong sense of civic nationalism that Ignatieff defines 'as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of patriotic practices and values'. This construction of a nation strengthens and maintains the state by promoting cohesion among all individuals who comprise the community regardless of ethnic, religious, linguistic or community allegiances, ensuring that they adhere to the values and recognise, the institutions of the state. A universal citizenry based on inclusiveness of social ties, fostering a common language, religious freedom, and multiculturalism is maintained through a state-led education system, a standard national language and a standard legal system. It unites the people for political, economic, defence and social purposes. This unity of purpose is used to depoliticise difference, to convince the people that they have a common interest, and to engender (and to continually legitimise) support and loyalty of the people to the government and the state's actions. It is not an identity built on the more exclusive characteristics of common descent, kinship, blood lines or genealogy (whakapapa), which bind Māori as tribal peoples. A major effect of the issues concerning foreshore and seabed customary rights and proprietary rights to fresh water has been the division of the citizenry along ethnic lines. Māori have united and protested the Crown's actions while the majority of the population are convinced that the Crown had to act in their interests to prevent any property claims Māori may have to the foreshore, seabed and freshwater.

Like other indigenous peoples who signed treaties with colonising powers Māori consider te tiriti/the treaty signed by their chiefly ancestors and the British Crown to be a living and binding document. It is a treaty that promised to guarantee Māori 'the full and exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'

¹³ Alan Ward, *A Show of Justice : Racial "Amalgamation" in Nineteenth Century New Zealand* (Canberra: Australian National University Press, 1974). 39. According to Ward, the official amalgamation policy of the Colonial Office and the New Zealand settler government aimed to provide Māori with equal standing to the settlers, facilitated by the British-style state institutions. The policy itself was flawed, however, because of 'European attitudes of racial or cultural superiority, and by pandering to settler prejudices, which denied the Māori real participation in the European order, except at a menial level'.

¹⁴ Kenneth Coates and P. G. McHugh, *Living Relationships. Kokiri Ngatahi : The Treaty of Waitangi in the New Millennium* (Wellington [N.Z.]: Victoria University Press, 1998); Augie Fleras and Jean Elliott, *The "Nations Within" : Aboriginal-State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992); P. Havemann, ed. *Indigenous Peoples' Rights* (Auckland: Oxford University Press, 1999).

(Article 11 of the English version) for as long as Māori wished to retain them, in exchange for the Crown's right to govern in New Zealand (Article 1 of the English version). Furthermore, Māori were guaranteed the rights and privileges of British subjects (Article 111 of the English version), that is, rights of equality.¹⁵ Te Tiriti/the treaty however, is more notable for its breaches rather than for its implied promises and guarantees. The desire immigrants had for Māori land and resources rapidly depleted tribal properties and estates. The 1860s land wars were just the beginning of an insatiable demand for precious Māori possessions. Māori lost much of their economic resource base through unjust, illegal, excessive or surplus land confiscations¹⁶ and questionable court rulings that said Māori customary rights did not continue once the Crown acquired sovereignty in 1840.¹⁷ The combined effects rapidly impoverished most tribes (iwi) and subtribes (hapū). Any current lack of ability for many tribes to be self-determining, entrepreneurial or influential economic developers correlates with a lack of ownership of resources.

What Is Just?

In New Zealand, there is a widely held notion of justice that believes equality of opportunity, equality before the law and unequal rewards distributed according to past performance (qualifications) constitutes justice. Injustice, at least to liberal non-Māori (Pākehā), occurs when people are singled out on the basis of race, when affirmative action policies are applied or separate institutions, practices or laws distinguish Māori from Pākehā.¹⁸ This liberal philosophy of equality does not recognise that such a philosophy can easily disadvantage collectives.¹⁹ Although Sharp says this ideology remained constant throughout the 1980s, it has in fact remained constant to this day.²⁰ His following comment is just as relevant in 2017 as it was in the decade he was discussing.

As the claims to restitution of lands, language, culture and fisheries unfolded, and as the Māori demanded institutional reforms appropriate to their separate rights, the same basic conception of social justice was reiterated: equality before the law, equality of opportunity as justifying inequality of condition, and personal and group failure as accounting for the Māori's relative position.²¹

Sharp points out that this school of thought does not take into account that equality of opportunity can in fact be very unequal.²² It can be influenced by a range of socio-economic factors such as education, employment, health, family wealth, residence, neighbourhood

¹⁵ I. H. Kawharu, *Waitangi : Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland ; New York: Oxford University Press, 1989).

¹⁶ AJHR, "Appendices to the Journals of the House of Representatives G-1e," (Wellington: Parliament, 1908); "Appendices to the Journals of the House of Representatives G-5, 1928 G-8, 1948 E13.," (1921); "Appendices to the Journals of the House of Representatives. Report of the Royal Commission to Inquire into Confiscation of Native Lands and Other Grievances Alleged by Natives G-7," (Wellington: Parliament, 1928); "Appendices to the Journals of the House of Representatives. Report of the Royal Commission to Inquire into and Report on Claims Preferred by Members of the Maori Race Touching Certain Lands Known as Surplus Lands of the Crown G-8," (Wellington: Parliament, 1948).

¹⁷ F. M. Brookfield, "Māori Claims and the Special Juridical Nature of the Foreshore and Seabed," *New Zealand Journal of Public and International Law* 2, no. 179 (2005).

¹⁸ Andrew Sharp, *Justice and the Māori. The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*, 2nd ed. (Auckland: Oxford University Press, 1997).

¹⁹ "What If Value and Rights Lie Foundationally in Groups? The Māori Case," *Critical Review of International Social and Political Philosophy* 2, no. 2 (1999).2

²⁰ *Justice and the Māori. The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*.194-226

²¹ Ibid.196

²² Ibid. 195

connections, and the like. Whether it is proper and fair to categorise justice as either alike or different (equality versus equity) is a dilemma and a challenge.

Justice does have many facets and it is all about who gets what and the choices made regarding what is fair or equitable in society. The distribution of goods and services, who gets what, when and how²³ and the choices made are most often contentious because of competing notions of equality and fairness. As Sharp has noted, these views change as they are continually argued about and negotiated by the persons who hold them.²⁴ Distributive justice, or social equity, is decided through the ideals of equal opportunity and equal access, with hopes to ensure that all people have similar access to resources. It is all about having a fair distribution of resources. Justice by way of reparation, which is a broader notion of justice in the sense that distributive justice is frequently used in relation to individual grievances while reparative justice tends to refer to groups, generally refers to compensation. This is usually material compensation, often monetary, for some past wrong in order to repair damages said to have been inflicted on the peoples that receive the compensation. It can also include cultural justice, by way of some sort of symbolic recognition or apology, or a negotiation of cultural property of sites or treasures of significance which go beyond economic value because the group's identity is invested in them.²⁵

Central to the demand for reparation is often land because it provides a base for economic viability, which then provides the right to control resources and become self-determining. Reparation does however, rely on the conscience of the state (the power holder, the representative of the wider community) in order to provide restitution and find a political solution to come to terms with the past. Reparative justice is about coming to terms with the past so that, at the very least, 'previously divided groups will come to agree on a mutually satisfactory narrative of what they have been through, opening the way for a common future',²⁶ recognising the consequences of past behaviours on contemporary generations. The extinguishment of Māori customary title in both the now-repealed 2004 legislation and 2011 Foreshore and Seabed (Takutai Moana) legislation begs the question of what is just, fair and equitable—and to whom? If an injustice has been carried out in the 'public interest', then is there a moral obligation on the Crown to provide some form of reparative justice?

Today, the general socio-economic position of Māori as individuals and as tribal peoples is much below that of all other ethnic groups in New Zealand except Pacific Islanders. While the socio-economic gap between Māori and non-Māori has not shrunk, some improvements to Māori well-being, especially with regard to Māori educational attainment and health, have started to become evident in the last decade.²⁷ This coincides with, after 1992 the emergence of a small but rapidly growing Māori economy and asset base based on Treaty settlements, which in 2001 was estimated to be worth \$9.4 billion.²⁸ By 2010 the Māori asset base was estimated to be worth at least \$36.9 billion.²⁹ The first major treaty settlement was the Treaty of Waitangi (Fisheries Claims) Settlement Act of 1992. Fisheries are a major part

²³ Harold Lasswell, *Politics: Who Gets What, When, How*, 2nd ed, with postscript, Cleveland: World Publishing, 1958 ed. (New York: McGraw-Hill, 1936).

²⁴ Sharp, *Justice and the Māori. The Philosophy and Practice of Māori Claims in New Zealand since the 1970s*.318

²⁵ John Torpey, *Politics and the Past. On Repairing Historical Injustices* (Lanham: Rowman & Littlefield Publishers, Inc., 2003).

²⁶ *Ibid.*25

²⁷ Statistics New Zealand, "2013 Census Quick Stats About Māori," (2013).

²⁸ New Zealand Institute of Economic Research, "Maori Economic Development. Te Ohanga Whanaketanga Maori," (Wellington: Report prepared for Te Puni Kokiri, Ministry of Maori Development, 2003).

²⁹ Innovation and Employment Ministry of Business, "Http://Www.Mbie.Govt.Nz/Info-Services/Infrastructure-Growth/Māori-Economic-Development/the-Māori-Economy," (2010).

of the Māori economy, and Māori control about 40% of New Zealand's fishing industry which by 2010 was generating around \$299 million a year. Fishing and aquaculture are expanding economic markets, and private property rights to fishing and water space are very valuable commodities. If Māori were able to claim customary title to the foreshore and/or seabed, then current federal and local government policies that allocate and lease sea-space to individuals and organisations (effectively privatising it) would likely need to be re-examined.

The objective of the Foreshore and Seabed Act was to '...preserve the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of all the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed'.³⁰ What are the implications for Māori property rights, as guaranteed in article 11 of te Tiriti o Waitangi/he Treaty of Waitangi?

Private Property Rights

Generally, te Tiriti o Waitangi/the Treaty of Waitangi does not place any legal obligations on the Crown unless the treaty itself is mentioned in law, although the courts have indicated that the treaty is of great constitutional importance to New Zealand. Nevertheless, when te Tiriti o Waitangi/ the Treaty of Waitangi was signed in 1840 the Crown acquired the right to govern (Article 1) while providing Māori with a guarantee of full property rights with pre-emption rights to the Crown if Māori wished to cede some of that property (Article 11). Colonial governance was facilitated by the introduction of English common law which recognised native customary title and provided that this title exists until it is extinguished by clear legislation. According to Jim Evans,³¹ Law Professor at the University of Auckland, a test case on law relating to native title was set up in 1847 and the courts ruled that only the Crown by way of its pre-emption rights could extinguish native title, a decision based on established case law. It follows, then, that native title and customary ownership were clearly recognised and understood when te Tiriti o Waitangi/the Treaty of Waitangi and its three articles were finalised in 1840. Brookfield points out that while the Crown did impose a new legal system by revolutionary change, the property rights of the displaced legal system of the colonised continued.³² Accordingly, Māori believe that unless Māori agree to alienate their customary title to the foreshore, seabed, rivers and waters (among other claims), title remains with Māori. As recently as 1986, the government recognised this when fishing became a property right, with the introduction of a quota management system³³ (QMS) which provided individual transferable quota.

Initially no account was taken of the pre-existing and unextinguished collective tribal fishing rights of Māori. However, when some Māori tribes sought and won a High Court injunction preventing the allocation of a fisheries quota,³⁴ it forced the government to enter into negotiations with a number of Māori groups. This led to an interim agreement providing for some quota being allocated to Māori as well as a cash payment to Māori. Subsequently, the Crown promised Māori 20% of quota of all fisheries not already included in the QMS as well as funding to purchase 50% of New Zealand's biggest fishing company, Sealords. In return, Māori agreed to relinquish any customary claims and titles to commercial fisheries and signed

³⁰ Foreshore and Seabed Act Part 1s3.

³¹ Jim Evans, "Untangling the Foreshore," (<http://publicaddress.net/default,1248.sm#post1248>: Unpublished, Auckland University, Professor of Law, 2004).

³² Brookfield.

³³ The government sets a yearly total allowable catch for every fish stock to help keep New Zealand fisheries sustainable. 'Quota' are allocated to fishers according to pre-determined government protocols.

³⁴ *Ngāti Apa and Others V Attorney-General*, 19 June 2003.

the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Reparation for Māori customary rights to commercial fishing activities was deemed to be just since government paid out cash and allocated fishing quota to Māori and it was implied that the negotiated settlement was fair, one of the values underlying 'the norms of conduct with which good governments conform'.³⁵

Why, then, are Māori claiming property rights to the foreshore, seabed, rivers and waters? Māori are questioning the right of the Crown to vest ownership of natural resources into the Crown, thereby eliminating Māori customary rights (or at least severely limiting, identifying and defining those rights as specific customary use rights), and making them conditional upon Crown approval.³⁶ It concerns the right, or otherwise, of the State to assume ownership and privatise water, as Māori argue ownership is guaranteed by native customary title. The privatising of water space through marine farming has flourished since the liberalisation of the New Zealand economy post-1984. Marine farming in the Marlborough Sounds at the top of the South Island is thriving and water space is at a premium. In 1997 eight local subtribes, the Iwi of Te Tau Ihu, were dissatisfied with marine farming activities in the Marlborough Sounds and sought clarification of their claim to customary ownership of the seabed—the land under the water—in the Marlborough Sounds. Applications they made to the local council for marine farming licenses had been consistently denied. Then, the government placed a moratorium on marine farming applications in the Marlborough Sounds, which was a forerunner to the imposition of a coastal tendering regime for marine farming, similar in effect to the quota management scheme of 1986.³⁷ It would lead to the privatisation of coastal space in the Marlborough Sound, and because local Māori were not already farming in the Sounds, they were locked out of the tendering scheme. Hence their application for Māori customary title; they wanted the land below mean high-water mark out to the limits of the territorial sea to be declared Māori customary land.

The 1993 Te Ture Whenua Act allowed the Māori Land Court to determine if land holds the status of Māori customary land or native title. That is, whether the land was held in accordance with tikanga Māori. Land as defined in the act includes land below the water.³⁸ The 1997 Māori Land Court decision was favourable for the local subtribe but was appealed to the Māori Appellate Court by the local council, which opted to state a case for the High Court to answer. In 2001, the subtribe appealed the High Court decision to the Court of Appeal and on 19 June 2003 the Court of Appeal ruled that they should be allowed the opportunity to prove in court their customary ownership of the foreshore and seabed.³⁹ It was at this point that government said this would not happen and determined that it would introduce a new legal requirement regarding Māori customary rights to the foreshore and seabed, in place of the then-current law. But as Easton⁴⁰ points out, it is not sufficient for the Crown to pass a statute saying that it owns the foreshore and seabed, because that ignores the question of who previously did,

³⁵ Waitangi Tribunal, "Report on the Crown's Foreshore and Seabed Policy," (Wellington: Waitangi Tribunal (Wai1071), 2004).13.

³⁶ Government New Zealand, "The Foreshore and Seabed of New Zealand. Protecting Public Access and Customary Rights : Government Proposals for Consultation," (2003).

³⁷ Grant Powell, "A Few Thoughts on Foreshore and Seabed," (unpublished: <http://www.converge.org.nz/pma/fs121103.doc>, 2003).

³⁸ 1993 Ture Whenua Act (s129(1)(a)TTWMA

³⁹ Re Marlborough Sounds Foreshore and Seabed, 22A Nelson MB 1, 22 December 1997, Hingston J; Crown Law Office v Māori Land Court (Marlborough Sounds) 998/3-9 Te Waipounamu ACMB, 19 October 1998, Durie CJ, Smith, Carter, Isaac JJ); Re Marlborough Sounds Foreshore and Seabed Decision [2002] 2 NZLR 661; Ngāti Apa and others v Attorney-General [2003] 3 NZLR 643.

⁴⁰ Brian Easton, "Rightful Owners," *Listener* 190, no. 3301 (2004).

which then introduces the likelihood of rights being expropriated—the land was nationalised without compensation.

The state has attempted to foster the myth that all New Zealanders must have unfettered access to the foreshore and surrounding waters. Its 2003 policy document titled ‘Foreshore and Seabed of New Zealand. Protecting Public Access and Customary Rights: Government Proposals for Consultation’ accentuates the ‘we are all one nation’ notion with its ‘protecting public access’ theme and the corresponding implication that these assets are under threat by Māori customary rights claims. The document is littered with many beautiful pictures of children from various ethnic groups playing on pristine beaches. People are shown freely gathering seafood and shell fish (kai moana). Pleasure boats and yachts, which are important features of the New Zealand lifestyle, are craftily and skillfully anchored in the background, portraying the sea as everybody’s playground. The emphasis is on the idea that we are all one people, we are all one nation and everyone is equal. The selective use of multiple identities in the images is an ingenious and subtle denial of the customary rights of one particular ethnic group: the Māori. The notion of everyone having equal rights and access to the beaches effectively denies Māori native title and sets mainstream New Zealand against the indigenous minority. The strong belief held by Māori, on the other hand, that the government’s legislation is unjust was evident when a Māori protest march (hikoi) culminated with tens of thousands of Māori protesting outside parliament on 6 May 2004.⁴¹

The reality (as opposed to general public perception) is that there are already extensive private sea and foreshore property rights and there is a ‘race for space’ in terms of marine farming, marine reserves and marinas. A proposed Oceans Policy⁴² intends to provide a comprehensive framework for the management of the coastal marine environment. Private property rights currently include:

- Rights of private landowners adjoining the foreshore
- Rights to engage in marine farming and aquaculture
- Rights of owners of land vested as private property, often in relation to ports, harbors and marinas
- Rights of private owners of reclaimed land
- Rights of commercial fishers
- Rights to take minerals from the foreshore and seabed.⁴³

The total area of foreshore (not coastline) in private ownership is not yet clear. The Minister for Land Information⁴⁴ confirmed in Parliament that of a total coastline of 19,833 kilometres, 6,032 kilometres (about one third) is bounded by land in private ownership. The Minister indicated that approximately 48 parcels exist that are surveyed to be below the mean high-water mark but that figure does not provide the amount of land in those parcels nor does it include foreshore in private title due to erosion. It is also not clear how much of the foreshore is controlled, owned, managed or effectively privatised by local authorities who are statutory delegates of the Crown.

⁴¹ New Zealand Herald, "Hikoi Size Estimates Range from 10,000 to 30,000," (Auckland2004).

⁴² A New Zealand Oceans Policy is being developed by government. (See <http://www.oceans.govt.nz/>.) It will cover ocean management including effects from land, and will extend out to the edge of the Exclusive Economic Zone and the Continental Shelf. It will take account of government decisions on public access and customary rights to the foreshore and seabed. This work is being led by the Department of the Prime Minister and Cabinet.

⁴³ Waitangi Tribunal. 31

⁴⁴ John Tamihere, "Foreshore and Seabed—Private Ownership," in *Parliamentary Questions and Answers* (New Zealand Parliamentary Debates, 2004).

Local authorities and other regulatory bodies are responsible for the ongoing attrition of customary rights within the coastal marine area through their administration of the Resource Management Act and Local Government Act. McCulley and Mutu's case-study of the northern New Zealand iwi/tribe, Te Runanga-a-Iwi O Ngāti Kahu, starkly demonstrates this.⁴⁵ Their work documents a damning record of systematic coastal degradation by local authorities. It shows that the Northland Regional Council allowed their harbour, Rangaunui, to be the recipient of timber mill waste. The Department of Conservation permitted vehicles to drive through sacred sites (wahi tapu) on Waikakari. The Far North District Council consented to the purchase of a large coastal property by a foreign investor, who then systematically destroyed sacred sites on the sand dunes by blocking wetlands, registered archaeological sites and large sections of the sand dunes, including the native plants (pingao) that cover them and help prevent their erosion. Local tribes were forced to take the Department of Conservation and the Northland Regional Council to court to stop raw sewage discharging into the local waters. The Far North District Council that allowed illegal storm water discharge to wash out ancient burial grounds, while the Northland Regional Council permitted illegal discharges from a development to discolour a local beach, causing shellfish to become disfigured and forcing temporary closure of the beach. The Northland Regional Council allowed run-off from farms to destroy the shellfish beds and the Far North District Council constructed an inadequate sewage system which overloads and discharges raw sewage onto the harbours.⁴⁶ According to Mutu,⁴⁷ Te Runanga-A-Iwi O Ngāti Kahu have always shared their beaches with the general public but they will not allow them to be wrecked.

These experiences are not unique to Ngāti Kahu. The Report of the Waitangi Tribunal on the Motunui-Waitara claim⁴⁸ and the Finding of the Waitangi Tribunal on the Manukau claim⁴⁹ are just two of a number of Waitangi Tribunal reports showing coastal and environmental degradation and pollution as a result of local government planning and development. Regardless of the injustices perpetrated against Māori tribes, however, they continue to share tribal treasures (taonga) with all New Zealanders. The mountain Aoraki (Mt. Cook) was deeded back to Ngāi Tahu as part of their negotiated treaty settlement package, but instead of taking private and exclusive ownership of the mountain, Ngāi Tahu have been looking at formally (and generously) returning it to the nation. In 2004 the Te Arawa people gained title to 13 Rotorua lakes (including some that are deteriorating and slowly dying from algae bloom, which is still starving the lakes of oxygen because of environmental abuse and degradation) but public access has been ensured even though Te Arawa have now regained title. In 1991 Ngāti Whatua Ōrākei's title to Okahu Bay (Auckland) was finally restored yet public access to the foreshore at Okahu Bay is, and always will be, unrestricted. Sir Hugh Kawharu, elder statesman (kaumatua) of Ngāti Whatua Ōrākei, articulated clearly the cultural importance of title to land. It bestows 'mana' and requires sharing with all: 'the mana⁵⁰ of Ngāti Whatua stands tall, intact and protected...the key is the retention of mana'.⁵¹

⁴⁵ Matiu McCully and Margaret Mutu, *Te Whānau Moana. Nga Kaupapa Me Nga Tikanga Customs and Protocols* (Auckland: Reed, 2003); Margaret Mutu, "Te Runanga-a-Iwi O Ngāti Kahu. Hui -a-Iwi on Foreshore and Seabed, Submission to the Crown," (Nga Whare Wātea Marae, Mangere 2004).

⁴⁶ To gain a better understanding of the unique value of these treasured sites visually, see McCully and Mutu (2003).

⁴⁷ Mutu.

⁴⁸ Waitangi Tribunal, "Report of the Waitangi Tribunal on the Motunui-Waitara Claim (Wai 6)," (1983).

⁴⁹ "Report of the Waitangi Tribunal on the Manukau Claim (Wai 8)," (Wellington 1985).

⁵⁰ 'Mana' can be difficult to translate but for the purposes of this quote it can be translated as 'integrity'

⁵¹ Waitangi Tribunal, "Report on the Crown's Foreshore and Seabed Policy." 11.

Racism

Since the Court of Appeal decision in June 2003, the rhetoric from the main political parties to ‘treat all New Zealanders equally’ (with the implication that Māori have and are somehow being afforded preferential treatment) has progressively increased. The major opposition party (National) used ‘race’ issues as a major electoral theme to increase political ratings following their disastrous election results in 2002. Post-2002 it was evident that the sound New Zealand economy, low unemployment, reasonable interest rates and lack of any major defence issue left little for the political opposition to campaign on. The soon-to-be deposed National party leader, Bill English, began suggesting that the Treaty of Waitangi gave Māori rights that others do not enjoy.⁵² In a failed attempt to shore up his declining leadership support, he expounded the idea that the Treaty of Waitangi segregated Māori and the rest of New Zealand, destabilising the egalitarian ideal of democracy, and added that ‘our common citizenship’ was being undermined by new laws.⁵³ Race became the targeted subject. At the beginning of 2004 the newly-instated leader of the National Party gave a speech⁵⁴ expressing race-based sentiments similar to his predecessor’s, but in this case the general public took notice and immediately the National Party’s poll rating improved dramatically. 2004 polling by NBR-Phillips Fox suggested the majority of all New Zealanders believed race relations between Māori and non-Māori were getting worse.⁵⁵ Colmar Brunton/TV One polls showed similar results.⁵⁶ While race issues only ranked number ten on a voters list of priorities in 1999⁵⁷, by 2005 ‘race’ was much elevated in the rankings.

For much of 2004 the commercial polls indicated the National Party had gained widespread, across-the-board support for its focus on voter discontent over te Tiriti o Waitangi/ the Treaty of Waitangi and the foreshore and seabed issue. It was not until late 2004 that the incumbent left-leaning Labour government’s ratings starting pulling ahead of those of the opposition. However, the government made considerable efforts to shore up its support with mainstream New Zealanders by introducing new policy objectives to reduce inequalities among all New Zealanders, without explicitly targeting Māori areas of need. For example, the government had been investing in Māori education, with a school funding formula did have an ethnicity weighting that specifically targeted Māori. Changes to this policy were announced in December 2004, whereby the newly appointed Minister of Race Relations stated that policy changes were being made to school funding and that the way schools were funded would now be based on need, not race.⁵⁸ The government was responding to the apparent mainstream perception that Māori are a preferred group and have special rights and privileges at the expense of the rest of the population. It has already been demonstrated that the Māori economy is small so any perceived threat of Māori being powerful economic rivals is just that—perceived, rather than real. Given that

⁵² Bill English, "One Standard of Citizenship-One Rule for All. Speech to the New Zealand Institute of Directors at the Wellington Club, Wellington," (19 November 2002).

⁵³ "The Treaty Grows Another Leg," 2003.

⁵⁴ Brash.

⁵⁵ UMR Research, Mood of the Nation Report. New Zealand (2004). Retrieved 22 September 2006 http://www.umar.co.nz/Pdfs/UMR_SOTN_V7.pdf

⁵⁶ One News TVNZ, "One News Colmar Brunton Poll: March 04,"

http://onews.nzzoom.com/onews_detail/0,1227,262623-1-8,00.html 21 March; "One News/Colmar Brunton Poll: February 04," http://onews.nzzoom.com/onews_detail/0,1227,255490-1-8,00.html.

⁵⁷ Jack Vowles et al., *Proportional Representation on Trial* (Auckland, N.Z: Auckland University Press, 2002).

⁵⁸ Trevor Mallard, "First Results of Review of Targeted Programmes," <http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=21856>.

Māori collectively also feature at the bottom of nearly all socio-economic indicators,⁵⁹ it seems reasonable to conclude that an element of racism may colour those attitudes.

The leaders of the other centre-right political parties, New Zealand First and ACT, also use a common theme of 'we are all one people, one rule for all'.⁶⁰ It is an attempt to either discredit te Tiriti o Waitangi/the Treaty of Waitangi and its place in the social framework of government, or an appeal to that sector of the voting population that is unwilling to recognise (or are unaware of) the fundamental importance of Treaty of Waitangi settlements for the positive social well-being of New Zealand society.⁶¹ Te Tiriti o Waitangi/the Treaty of Waitangi is a document that does not have the status of 'supreme' law, however, the Court of Appeal accepted in the 1987 case *New Zealand Māori v. Attorney-General* that the contemporary focus of the Treaty of Waitangi is on the spirit rather than the letter of the Treaty, and on the observance of the principles of the Treaty rather than the terms of the Treaty.⁶² References to the principles enable the spirit, intent, circumstances and terms of te Tiriti/the treaty in both the Māori and English text to be interpreted and applied in a modern context.

Broadly, the principles refer to concepts of partnership, protection and participation, although the courts, Waitangi Tribunal, and government (among others) have all defined with differing values those principles that they believe are most important.⁶³ Values within the partnership between Māori and the Crown have been identified as including a duty to act reasonably, honourably and in good faith, to make informed decisions and ensure that appropriate consultation takes place between Māori tribes and the Crown.⁶⁴ Brash (as the leader of the National Party in 2004, attempted to convince the nation that '(t)he Treaty did not create a partnership...the principles...never clearly defined yet ever expanding...are the thin edge of a wedge leading to a racially divided state and we want no part of that'.⁶⁵ Conversely, Labour Party policy claimed the Treaty of Waitangi provides a base from which strong, mutually-respectful relationships can be developed and strengthened⁶⁶ while at the same time the party passed legislation that does injustice to one ethnic group: Māori.

Government policy emphasis post-2002 has been to reduce the social and economic disadvantages of individuals with particular needs by progressively denying a correlation between ethnicity and socio-economic disadvantage. The 'equalisation' of policies, the homogenising egalitarianism that reduces the issue to one of 'class', circumvents ethnicity because of the apparent 'privileged' position of Māori. Opposition parties have deliberately set out to undermine both the targeting of Māori socio-economic

⁵⁹ Statistics New Zealand, "Total People Employed, Unemployed and Not in Labour Force by Ethnic Group," (Wellington: Statistics New Zealand, 2004); B Robson, G Purdie, and D Comack, "Unequal Impact: Maori and Non-Maori Cancer Statistics 1996-2001," (Wellington, New Zealand: Ministry of Health, 2006).

⁶⁰ Winston Peters, "Sowing the Seeds of Secularism. Speech, Party Convention," (10 November 2002); Richard Prebble, "One Law for All. Act's Waitangi Treaty Policy Launch, One Tree Hill, Auckland," (03 July 2002).

⁶¹ Ann Sullivan, "The Treaty of Waitangi and Social Well Being: Justice, Representation, and Participation," in *Waitangi Revisited. Perspectives on the Treaty of Waitangi*, ed. Michael Belgrave, Merita Kawharu, and David Williams (Melbourne: Oxford University Press, 2004).

⁶² Waitangi Tribunal, "Te Whānau O Waipareira Report (Wai 414)," (Wellington: GP Publications, 1998). 19.

⁶³ Janine Hayward, "Appendix: The Principles of the Treaty of Waitangi," in *National Overview (Volume 11): Waitangi Tribunal Rangahaua Whanu Series*, ed. Alan Ward (Wellington: GP Publications, 1997).

⁶⁴ Te Puni Kōkiri, *He Tirohanga O Kawa Ki Te Tiriti O Waitangi. A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kōkiri/Ministry of Maori Development, 2001).

⁶⁵ Brash.

⁶⁶ Labour Party, "Maori Development Policy 2002," Labour Party www.labour.org.nz.

inequalities and the place of te Tiriti o Waitangi/the Treaty of Waitangi in the political and legal framework of New Zealand. Kymlicka's claim that 'Indians are indeed subject to racism, but the racism they are most concerned with is the racist denial that they are distinct peoples with their own cultures and communities'⁶⁷ could equally be applied to New Zealand.

The Politics of Property Rights

Race is a powerful nation-building tool. Political polling indicates there was substantial popular support⁶⁸ for the government's policy to legislate away the right of Māori to go to the courts for a determination on Māori customary title. The main political parties (Labour and National) agreed on this goal, although they disagreed on the method of denial. The largest minor political party, New Zealand First, also supported the government, and while not part of the coalition government, did provide it with the necessary votes to pass the discriminatory foreshore and seabed legislation. It vested foreshore ownership in the Crown, guaranteed public access to the foreshore now and in the future, recognised specific Māori ancestral connections, and enabled Māori to keep exercising customary rights (but only referring to some minor usage rights, such as collecting stones for cultural use).⁶⁹

Only two of the minor political parties supported the Māori position. The left leaning Green party and far-right ACT party opposed the legislation. The Greens limited their support to arguing that the legislation amounted to a confiscation of the Māori legal right to go to court.⁷⁰ ACT supported the private property rights principle.⁷¹ Only one Māori member (Tariana Turia) of the (then) Labour government caucus totally opposed the passing of the foreshore and seabed Bill. She resigned from her Ministerial position in Parliament, from government and the Labour party. She formed a new political party—the Māori Party—forced a by-election which she won, and then, just eighteen months later, her new party won four of the seven Māori parliamentary seats. Since the introduction of a proportional electoral system in 1996 (MMP) the Māori vote has been political.⁷² Māori have refused to allow their support to be taken for granted by any party (or any elected candidate) and the foreshore and seabed issue was a catalyst for disillusioned Māori to thrust a Māori political party onto the national political arena.

Aside from Māori organisations, only one lobby group publicly supported the Māori position on this issue but for different reasons. The economic value of the rights to fish, to engage in marine farming, oil and mineral exploration and resource development is very high, and according to a Business Round Table report, the government's proposed legislation was likely to erode private property rights (which included Māori customary rights) and thereby would be detrimental to prosperity. The Business Round Table members are supporters of private property rights. They argued that the court process should be allowed to run its course and if property is appropriated then compensation

⁶⁷ Will Kymlicka, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (New York: Oxford, Clarendon Press, 1995).

⁶⁸ See for example, results from ColmarBrunton/TV One poll Aug 23 2003: http://www.onenews.nzzoom.com/onenews_detail/0%2C1227%2C215453-1-8%2C00.html or NBR-Phillips Fox poll 26 March 2004:

http://www.nbr.co.nz/search/search_article.asp?id=8634&cid=0&cname=Results

⁶⁹ see <http://www.knowledge-basket.co.nz/gpprint/docs/bills/20041291.txt>

⁷⁰ Jeanette Fitzsimons, "Green Mps Welcomed Hikoi to Parliament," (2004).

⁷¹ Richard Prebble, "Party Regional Conference," (Christchurch, 2003).

⁷² Ann Sullivan, "Effecting Change through Electoral Politics: Cultural Identity and the Māori," *Journal of the Polynesian Society* 112, no. 3 (2003).

should be paid.⁷³ Federated Farmers initially opposed the government's proposed foreshore policy on the grounds that four groups of farming landowners had titles covering the foreshore. Some farmers have titles acquired before 1865,⁷⁴ and others have titles specifically reaching to the low water mark, while still others have titles reaching to the mean high-water mark (as opposed to the 'high water spring mark', which is higher up the beach). Then there are the group who have titles that extend over the seabed as a result of erosion. As far as Federated Farmers was concerned, any declaration of the foreshore and seabed being in the public domain either had to exempt foreshore and seabed already held under private title or had to include compensation for the property right being removed.⁷⁵ When it was apparent that the foreshore and seabed legislation would not affect any private property rights that already existed, the farming lobby group went silent on any alignment between their private property rights and Māori customary rights. There is some irony to this. In June 2005 farmers were trying to mobilise themselves with a 'closed gate' protest action, restricting public access to waterways on farms because of government plans to introduce new legislation to allow the public to walk along significant⁷⁶ walkways and around lakes. Within weeks the government withdrew its proposed legislation.

The emotive impact of the government stance on this issue is considerable. It was sold to the general public as a public good issue, invoking fears guided by race rather than an issue of injustice: a denial of basic rights to Māori. The myth of public access to the foreshore being under threat by the possibility of a court ruling that Māori have customary title generated a nationalist fervor and ill-disguised racist turn against Māori. On the one hand, the government, as the sovereign power, assumed ownership of all foreshore and seabed that was not already in private title and did not allow this assumption of ownership to be circumvented by the courts. Māori, on the other hand, are adamant that, firstly, their fundamental rights as citizens to go to court are being breached, and secondly, their customary title to the foreshore and seabed has never been alienated.

Although the Waitangi Tribunal⁷⁷ expressed considerable concerns about the proposed legislation and the Human Rights Commissioner advised the Prime Minister that '...the right to natural justice includes the right for all New Zealanders to be heard and the assurance that the outcome of a decision has not been predetermined',⁷⁸ the resolve of the Crown to pass the legislation left Māori with few options for redress. An alliance of Māori organisations (Ngāi Tahu, Taranaki Māori Trust Board, and the Treaty Tribes Coalition) petitioned the United Nations Committee on Elimination of Racial Discrimination that the government's actions had breached international human rights. On 11 March 2005 the United Nations Committee on Elimination of Racial Discrimination published the following statement: 'the New Zealand Foreshore and Seabed Act 2004 appeared to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular

⁷³ NZ Business Roundtable, "Submission on the Foreshore and Seabed," (Wellington: NZBR, 2003).

⁷⁴ Waitangi Tribunal, "Report on the Crown's Foreshore and Seabed Policy." This tends to be land acquired by missionaries or pre-1840 land purchases. In 1865 Native land legislation came into effect, empowering the Native Land Court to transform customary rights to freehold title. From that time, the court's operations became the principal manner in which customary title was extinguished.

⁷⁵ Audrey Young, "Farmers Talking Compo over Foreshore Claims," *New Zealand Herald*, 29 September 2003.

⁷⁶ 'Significant' was defined as permanently running natural waterways at least 3 metres wide Labour Party.

⁷⁷ Waitangi Tribunal, "Report on the Crown's Foreshore and Seabed Policy."

⁷⁸ Rosslyn Noonan, "Letter to the Right Honourable Helen Clark Prime Minister. Foreshore and Seabed: Protecting the Public Access and Customary Rights," news release, 23 November, 2003.

in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress'.⁷⁹

In 2006, the report of the Special Rapporteur to the United Nations Economic and Social Council on New Zealand⁸⁰ recommended that the government repeal or amend the Foreshore and Seabed Act 2004 and enter in negotiations with Māori so that Māori rights could be resolved without discrimination of any kind. The Prime Minister⁸¹ claimed on national television that the report was unbalanced, and similarly, the deputy Prime Minister⁸² dismissed the report as unbalanced, selective in its findings and narrow.

Crown actions were racist as the foreshore and seabed legislation only affected the right of Māori to go to Court and Māori customary rights. The government had once again expropriated Māori property rights, but not the individual private property rights of those people who already had individual title to areas of the foreshore and seabed.

A core idea of justice, Sharp argues, is to give to each what is rightfully theirs and that those to whom justice is due should be given by others their 'property' or their 'right'.⁸³ However, if the rights or properties of some individuals or groups stand in the way of the greater good, it does seem wrong for an injustice to be done to secure the greater good by negating those individual or group rights. To see this, he argues, is to see the basis of the right of reparation and it is how the right of reparation emerges. This is standard western political thinking, and it follows that if Māori property rights are/were taken then Māori rights are/have been violated, and the government must make reparations. The Crown, however, despite international condemnation, has refused to acknowledge the injustice of its actions and thereby compounds that injustice by not having to acknowledge that at the very least, Māori have rights to some form of redress.

The Crown is constructed as having a duty to act in the interests of all New Zealanders⁸⁴ but so as far as the foreshore and seabed issue is concerned, Māori rights have been circumvented so that the prevailing social order can be maintained. The Office of Treaty Settlements asserts that because the Crown acts in the interests of all New Zealanders, it is required to be restrained. Therefore, it cannot satisfy Māori demands for justice because it has to balance the needs of all New Zealanders. Claims settlements with Māori should not create further injustices, so it must protect the rights of the majority of New Zealanders. Those interests include public access and freeing of restrictions on land and resources.⁸⁵ McHugh⁸⁶ has shown that rights of navigation, landing and sea fishing,

⁷⁹ United Nations General Assembly, "Decision 1 (66) New Zealand Foreshore and Seabed Act 2004," (Geneva: United Nations, 2005).

⁸⁰ Rodolpho Stavenhagen and United Nations Economic and Social Council, "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Addendum, Mission to New Zealand. Human Rights and Indigenous Issues.," (United Nations Commission on Human Rights Council 2006).

⁸¹ Helen Clark, "Un Report Critical of Foreshore Act. Retrieved 14 September [Http://Tvnz.Co.Nz/View/Page/425825/695153](http://Tvnz.Co.Nz/View/Page/425825/695153) Tvnz, One News 04 April," (2006).

⁸² Michael Cullen, "Response to Un Special Rapporteur Report www.Beehive.Govt.Nz/Print/Printdocument.aspx?Documentid=25366 04 April," news release, 2006.

⁸³ Andrew Sharp, "Justice, Self-Government, and Current Theories of Māori Organisation" (paper presented at the 2004 NZ Treasury Seminar Series, Unpublished article, 2004).

⁸⁴ Douglas Graham, "Crown Proposals for the Settlement of Treaty of Waitangi Claims," (Wellington: Office of Treaty Settlements, 1994).

⁸⁵ Ibid. 6-7

⁸⁶ Paul G. McHugh, "Aboriginal Title in New Zealand: A Retrospect and Prospect," *New Zealand Journal of Public and International Law* 2 (2004).

included in a range of public goods in Australia, are likely to be viewed similarly in New Zealand.

The general perception was that if Māori can claim customary title to the foreshore and seabed then access for the general public would be denied. The Waitangi Tribunal⁸⁷ responded that history shows that contrary to the actions of a number of private owners who do prohibit public access, Māori have not done so. The general public have always freely enjoyed the Ngāti Whātua owned foreshore of Okahu bay in the centre of New Zealand's biggest city, Auckland. The Taranaki Māori on the west coast of central North Island forced the local authorities to clean up their polluted foreshore not only for local tribal interests, but for everyone. Similar actions have taken place with other water resources such as the Whanganui and Kaituna rivers. Māori cultural practice (tikanga) is not exclusionary.

[U]nderlying the assertion of power comprised in the term 'mana' requires the holder(s) of the mana to exercise that power in a spirit of generosity (manaaki) towards others. The effect of this is that those with mana in land have a reciprocal duty to manaaki others. In turn, the exercise of manaaki reinforces the mana of the right holders. There is an endless cycle of entitlement, responsibility, and generosity.⁸⁸

The Tribunal also emphasises the point that foreshore only relates to that part of the beach which is below the high-tide mark, the tidal zone that is twice daily wet by the tide. Most beaches are above that mark and the reality is that it would be difficult to prevent access to the 'wet' zones of the beaches.

Conclusion

The cultural importance of the foreshore and seabed is highly significant to the traditional tribal owners, as is their economic potential. The current dilemma arose because some tribes felt they were unfairly being denied access to marine mussel farming licenses. Economic interests in sea country are extensive, with property rights that have been created for commercial interests to allow trans-national mining companies the rights to mine and explore the ocean floor, with the foreshore exploited for tourism, ports and marinas, and with property rights to the seabed for aquaculture purposes in huge demand. Fresh water is of course a public good. But when commercial interests are in direct conflict with 'public good', then the fundamental question of who owns and who manages common water resources needs to be resolved. Currently, the taking of fresh water for commercial purposes has little legislative management and licensing charges that are imposed are minimal. There are few sanctions or restrictions to prevent this 'public' resource being abused for private profit. The depletion and/or pollution of the water system affects the viability and utility of the ecosystem but commercial interests, individual title to private properties, individual leases or extractive resource consents override Māori customary rights. Māori are still being denied the opportunity to prove collective customary title as explicitly guaranteed in Article 11 of te Tiriti o Waitangi/the Treaty of Waitangi. The government has refused to consider any form of redress because it does not recognise any prior ownership rights and therefore does not consider there to be any grounds for reparations. Nevertheless, an injustice has taken place and the economic benefits continue to advantage non-Māori.

If a group's rights are being unjustly denied by their own government, then it is not clear what third party (if any) has the right to intervene in order to force the government to respect those rights. The United Nations Committee on the Elimination of Racial

⁸⁷ Waitangi Tribunal, "Report on the Crown's Foreshore and Seabed Policy." 95.

⁸⁸ Ibid.

Discrimination in 2005 has projected into the international arena the Crown's extinguishment of Māori customary title, the Crown's discrimination against Māori and the Crown's failure to provide redress. Although the government has refused to act upon the recommendations in the United Nations report, the internationalisation of the New Zealand government's act of overt racial discrimination against Māori dishonours all New Zealanders. *Ka whawhai tonu mātou: the never-ending struggle.*

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