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LEGAL RECOGNITION OF RIGHTS DERIVED FROM THE TREATY OF WAITANGI

Edward Willis*

This article analyses the effect of the Treaty of Waitangi in terms of legal entitlements, and develops a particular type of legal entitlement termed a "Treaty right". The law generally responds very differently to valid claims involving rights than it does to claims based on other legitimate interests. The article identifies three such responses – limitations on state power, priority over other interests, and substantive remedies for breach – and demonstrates that the Waitangi Tribunal's jurisprudence suggests similar responses to certain claims based on Treaty interests. The Tribunal's jurisprudence gives rise to a framework for understanding and applying Treaty rights, which is found to be robust and conceptually sound. Accordingly, the framework is a useful conceptual tool that should be utilised more widely, and may also have practical implications such as better understanding the constitutional implications of the Treaty of Waitangi.

I Introduction

Observing a meaningful distinction between rights and other legal interests may prove useful in understanding the legal effect of New Zealand's founding document, the Treaty of Waitangi (the Treaty). While the Treaty's importance is continuously affirmed, it is still characterised by a high degree of legal uncertainty.[1] This article contends that a valid distinction between Treaty rights and other Treaty interests can be drawn, and that Māori claims based on Treaty rights require a distinct legal response. Where such rights are identified, whether by the Waitangi Tribunal (the Tribunal), the courts or in legislation, it can be expected that the law will respond to those Treaty rights in a manner consistent with its treatment of other fundamental rights. In this way, recognition of Treaty rights may elucidate the legal effect of the Treaty in specific circumstances.

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1 See generally Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

This article is divided into four substantive parts. Part II elaborates on three key traditional legal responses to claims involving rights: limiting state power, prioritising rights over competing private interests, and ensuring a substantive remedy is available for breach. These responses suggest that the legal system takes claims based on rights seriously, and that rights represent a powerful normative and legal tool for individuals and minority groups. Part III demonstrates that direct support for the distinction between rights and other interests in the Treaty context can be found in the jurisprudence of the Tribunal. The Tribunal has recognised that some Māori claims based on the Treaty require legal responses similar to the way that the legal system responds to other important rights. Drawing primarily on three key Tribunal reports, it can be shown that the Tribunal's jurisprudence provides a conceptual framework for understanding Treaty rights.

Part IV assesses the Tribunal's Treaty rights framework, particularly with reference to Treaty jurisprudence in the courts. While the courts' jurisprudence is still developing, it is both orthodox and consistent with the Tribunal's framework. This suggests that there are few meaningful impediments to the wide-spread adoption of the Tribunal's framework in dealing with Māori claims based on the Treaty. Consequently, the article concludes in Part V by arguing for greater recognition of the distinction between Treaty rights and other Treaty interests, and by speculating on a potential application of the distinction as a means of clarifying the constitutional status and effect of the Treaty.

II Legal Responses to Claims Involving Rights

While rights are not easy to define, it is clear that they are not like other legal interests. Almost a century ago Hohfeld demonstrated that rights are necessarily connected with legal duties, whereas other legal interests are not.[2] Further, liberal jurisprudence has long recognised that rights have an inherent morality that is absent from other interests, so that "[w]hen we say that someone has a 'right' to do something, we imply that it would be *wrong* to interfere with his [or her] doing it".[3] However, the particular characteristics that necessitate a duty or imply a moral obligation, and therefore distinguish rights from other interests, are not susceptible to precise definition.[4] For this reason this article adopts the rather vague definition of a "right" as an entitlement with a corresponding legal or moral duty without seeking to refine the definition further. By contrast, to refer to an "interest" is to refer to any sort of legal advantage or entitlement.

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2 See Wesley Newcomb Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16.

3 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978) at 188 (emphasis added).

4 See HLA Hart "Bentham on Legal Rights" in AWB Simpson (ed) *Oxford Essays in Jurisprudence (Second Series)* (Clarendon Press, Oxford, 1973) 171 at 171. For an attempted definition of a "right" see Jim Evans "What Does it Mean to Say that Someone has a Legal Right?" (1998) 9 Otago LR 301.

The difficulty in defining a "right" with precision may also be the reason that the distinction between rights and other interests is not always observed in legal analysis. Without resolving the definitional difficulty, the distinction can still usefully be made if the focus shifts to articulating the law's response to a valid claim founded on a right. Three ways the law has traditionally responded to such a claim are to treat a right as a limit on the exercise of state power, to prioritise the right over competing private interests, or to provide a substantive remedy for breach of a right. A "mere" interest does not elicit these kinds of legal responses.

Some specific examples may serve to highlight the importance of legal responses to claims based on rights. In modern New Zealand, where an absolutist form of Parliamentary sovereignty is still the dominant paradigm, it may be difficult to conceive of rights acting as a limit on state power. However, the courts have demonstrated a willingness to act in appropriate circumstances to protect fundamental rights even in the face of apparently contrary legislative intent. One means of achieving this is by "reading down" a legislative provision so that it can be construed consistently with a fundamental right. In *Zaoui v Attorney-General* the Supreme Court found that the right to freedom from torture and the right not to be deprived of life, both fundamental human rights,[5] should be given effect so that a refugee with security risk status would not be deported.[6] To achieve this result, s 114K of the Immigration Act 1987, which requires the Minister of Immigration to make a decision on whether to deport based on confirmation of a security risk certificate in respect of a refugee, was effectively stripped of legal effect, contrary to a seemingly orthodox interpretation of the provision.[7]

Even fundamental interests of the State usually accorded considerable weight, such as national security, may give way to fundamental human rights.[8] This emphasises the high onus on those seeking to displace fundamental rights to facilitate recognition of other important interests, as often recognition of rights entails a strong presumption of priority over competing interests. A clear expression of this priority of rights over competing interests in New Zealand is the New Zealand Bill of Rights Act 1990 (NZBORA), which prescribes that NZBORA rights may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.[9] NZBORA therefore acknowledges the balancing of important interests, sometimes even conflicting rights, is a central function of a modern legal system, but recognition of fundamental rights is the appropriate starting point. Most legal interests do not attract this kind of priority.

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5 See New Zealand Bill of Rights Act 1990, ss 8 and 9.

6 *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC).

7 Claudia Geiringer "Parsing Sir Kenneth Keith's Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 179 at 182.

8 See *Zaoui*, above n 6.

9 New Zealand Bill of Rights Act 1990, s 5.

Finally, the law may ensure a substantive remedy is available for breach of a right. New Zealand's key instrument for affirming and protecting fundamental rights, NZBORA, does not contain any express remedy provisions. Despite this omission, the courts have consciously sought to vindicate breaches of NZBORA rights, adopting a "rights-centred approach" in respect of such remedies.[10] In *Simpson v Attorney-General* the Court awarded punitive damages against the Crown for breaches of the NZBORA right to freedom from unreasonable search and seizure in the absence of any other effective remedy.[11] In this respect rights are not ineffectual, and the courts will choose a remedy carefully to ensure vindication of an abrogated right.[12]

These three legal responses to rights distinguish them from other legal interests, but also suggest something important about their nature: a valid claim based on a right is treated seriously. The ways that the legal system may respond to rights – limiting state power, prioritising rights over other interests, and providing a substantive remedy for breach – are not responses that the law takes lightly. These responses are consistent with legal recognition of an entitlement with a strong normative element and a corresponding duty (which necessarily also carries a strong normative element). Legal rights are important because they represent a powerful tool at the disposal of an individual or minority group to ensure that their fundamental normative interests are protected by the imposition of a legal duty on others, including the state, enforceable by the courts.[13]

III The Distinction between Treaty Rights and Other Treaty Interests

It bears repeating that rights are not like other legal interests. The Tribunal has long recognised this distinction in the Treaty context. This Part draws primarily on three reports of the Tribunal to highlight that each of the three legal responses to rights also applies to Treaty rights: *He Maunga Rongo: The Report on the Central North Island Claims, Stage 1* (the "*He Maunga Rongo Report*"),[14] the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (the

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10 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 1176-1178.

11 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA) at 676. See also *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA); *McKean v Attorney-General* [2007] 3 NZLR 819 (HC).

12 See *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA) at 161-162 per Thomas J dissenting.

13 See AT Williams "Human Rights and the Law: Between Sufferance and Insufferability" (2007) 123 LQR 133 at 146.

14 Waitangi Tribunal *He Maunga Rongo: The Report on the Central North Island Claims, Stage 1: WAI 1200* (2008) [*He Maunga Rongo Report*].

"*Muriwhenua Fishing Report*"),[15] and *The Petroleum Report* (the "*Petroleum Report*").[16] Analysis starting with these three reports demonstrates the existence of a coherent conception of Treaty rights as distinct from other Treaty interests. It is submitted that cumulatively the jurisprudence of the Tribunal provides a framework for understanding and applying Treaty rights.

The Tribunal is limited in its ability to drive widespread adoption of the distinction between Treaty rights and other Treaty interests. For this reason, this Part begins with an account of the role of the Tribunal, highlighting the influence that it does (and does not) have.

A The Role of the Tribunal

The Tribunal is a quasi-judicial institution with exclusive jurisdiction to inquire into "the meaning and effect of the Treaty of Waitangi".[17] This means that the Tribunal is uniquely placed to identify, and provide some impetus for responses to, Treaty-related issues. The Tribunal is empowered to scrutinise Crown acts or omissions for compliance with the "principles of the Treaty" wherever such an inquiry is relevant.[18] By contrast, the ordinary courts generally have no jurisdiction to consider the direct legal effect of the Treaty unless it receives legislative expression.[19] The Tribunal's jurisdiction is, then, broad in respect of Treaty-related issues and quite distinct from that of the courts.[20]

The Tribunal's ability to enforce its determinations is more limited. In response to any well-founded claim, the Tribunal may recommend to the political branch of government that it take certain action to compensate for or remove any prejudice or to prevent other persons being similarly affected.[21] Any such recommendations may be specific or general.[22] Unlike the ordinary courts, however, the Tribunal generally cannot require that the political branch comply with its recommendations.[23] The Tribunal's jurisdiction is non-binding.

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15 Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim: WAI 22* (1988) [*Muriwhenua Fishing Report*].

16 Waitangi Tribunal *The Petroleum Report: WAI 796* (2003) [*The Petroleum Report*].

17 Treaty of Waitangi Act 1975, s 5(2).

18 Ibid, s 6.

19 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) at 324.

20 Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report: WAI 953* (2002) at 52.

21 Treaty of Waitangi Act 1975, s 6(3).

22 Ibid, s 6(4).

23 For the limited exceptions to this general rule see Treaty of Waitangi Act 1975, s 8A(2).

The nature of its jurisdiction – being broad in scope but with limited binding effect – creates opportunities and challenges for the Tribunal. Without conventional judicial restraints, the Tribunal is able to exercise considerable flexibility in determining the scope of its inquiries and in making recommendations. This flexibility has allowed the Tribunal to act as a "creature of Parliament's social conscience" on Treaty issues.[24] The Tribunal is, however, subject to significant informal restraints. For example, Tribunal recommendations require a degree of mainstream acceptance if they are to be implemented by the political branch of government and supported by the public.[25] Political acceptability is not easy where such controversial issues are in play, and in response the Tribunal has been at pains to insulate its recommendations from political whim through the application and development of sound principles.[26] Regardless of the robustness of the Tribunal's approach in making its recommendations, however, their non-binding status means that a degree of political will is required before those recommendations will be implemented and given legal effect.

B Recognising Treaty Rights

From the beginning the Tribunal recognised that claims based on the Treaty may involve rights. In its first major report the Tribunal suggested that the Treaty might limit the Crown's "right to make laws" and so acts as a limit on the Crown's sovereign power, and characterised some Treaty interests as having priority over other interests.[27] From that starting point a principled conceptual framework for understanding Treaty rights has emerged.

A focus on three reports highlights the key aspects of the Tribunal's framework for current purposes. First, the *He Maunga Rongo Report* articulates how the Treaty may constitute a principled limit on the exercise of Crown sovereignty. Second, the *Muriwhenua Fishing Report* demonstrates how Māori rights based on the Treaty may take priority over other competing interests. Finally, the *Petroleum Report* discusses the Crown's obligation to provide a substantive remedy to vindicate the infringement of a Treaty right. Together, these concepts form a framework of Treaty rights that is consistent with both the principles of the Treaty and legal principle.

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24 PG McHugh "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224 at 224.

25 E Taihakurei Durie and Gordon S Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62 at 72.

26 The ordinary courts have recognised the principled approach of the Tribunal, allowing themselves to be influenced by the Tribunal's jurisprudence when deciding legal issues that touch on the Treaty: see *New Zealand Māori Council v Attorney-General (Lands)* [1987] 1 NZLR 641 (CA) at 655.

27 Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim: WAI 6* (2nd ed, Waitangi Tribunal, Wellington, 1989) at 53.

1 Limiting Crown sovereignty – the He Maunga Rongo Report

The *He Maunga Rongo Report* is the product of a relatively recent Tribunal inquiry. The claimants were a number of central North Island iwi from the Kaingaroa, Rotorua and Taupo regions. The inquiry adopted a novel two-stage approach to Treaty claims. Stage one involved an inquiry into Crown-Māori relations generically, focusing on "big picture" issues only without reference to particularised statements of claim.[28] After the Tribunal's stage one report, the claimant iwi may choose to enter direct negotiations with the Crown to settle their claim, or proceed to stage two where the particulars of the claimants' grievances are examined. The *He Maunga Rongo Report* is the result of the Tribunal's stage one assessment, and so did not focus on particular claims.

Consistent with this big picture focus, the claimants contended that a common underlying factor in all Treaty breaches in their region was the Crown's failure to take into account their rangatiratanga, their right to autonomy and self-government.[29] The claimants contended that the Crown actively frustrated the exercise of rangatiratanga, or simply ignored it, over the course of the relationship between the Crown and the central North Island iwi. The claimant iwi argued that the resulting policy and actions of the Crown had prejudiced their ongoing development as an indigenous people.

The inquiry focused on Crown-Māori relations between 1840 and 1920, and the Tribunal found that during this period the Crown had indeed frustrated Māori attempts to exercise their right to autonomy and self-government. The Crown had contended that while Māori ambitions of autonomy and self-government had been frustrated, it was "simply not possible, practical, or desirable to give legal support and effect to Māori self-governing institutions" in the historical context.[30] The Tribunal disagreed, finding that, even taking the historical context into account, the Crown could have, and should have, done more to promote rangatiratanga. The policy choices made by successive governments throughout the nineteenth and early twentieth century in effect ignored these important Treaty rights.

The nature of the claim in the *He Maunga Rongo Report* puts the question of the Crown's sovereign right to govern freely in the interests of all New Zealanders directly in issue. This right of the Crown to govern is a core principle of the New Zealand constitution, and accordingly is extremely difficult to displace. The orthodox understanding is that, acting through Parliament, the Crown's authority is sovereign.[31] Further, the Treaty itself provides for the Crown to govern in the

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28 *He Maunga Rongo Report*, above n 14, at 5.

29 Ibid, at 1.

30 Ibid, at 165.

31 Joseph, above n 10, at 487.

general interest through the cession by Māori of kawanatanga,[32] a factor that the Tribunal itself has long recognised. This suggests strongly that the Crown itself has a significant degree of autonomy to make the policy and legislative choices that it sees fit, regardless of the Treaty guarantee of tino rangatiratanga. Reconciling these two factors – rangatiratanga and kawanatanga – is therefore central to the analysis in the *He Maunga Rongo Report*.

One possible approach, given the Tribunal's finding that rangatiratanga was indeed abrogated by the Crown, might have been to ignore, or at least downplay the significance of, the Crown's kawanatanga. This, however, has never been the Tribunal's approach. Rather, the Tribunal has sought to strike a balance between the competing interests of Crown kawanatanga and Māori tino rangatiratanga. Generally, the Tribunal applies this balancing exercise to the particulars of an individual claim, such as the management right in a significant natural resource.[33] In the *He Maunga Rongo Report*, the issue is dealt with at a much higher level: the analysis in the *He Maunga Rongo Report* suggests that as a general principle any exercise of kawanatanga, that is of the right to govern, needs to take account, and where possible give effect to, rangatiratanga guaranteed by the Treaty:[34]

> We find that … the Treaty guaranteed Maori their tino rangatiratanga over their land, resources, and people, in return for a Maori recognition of Crown governance and the Crown's right of pre-emption. This was a guarantee of Maori authority which limited and circumscribed the Crown's right to govern.

Given the Crown's kawanatanga, it is not necessarily inconsistent with the principles of the Treaty for the Crown to legislate as it sees fit.[35] It is important to note, however, that according to the Tribunal kawanatanga necessarily entails recognition of rangatiratanga. Under the Treaty, rangatiratanga "denotes the mana of Māori".[36] Rangatiratanga, as the expression of mana Māori in the Treaty, is therefore of central importance as it suggests some level of protection should be afforded to Māori interests. Reconciling kawanatanga and rangatiratanga entails a kind of balancing exercise where both sets of interests, Crown and Māori, must be given appropriate weight with neither displacing the other fully. One key effect of this balancing exercise involving kawanatanga and rangatiratanga is that the Crown cannot use its law-making power to defeat the guarantees it made to Māori in the Treaty.[37] In other words, the Treaty may prove to be an "in principle"

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32 Treaty of Waitangi Act 1975, sch 1. "Kawanatanga" roughly translates as "governance".

33 See *Muriwhenua Fishing Report*, above n 15, at 227.

34 *He Maunga Rongo Report*, above n 14, at 191.

35 *Muriwhenua Fishing Report*, above n 15, at 227.

36 Waitangi Tribunal *Ngawha Geothermal Resource Report: WAI 304* (1993) at 64.

37 Waitangi Tribunal *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (2004), vol 2 at 534–535. See also *He Maunga Rongo Report*, above n 14, at 174.

limitation on the exercise of sovereign power, suggesting that certain Māori interests derived from the Treaty should be given legal recognition in the same way as legal rights.

The importance of this point is difficult to overstate. Kawanatanga affords the Crown general authority to make laws, but also obliges the Crown to take proper account of Māori rights, that is to take proper account of rangatiratanga. It follows that Māori Treaty rights, the content of rangatiratanga, may limit the legitimate exercise of Crown authority. Put bluntly, "[s]overeignty is limited by the rights reserved in [Article II]".[38] It may be overstating the case to suggest that "all discussion and analysis of the implications of the Treaty must begin from its starting-point as a constitutional constraint",[39] but the point is nonetheless a fundamental one. Crown action may be considered *ultra vires* the Treaty, and therefore illegitimate, if it interferes with Treaty rights.

This Treaty-based "constitutional fetter" on the legitimate exercise of Crown authority may be difficult for some to accept, not least because of New Zealand's historical adherence to the doctrine of Parliamentary sovereignty.[40] Any objection along these lines, however, would be to misunderstand the Tribunal's approach. For a start, the Tribunal's non-binding mandate means it is difficult to construe the Tribunal's analysis as a serious threat to the sovereignty of Parliament. In fact, the non-binding nature of the Tribunal's recommendations means that the political branch has been able to accept the Tribunal's guidance on the principled exercise of sovereign power in respect of Treaty issues without the perception that Parliamentary sovereignty has been infringed.[41] The Tribunal's finding that Treaty rights may fetter legitimate Crown action should therefore be seen as guidance to the political branch on the appropriate exercise of sovereign power, rather than an attempt to undermine the basis of that sovereign power.

The Tribunal was also careful to point out that Crown action that interferes with Treaty rights may be justified in certain circumstances because of the Crown's overriding responsibility to govern in the interest of all New Zealanders.[42] Accordingly, there may be a "presumption" that the Crown should not legislate contrary to Māori interests guaranteed as Treaty rights, but this presumption can be displaced in particular situations.[43] However, any Crown action that abrogates Treaty rights must be undertaken in a manner consistent with the principles of the Treaty, that is, consistent with the

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38 *Muriwhenua Fishing Report*, above n 15, at 232.

39 RP Boast *The Treaty of Waitangi: A Framework for Resource Management Law* (New Zealand Planning Council and Victoria University of Wellington, Wellington, 1989) at 6.

40 Though there are signs that the tide is going out on the doctrine: see especially Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

41 See Petra Butler "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 at 352.

42 *Muriwhenua Fishing Report*, above n 15, at 227.

43 The "presumption" terminology is borrowed from Boast, above n 39, at 6.

balance between kawanatanga and rangatiratanga. Only where Crown action is consistent with the principles of the Treaty will the abrogation of Treaty rights be justifiable.

In addition to reconciling kawanatanga and rangatiratanga, it is notable that the Tribunal found support for its finding that iwi Māori had a right to self-government in Article III of the Treaty. Article III guaranteed Māori all the rights of British subjects, which the Tribunal considered extended to an equivalent right for Māori to the right of other British subjects to self-government through representative institutions.[44] This supports the notion that the right to rangatiratanga, the right to autonomy and self-government articulated by the Tribunal in the *He Maunga Rongo Report*, derives from the principles of the Treaty directly, and is consistent with the Treaty's plain terms. Accordingly, the Tribunal's findings appear to be an orthodox application of the Treaty, even despite the apparent challenge of rangatiratanga to traditional understandings of Crown sovereignty.

In sum, the Treaty provides some important limits on the legitimate exercise of Crown sovereignty. While it would be going too far to consider the Treaty an absolute limit on Crown authority, where possible the Crown must exercise its authority consistently with Māori interests guaranteed under the Treaty. As the Tribunal has been careful to point out, legitimate but unfair exercise of sovereign power lies at the centre of valid Treaty claims,[45] and there is a very high hurdle for the Crown to clear if it intends to argue that Maori Treaty interests should be overridden. This suggests, if not an absolute, then a meaningful and in-principle limitation on Crown sovereignty founded on Māori Treaty interests.

2 Priority over other interests – The Muriwhenua Fishing Report

The *Muriwhenua Fishing Report* is an early report of the Tribunal, which concerned a claim to fishing resources. The impetus for the claim was a government policy to issue exclusive rights to commercial fishing in the form of transferable fishing quota as part of efforts to mitigate the depletion of fishing stocks. Large commercial fishing enterprises would receive most of the quota, and so the policy would have significantly restricted Māori access to fisheries. The quota management policy therefore appeared to directly conflict with the Treaty, which expressly recognises Māori fishing interests.[46] The claimants challenged the policy on the basis of this inconsistency with the Treaty.

The Tribunal recognised the modern reality that Māori interests are only one of a number of interests in the exploitation of fishing resources, including non-Māori recreational and commercial fishing interests. The Tribunal determined that Māori interests in fishing resources that derive from

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44 *He Maunga Rongo Report*, above n 14, at 191.

45 Ibid, at 189.

46 Article II of the Treaty guarantees to Māori the "… full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties …": see Treaty of Waitangi Act 1975, sch 1.

the Treaty could not be considered in isolation from these competing, private interests in the same resource:[47]

> Rightly or wrongly, new circumstances now apply and a number of conflicting private interests, honestly obtained, must be weighed in the balance. It is out of keeping with the spirit of the Treaty … that the resolution of one injustice should be seen to create another.

The Tribunal's approach requires that the legitimate interests of all New Zealanders be taken into account before any articulation of Māori interests can be consistent with the principles of the Treaty. Accordingly, a principled framework for recognising Māori Treaty interests in fishing resources will also recognise other, competing interests.

Against this background of competing interests, the Tribunal explored the characteristics of Māori interests in fisheries derived from the Treaty. The Tribunal expressly characterised these interests as Treaty rights.[48] The Tribunal found some support for this characterisation in common law aboriginal title rights to fishing resources and a history of ersatz statutory recognition of Māori fishing rights,[49] but the basis for the Tribunal's characterisation of Māori fishing interests as Treaty rights appears to be the Article II guarantee by the Crown to Māori of rangatiratanga. As discussed above, rangatiratanga is important because it signifies that regard should be had to mana Māori. Recognition of mana Māori in respect of fishing resources in part entails recognition that mana Māori is of a different order to other interests in fishing.[50] Mana Māori in respect of natural resources generally implies that Māori not only have an interest in effective resource management, but an interest in effectively managing that resource.[51] In the specific instance of fishing resources rangatiratanga, as the expression of mana Māori in the Treaty, entails the protection of these uniquely Māori interests in fishing resources and informs the Crown's ability to legitimately exercise its sovereign authority over those resources:[52]

> To argue otherwise, to maintain that Māori have the same entitlements as everyone else, is another way of saying that the [T]reaty should be of no account, since the state should not discriminate whether or not a Treaty exists.

Respect for the Treaty therefore necessitates recognition of Treaty rights in certain contexts, including the management of fisheries.

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47 *Muriwhenua Fishing Report*, above n 15, at 11.

48 Ibid, at 238.

49 Ibid, at 96.

50 Boast, above n 39, at 25-26.

51 Ibid, at 8-9.

52 Ibid, at 16.

The Tribunal determined Māori rights to fishing resources should be recognised by affording those Māori interests a degree of priority over other, private interests. While the Tribunal characterised Māori Treaty interests in fishing resources as rights, the Tribunal appears to have characterised non-Treaty interests in fishing as "mere privileges".[53] Interests that are privileges can be effectively weighed and balanced against other interests as part of the democratic decision-making process; the priority that is characteristic of Treaty rights implies that such rights should sit above political horse-trading.[54] Accordingly, where Treaty interests constitute genuine rights held by Māori, they have priority over competing interests as a matter of principle because these rights represent a claim of a different nature.[55] Private interests in fisheries do not amount to entitlements to such resources, or interests in managing those resources.

While there is not necessarily any inconsistency between Treaty rights and other interests being exercised simultaneously, prudent management of fisheries may mean that not all interests in exploiting the resource can be satisfied. In such circumstances, private interests may be restricted or revoked, but the priority afforded to Treaty rights means that such rights cannot be legitimately restricted or revoked in the same way as other interests. In other words, if regulation is needed to closely manage fishing resources, then non-Treaty interests should be regulated first. If possible, Treaty rights should not be restricted at all, as infringing against a Treaty right should be considered a last resort. The Tribunal has characterised the priority of Treaty rights over non-Treaty interests in the following fashion:[56]

> Nothing in the Treaty restricts the free exercise of fishing rights … Unless absolutely necessary, the Crown should not restrict the [T]reaty right fishing of the tribes to counter overfishing … even if it is necessary to restrict the general public fishing, commercial or otherwise.

Private interests may therefore be required to give way so that Māori can continue to exercise their Treaty rights.

Taken together with the principle that the Treaty may act as a limit on the Crown's sovereign power, the *Muriwhenua Fishing Report* goes some way towards establishing a principled framework for understanding Treaty rights. Two key components of legal rights – a principled limitation on state power and a priority over competing interests – form part of the Tribunal's Treaty rights analysis. The question of how the Crown should respond to a breach of Treaty rights also needs to

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53 James Armstrong Douglas *The Crown, Māori and the Control of Natural Resources: Rights and Priorities under the Treaty of Waitangi* (LLB (Hons) Research Paper, Victoria University of Wellington, Wellington, 1990) at 15.

54 Boast, above n 39, at 16.

55 Nicola White and Andrew Ladley "Claims to Treaty and Other Rights: Exploring the Terms of Crown-Māori Engagement" (2005) 1(1) Policy Quarterly 3 at 6-7.

56 *Muriwhenua Fishing Report*, above n 15, at 232.

be considered. The Tribunal was presented with an opportunity to examine this issue in the *Petroleum Report*.

3 Vindicating infringed Treaty Rights – the Petroleum Report

A significant recent development in the Tribunal's Treaty rights framework is the articulation of the Treaty interest concept in the *Petroleum Report* (the Treaty Interest). The Treaty Interest supplements the Tribunal's framework by providing an effective remedy for breach of a Treaty right. In short, the Treaty Interest ensures that abrogated Treaty rights can be vindicated effectively.

The *Petroleum Report* involved Māori claims to petroleum resources in the Taranaki basin.[57] The claim arose in response to the proposed Crown sale of interests in the Kupe oil field. All non-Crown interests in New Zealand's petroleum resources were extinguished by statute in 1937,[58] though usual Crown practice was to compensate landowners financially for this expropriation. Māori landowners suffered disproportionately from this expropriation on two grounds. The first was that Māori landowners often did not receive the same compensation offered to other landowners. The second was that the extinguishment of Māori interests in petroleum appeared to be contrary to the guarantee of Māori property rights in Article II of the Treaty.[59] The claimants in the *Petroleum Report* sought recognition of and compensation for the loss of their property rights to petroleum resources, and saw the alienation of the Crown's interests in oil and gas reserves as frustrating any opportunity for recognition and compensation.

In determining that there had indeed been a breach of Māori property rights guaranteed by the Treaty, the Tribunal recommended a remedy with a novel element. The Tribunal suggested that the breach of Māori property rights created a Treaty Interest, which was said to arise:[60]

> … whenever legal rights are lost by means that are inconsistent with Treaty principles. [A Treaty Interest] carries with it a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right. Perhaps most importantly, the [Treaty Interest] creates an entitlement to a remedy for that loss additional to any other entitlement to redress.

The Tribunal has phrased the Treaty Interest in terms of a new "right to a remedy", but in substance the Treaty Interest is a mechanism to vindicate an existing Treaty right that has been breached. The

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57 The principal claimants were Ngā Hapū ō Ngā Ruahine of Taranaki. A subsequent claim was also lodged by Ngati Kahungunu ki Wairarapa.

58 Petroleum Act 1937, s 3(1).

59 See Treaty of Waitangi Act 1975, sch 1.

60 *The Petroleum Report*, above n 16, at 65. For general discussion of the Waitangi Tribunal's Treaty Interest as articulated in *The Petroleum Report* see Huia Woods *The Treaty Interest: A New Concept in Indigenous Rights?* (working paper, University of Waikato, 2006).

implicit element of vindication is borne out by the strong moral language used by the Tribunal that suggests that the Treaty Interest is only applicable in cases where Treaty rights are breached: the reference to a *wrongful* loss suggests a normative assessment that is characteristic of rights. The Treaty Interest therefore provides a mechanism to vindicate Treaty rights that have been breached by recognising that provision of a meaningful remedy is integral to recognition of the primary right, in this case a property right protected under the Treaty.

Importantly in the context of the *Petroleum Report*, the Treaty Interest applies in addition to other available remedies. The Crown would be expected to compensate Māori for the expropriation of their property, as Pākehā were, on the basis of common law principles. This common law compensation would be additional to, not alternative to, fulfilling the Treaty Interest as a remedy for breach of Treaty rights. The Treaty Interest vindicates the infringement of a Treaty right even where other rights have been infringed and may require their own remedy.[61] It is the fact of a breach of a Treaty right that gives rise to the Treaty Interest, indicating that such a breach is serious enough in itself to require a conceptually distinct remedy. Only a fundamental right warrants this type of vindication for its own sake.

Finally, it should be noted that the Tribunal's reference to an obligation on the Crown to negotiate redress should not be seen as diminishing the clear duty on the Crown to vindicate a breach of a Treaty right. Negotiation is an integral part of the process of vindicating Māori rights that are infringed by the Crown as the process of negotiation empowers Māori to ensure ongoing respect of Māori rights. The Crown cannot be "miserly" in its attempts to resolve Treaty claims through negotiation,[62] as only generous reparations can restore the honour of the Crown and repair the relationship with Māori.[63] Further, the language of negotiation is the language of the Treaty settlement process,[64] and so should not be seen as an opportunity for the Crown to avoid engaging on issues of Treaty rights.

The Tribunal's Treaty Interest complements the analysis provided in this article so that the Tribunal's Treaty rights framework accounts for all three ways that Treaty rights can expect to impact on the legal system. Treaty rights create a limit on the legitimate use of state power by requiring state action to be consistent with the principles of the Treaty, take priority over competing interests, and require vindication in the event of a breach. The Tribunal's framework further

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61 *The Petroleum Report*, above n 16, at 68.

62 Ibid, at 66. The Waitangi Tribunal also noted that Māori expectations of the negotiation process should not be extravagant.

63 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi: WAI 143* (1996) at 314.

64 See Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana kit e Tiriti o Waitangi me ngā Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2nd ed, Office of Treaty Settlements, Wellington, 2002).

indicates that these three elements have a basis in the Treaty – it is implicit in the principles of the Treaty that the legal system should respond in these ways.

C Summarising the Tribunal's Treaty Rights Framework

The three Tribunal reports discussed in detail in the preceding sections, the *He Maunga Rongo Report*, the *Muriwhenua Fishing Report* and the *Petroleum Report*, provide significant guidance on how Treaty rights are to be applied in practice. The key point to be emphasised here is that the Tribunal's treatment of Treaty rights is consistent with the law's approach to recognition of other fundamental rights. Given that some Māori interests based on the Treaty may limit Crown sovereignty, take priority over other private interests, or require a meaningful, substantive remedy in the event of breach, this suggests strongly that such interests may be properly considered to be Treaty rights. The bare bones of the Tribunal's Treaty rights framework is, therefore, consistent with expectations regarding the legal recognition of fundamental rights.

The Tribunal's Treaty rights framework provides much more nuanced guidance than simply an expectation that Treaty rights be treated as other fundamental rights would be. Rather, the framework provides important guidance on the specific application of rights in the Treaty context. Treaty rights do place limits on the legitimate exercise of state power, but this does not mean that Māori interests can unduly interfere with the Crown's duty to govern in the interests of all New Zealanders. Article I of the Treaty requires that the Crown must be free to govern in the interests of all New Zealanders. However, where the opportunity exists, the exercise of that sovereign power must be consistent with Māori rights under the Treaty; legislating or otherwise acting contrary to such rights is only justifiable in exceptional circumstances. Further, the Crown must actively support Māori in the exercise of their own authority, to manage their own affairs. The exercise of Crown authority without regard to these factors is to ignore the existence of Treaty rights.

Given the importance of Treaty rights in fulfilling the Crown's promises under the Treaty, it is natural that Treaty rights should be afforded a priority over other private interests in some circumstances. In practice, this means that Treaty rights cannot be traded against these other "mere" interests, but must be given effect on their own account. Other interests may only be recognised to the extent that Treaty rights remain unaffected. Taking Treaty rights seriously means that those other, competing interests should be regulated or restricted first. To regulate Treaty rights in the same manner as other interests would, in effect, reduce those rights to mere interests as well.

Finally, Treaty rights require vindication if they are breached by the Crown. Any such breach is wrongful in itself, and a separate remedy is required in addition to any other redress in order to restore the honour of the Crown. In many cases, full compensation for losses resulting from the abrogation of Treaty rights is simply beyond the means of the Crown to provide for. The Tribunal has recognised this reality, but has also insisted that any redress or remedy for a breach of Treaty rights must be meaningful, and not miserly. Only redress offered in good faith with respect to the Māori interests involved can restore the honour of both Treaty partners.

In short, the Tribunal's Treaty rights framework is a specific, coherent application of legal recognition of important rights in the Treaty context. However, adopting the Tribunal's framework may prove problematic if that framework does not align with either the terms and principles of the Treaty, or Treaty jurisprudence developed by the courts. Assessing the Tribunal's Treaty rights framework against this wider context is the subject of the next Part.

IV Assessing the Tribunal's Treaty Rights Framework

Thus far, this article has focused on articulating the Tribunal's Treaty rights framework. One of the strengths of this framework has been highlighted by the recurring discussion of the way the law responds to rights: Treaty rights, according to the Tribunal, should elicit the same types of legal responses as other fundamental rights. Accordingly, the legal system should be able to integrate the Tribunal's framework fairly easily, at least prima facie, as the law already has available to it the key tools for recognising and giving effect to Treaty rights. This Part IV assesses the Tribunal's framework on two further grounds to emphasise that there is no meaningful impediment to adopting the framework more widely: consistency with the terms and principles of the Treaty, and compatibility with the Treaty jurisprudence of the courts.

A The Terms and Principles of the Treaty

The Tribunal's Treaty rights framework is entirely consistent with the terms and principles of the Treaty. This is important: it would be unprincipled to attempt to stretch the application of the Treaty beyond its terms and principles to artificially establish Treaty rights where such rights would not otherwise apply. This consistency is a product of the fact that the Tribunal's Treaty rights framework derives from the principles and text of the Treaty directly. The Tribunal's starting point is not traditional legal responses to issues of rights, but the claims of Māori based on the text and principles of the Treaty.[65] Sometimes this approach is implicit in the Tribunal's analysis, as is the case where Treaty rights are articulated in terms of striking the appropriate balance between kawanatanga and tino rangatiratanga.[66] The Tribunal also often makes this point expressly, noting that its mandate stems directly from the Treaty.[67] It can hardly be doubted, therefore, that the Tribunal's Treaty rights framework is consistent with, and assists with giving effect to, the terms and principles of the Treaty.

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65 Treaty of Waitangi Act 1975, s 6.

66 See Waitangi Tribunal *Ngai Tahu Sea Fisheries Report: WAI 27* (Brooker and Friend, Wellington, 1992) at 269.

67 *He Maunga Rongo Report*, above n 14, at 200.

B The Jurisprudence of the Courts

As foreshadowed, the ordinary courts approach Treaty issues in a very different manner from the Tribunal. While the courts may use the Treaty as an extrinsic aid to assist with the interpretation of statutes,[68] and have relied on the Treaty as a mandatory consideration in the administrative law context,[69] the only way the courts can inquire into the direct legal effect of the Treaty is where it has been incorporated into legislation.[70] Unlike the Tribunal, which can be proactive in dealing with Treaty issues, the courts must wait until the opportunity presents itself before providing a legal interpretation of the Treaty.

Where the courts have been afforded the opportunity, they have proven willing to make the most of it. Never was this more true than in the famous *Lands* case,[71] where the Court of Appeal was called on to interpret the statutory phrase "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[72] It is not necessary to repeat the facts or decision of that case, or the controversy that surrounded the Court's interpretation of Treaty principles.[73] The key point for present purposes is that the content of the principles of the Treaty in law, first articulated in the *Lands* case and developed in later cases, now constitutes a fairly recognisable list. A comprehensive review of the principles of the Treaty as articulated by the courts lists seven principles:[74]

- The acquisition of sovereignty in exchange for the protection of rangatiratanga;
- The partnership established by the Treaty, and the duty on the partners to act reasonably and in good faith;
- The freedom of the Crown to govern;
- The Crown's duty of active protection;

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68 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

69 *Attorney-General v New Zealand Māori Council (Radio Frequencies)* [1991] 2 NZLR 129 (CA).

70 *Te Heuheu*, above n 19.

71 *Lands*, above n 26.

72 State-Owned Enterprises Act 1986, s 9.

73 This controversy is in spite of the orthodox nature of the Court's jurisprudence on Treaty issues: see generally PG McHugh "'Treaty Principles': Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39 VUWLR 39 [McHugh "Treaty Principles"].

74 See Janine Haywood "Appendix: The Principles of the Treaty of Waitangi" in Alan Ward *National Overview: Waitangi Tribunal Rangahaua Whānui Series* (GP Publications, Wellington, 1997) vol 2 475 at 477-479.

- The Crown's duty to remedy past breaches of the Treaty;
- The Māori right to retain rangatiratanga over their resources and taonga and to have all the rights and privileges of citizenship; and
- The Crown duty (in some circumstances) to consult with Māori.

There is obviously some overlap between these principles. For example, the Crown's duty of active protection of Māori interests is likely to entail an obligation to consult with Māori, otherwise the Crown has no way to ensure that it is discharging its duty fully and properly. This overlapping nature of legal Treaty principles emphasises that these principles share many characteristics with Treaty rights. The right of the Crown to govern is listed above as a central Treaty principle, for example, and has been explicitly incorporated into the Tribunal's Treaty rights framework. Further, this right is always to be balanced with Māori rangatiratanga under the Tribunal's Treaty rights framework, and Māori rangatiratanga receives explicit recognition and protection under the courts' Treaty principles. The Crown's duty to actively protect Māori interests and express acknowledgement of the partnership-style relationship between Māori and the Crown provides a basis for Māori rights based on rangatiratanga and priority of these rights over mere privileges. The need to offer a remedy for a breach of a Treaty right under the Tribunal's framework is also mirrored in the courts' principle that the Crown should remedy past breaches of the Treaty. In sum, the ways in which the Tribunal suggests Treaty rights impact on the legal system are entirely consistent with the principles of the Treaty as articulated by the courts.

The courts' articulation of Treaty principles has itself drawn criticism. The well-worn criticism of judicial activism has followed the courts' articulation of Treaty principles, with the suggestion being that the courts have exceeded their mandate in interpreting and applying the principles of the Treaty.[75] However, this criticism is unwarranted on at least three grounds. First, it should be noted that the courts have been required by legislation to tackle the issue of Treaty principles head on. As the then President of the Court of Appeal noted in his judgment in the *Lands* case: "If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity."[76] Secondly, it should be noted that the orders of the Court in the *Lands* case were largely procedural and did not dictate the substantive detail of the principles of the Treaty and their application to the case. The substantive detail and application of principles was left to the political branch of government to determine, albeit through negotiations with Māori. Finally, it should be noted that the courts' approach to Treaty issues has, over time, been continually affirmed as

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75 Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 209.

76 *Lands*, above n 26, at 668.

orthodox within the wider context of common law recognition of indigenous interests.[77] No sensible claim of judicial activism can be made when this context is properly understood. The approach of the courts to Treaty issues, and by extension the consistent approach of the Tribunal, is orthodox and inherently non-controversial.

For completeness, one distinctive feature of the Tribunal's jurisprudence worth pausing over is its acknowledgement of a broader context constituted by the overlapping interests in which Treaty rights take affect. This aligns closely with common law developments on indigenous rights. The common law process of "rights integration" recognises that indigenous interests necessarily exist within a wide, overlapping framework of rights and interests.[78] Indigenous interests need to be articulated and given effect to within this broad context. The Tribunal gives express recognition to the right of the Crown to govern in the interests of all New Zealanders, the competing, private interests in natural resources such as fisheries, and the limits on available compensation as a means of redressing breaches as part of its Treaty rights framework. This awareness of the wider context further ties the Tribunal's Treaty rights framework to orthodox legal approaches to indigenous issues.

The consistency of approach between jurisprudence of the courts and the Tribunal is important because it demonstrates that there is nothing alien or controversial about the Tribunal's Treaty rights framework in a legal sense. The same fundamental principles underpin both approaches, and the courts have in fact proved willing to draw liberally on the Tribunal's analysis where it is relevant.[79] This suggests that there is nothing in principle preventing the adoption of the Tribunal's Treaty rights framework more widely within the legal system as part of a meaningful response to Māori claims based on the Treaty.

V Conclusion

The key theme of this article has been that the Waitangi Tribunal's jurisprudence provides a coherent framework for recognition of Treaty rights as a distinct subset of Treaty interests. The conceptual strength of the distinction between Treaty rights and other Treaty interests clearly has some analytical value. Where Treaty rights are identified, the legal system can be expected to respond in distinct ways: the Treaty and its principles certainly contain the scope to act as a limitation on Crown sovereignty, to take priority over other interests and to require a meaningful remedy for breach. However, it is equally important to note that not all interests founded in the

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77 See generally PG McHugh "What a Difference a Treaty Makes: The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law" (2004) 15 PLR 87; McHugh "Treaty Principles", above n 73.

78 See PG McHugh "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 25 at 60.

79 *Lands*, above n 26, at 655.

Treaty will require such responses. The difference between claims based on Treaty rights and other claims based on the Treaty can perhaps be summarised as the difference between an obligation on the Crown to recognise and consider Māori interests based on the Treaty (Treaty interests) and an obligation to actively protect those interests (Treaty rights).[80]

The distinction between Treaty rights and other Treaty interests is, therefore, an important one in both a conceptual and practical sense. One example of where the application of the distinction between Treaty rights and other Treaty interests may prove useful in practice, and so should be observed more readily, lies in clarifying the constitutional significance of the Treaty. That the Treaty is of constitutional significance is now widely accepted: it represents the foundation of a new British colony,[81] and signifies the beginning of constitutional government in New Zealand. However, the precise nature of the Treaty's constitutional significance is still contested. Recognition that Treaty rights are a distinct category of Treaty interests may assist in clarifying the matter, as rights are legal constructs with constitutional implications. Rights carry a high degree of both moral and legal force,[82] and rights manifest themselves in the legal system in ways that might be described as "constitutional": limits on state power, priority over competing claims and substantive remedies in the event of a breach are all constitutional ideals. Treaty rights therefore have strong constitutional parallels with other fundamental rights, such as human rights.[83] As such, a claim based on a Treaty right has a constitutional element that other Treaty claims may not have. Other Treaty interests do not demand the same level of constitutional recognition from the legal system, and therefore will not require the same type of legal response.

Recognising the constitutional nature of the Treaty, and therefore indigenous rights, is a pressing issue for New Zealand. Other common law jurisdictions have long recognised such rights: in the United States, treaties with indigenous peoples are considered supreme law,[84] and in Canada common law aboriginal rights are protected by the Constitution Act 1982, which recognises and

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80 See Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim: WAI 8* (1985) at 95.

81 William Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1971 reprint, Caper, Wellington, 1890) at 35, cited in Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1987) at 55.

82 Philip Joseph "The Higher Judiciary and the Constitution: A View From Below" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) 213 at 227.

83 This analogy has also been recognised by the Human Rights Commission: see generally Human Rights Commission *Human Rights and the Treaty of Waitangi: Te Mana i Waitangi* (Human Rights Commission, Wellington, 2003). See also Ivor Richardson "Rights Jurisprudence – Justice For All?" in Philip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61 at 75.

84 *United States v State of Washington* (1974) 384 F Supp 312 at 332.

protects such rights.[85] This indicates that New Zealand has significant ground to make up in this area. New Zealand has only recently moved away from the remaining tiny minority of countries that do not support the United Nations Declaration on the Rights of Indigenous Peoples,[86] suggesting that this is an area of New Zealand constitutional law still ripe for development. Appropriate application of the distinction between Treaty rights and other Treaty interests would allow the development of a New Zealand approach to indigenous rights that is consistent with legal principle and international practice. Further, a principled legal response to Māori claims based on the Treaty compels the adoption of such an approach.

Despite the important implications of the distinction between Treaty rights and other Treaty interests, however, it is a distinction that is not often observed.[87] This can mean that the rhetoric of Treaty rights is used in a way that disconnects it from the substance of such rights, resulting in confusion as to the intended effect of such rights in the legal system. Too often the phrase "Treaty rights" is used indiscriminately to refer to any kind of Treaty interest, whether a Treaty right as properly understood or otherwise. Alternatively, the conglomerate phrase "rights and interests" is used when discussing the legal effect of the Treaty, regardless of whether the accompanying analysis actually permits recognition of Treaty rights as distinct from interests that can form part a of broad policy balancing exercises.[88] Such attitudes may need to be reconsidered in light of the Tribunal's Treaty rights framework.

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85 Constitution Act 1982 (Canada), s 35(1).

86 Declaration on the Rights of Indigenous Peoples (opened for signature13 September 2007) GA Res 61/295, A/Res/61/295 (2007).

87 The primary exception appears to be Boast, above n 39. Another possible exception is the work of Paul McHugh, but while McHugh recognises some of the unique jurisprudence associated with rights and applies this jurisprudence in the Treaty context, he does not directly draw a distinction between rights and other interests: See Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

88 See Palmer, above n 75, at 210.