

NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o nga Kaupapa Ture a Iwi o Aotearoa

New Zealand Journal of Public and International Law



VOLUME 3 • NUMBER 2 • NOVEMBER 2005 • ISSN 1176-3930

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Hon Michael Kirby
Philip A Joseph
Paul McHugh

Nicole Roughan
Steven Freeland
Jason N E Varuhas

VICTORIA UNIVERSITY OF WELLINGTON
Te Whare Wānanga o te Ūpoko o te Ika a Māui



FACULTY OF LAW
Te Kauhanganui Tatai Ture

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2005

The mode of citation of this journal is: (2005) 3 NZJPIL (page)

The previous issue of this journal is volume 3 number 1, June 2005

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Robin Cooke Lecture 2004

Deep Lying Rights – A Constitutional Conversation Continues <i>Hon Michael Kirby</i>	195
---	-----

NZCPL Lecture Series

Scorecard on our Public Jurisprudence <i>Philip A Joseph</i>	223
---	-----

Articles

Setting the Statutory Compass: The Foreshore and Seabed Act 2004 <i>Paul McHugh</i>	255
Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy <i>Nicole Roughan</i>	285
Child Soldiers and International Crimes – How Should International Law be Applied? <i>Steven Freeland</i>	303
One Person Can Make a Difference: An Individual Petition System for International Environmental Law <i>Jason N E Varuhas</i>	329

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship.

The NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Submissions from law students at New Zealand universities are particularly encouraged. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of the NZJPIL for indications as to style; for specific guidance see the Victoria University of Wellington Law Review Style Guide, copies of which are available on request. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Contributions to the NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$95 (New Zealand) and NZ\$120 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

TE TIRITI AND THE CONSTITUTION: RETHINKING CITIZENSHIP, JUSTICE, EQUALITY AND DEMOCRACY

*Nicole Roughan**

The possible reform of New Zealand's constitution has long generated debates about how to account for the place of Te Tiriti and the weight of its guarantees, but such debates overlook the underlying conceptions of citizenship that are contested in disputes over rangatiratanga and sovereignty. This article argues that constitutional harmony requires moving beyond debates over rights to a reassessment of the very notion of citizenship to which our constitution sets out aspirations. Rather than conceiving of citizenship in the orthodox liberal fashion of universality and unity towards a common will, there is a need to recognise a differentiated notion of citizenship that can account for a plurality of nations and values. Within this framework, theory and practice can begin to address how Te Tiriti and the practice of rangatiratanga might be reconciled with rule of law ideas about justice, equality and democracy.

The constitution of any society, whether appearing in a written enactment or in basic rules of the common law, should say much about the ideal of citizenship to which that society ascribes. It should give an indication of how law is to address and balance competing interests, how it is to protect popular and minority interests and how the rule of law is to be protected. A constitution is where we look to find understandings of the rights and responsibilities of those who govern or are governed and remedies for times when these are not being met. In fulfilling such an important role, a constitution should ideally have a sound theoretical basis, a historical justification and a firm level of public acceptance. No such ideal is evident in New Zealand. Instead, New Zealand's constitutional theory and justification have too often ranged from a self-denying

* Assistant Lecturer, Faculty of Law, Victoria University of Wellington.

"atheory",¹ to an inaccurate, exclusionary story of origin adopted from our colonial past.² As a result, the constitution that we live with fails to clarify the role of the Treaty of Waitangi/Te Tiriti o Waitangi³ or the practice of rangatiratanga⁴ and fails to address the divergent conceptions of justice, equality and democracy that "indigenous issues" bring to light. It is a constitution wholly unsuited to a nation struggling to enter the post-colonial age: its combination of confusion and exclusion offers little help in resolving our most difficult questions of law and justice.

Current attention to the possibility of a constitutional review, reflected in the creation of a select committee charged with investigating paths of reform, illustrates the extent to which confusion reigns and disharmony results. The latest attention to constitutional matters has been driven by polarised reactions to the specific issue of indigenous rights rather than by broad concerns over power relationships or civil protection. Of all the matters to which reformist attention might be addressed, perhaps the most intractable remains the proper status of Te Tiriti o Waitangi and what it means for Māori, Pākehā and the Crown. The debate over the status and content of the Treaty does not, however, simply hinge upon questions of rights and obligations. Instead, this article argues that at the heart of constitutional terms and guarantees lies the notion of citizenship and, in particular, what it means to be a citizen of Aotearoa/New Zealand. Giving weight to any conception of what justice is and what it requires, what democracy involves and how it should work, or what equality means and how it can be achieved, requires close attention to what our ideal of citizenship is and how a constitution might give it expression.

This article, therefore, examines how an ideal of citizenship capable of underpinning our constitution might take shape in a way that neither avoids theory nor ignores history. The key issue is to consider how Te Tiriti o Waitangi and the practice of rangatiratanga as its foremost guarantee relate to the particular conception of citizenship that has prevailed in the liberal thought and practice upon which our current constitution is premised. That conception of citizenship is framed here as the sometimes hidden arena for debate in New

1 For example, the pervading influence of A V Dicey and the positivist reluctance to justify or re-theorise the British constitution can be seen in the relative lack of analysis of New Zealand's own constitutional identity and how this might differ from the British. See P G McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 U Toronto LJ 69, 85.

2 McHugh, above n 1, 69-73.

3 To avoid promoting either the Māori text (Te Tiriti) or the English text (the Treaty) and to recognise the importance of both, these terms are used interchangeably in this article unless otherwise indicated.

4 For an introductory discussion of this concept, see pages 288-289. For a more detailed account, see Simon Hope "The Roots and Reach of Rangatiratanga" (2004) 56 Political Science 23.

Zealand between those who insist on universality of subjects and object to "special" treatment and those who seek justice, equality and participation in accordance with the practice of rangatiratanga. The constitutional role and meaning of the Treaty, through this lens, is not only relevant to protecting Māori rights or embodying Crown duties: it can also contribute to New Zealand's constitutional notion of what citizenship involves, especially if a model of citizenship might help to reveal the demands of justice, equality and democracy.

In this way, the role of Te Tiriti and justifications for the practice of rangatiratanga are not left to democratic convenience. If our constitutional conception of citizenship accounts for rangatiratanga, no political majority should be able to suppress it. The view of those opposed to a constitutional role for the Treaty or its principles, seeing it as no basis for nationhood and lacking a unifying role, may well be borne out by apparent public dissent over "special rights" and the "grievance industry", but such comments involve question-begging. The prior question to whether Te Tiriti is a basis for nationhood is whether we indeed have or desire a single nationhood or unifying ideal, or whether our conception of citizenship can be a differentiated one with multiple nations interacting in one society. This article addresses these questions, taking the Treaty as a starting point and developing other arguments for how liberal theory can account for and justify the practice of rangatiratanga.

Looking first at Te Tiriti itself, problems emerge over what we believe it to mean and what it therefore says about citizenship. In Article 2 of the Māori text, the guarantee of tino rangatiratanga provides for the continuation of Māori authority and control, suggesting that any notion of citizenship is one of membership of communities constituted in accordance with tikanga. In Article 3, Māori are accorded the same rights and duties as British citizens, but Sir Hugh Kawharu's argument that the protection of tikanga involves a protection of rights and duties under existing law and custom, rather than those of the British subject, suggests that citizenship was not to be solely guided by the British conception.⁵ In contrast, the English version of the Treaty purports to bring all Māori within the citizenry of the Crown in accordance with the cession of sovereignty. The particular conception of citizenry in which Māori were to be included was undoubtedly British, with its attendant rights and privileges. Only pre-existing property rights were protected, not the exercise of rangatiratanga nor the continuation of citizenship according to tikanga.

5 See generally I H Kawharu's modern English translation of the Māori text of Te Tiriti, fn 11. The translation is reprinted on the New Zealand government website in an apparent acknowledgement of its authority, see <<http://www.treatyofwaitangi.govt.nz/treaty/background.php>> (last accessed 6 October 2005).

Leaving aside questions of translation or priority, of most interest here is the question of what citizenship in New Zealand might look like as a result of the Treaty and Te Tiriti. The distinction between citizenship as legal status and citizenship as the notion of what it means to be a member of a community⁶ allows some of the ambiguities to be dealt with. Until the 1970s, New Zealand's constitutional picture showed a singular legal status in which Māori had become citizens of the British colony of New Zealand. In recent Treaty jurisprudence, however, more attention has been given to what it should mean to be a citizen. This is thought to incorporate some form of protection for a Māori conception of community membership, in the form of the practice of rangatiratanga.

Because rangatiratanga is the foremost expression of a continuation of the authority of hapu (sub-tribe or kinship groups) or iwi (tribal groupings with a common ancestor), the concept and practice of rangatiratanga lies at the centre of interaction with Western notions of citizenship and its derivative accounts of social equality, justice and democracy. Although the traditional English rendering of rangatiratanga is something like "chieftainship",⁷ "authority",⁸ "Māori control over things Māori"⁹ or "sovereignty",¹⁰ many commentators now challenge this characterisation of rangatiratanga as only relating to the political sphere. Rangatiratanga is not merely a matter of political or economic power, but is "a way of living and interacting with each other", a shared philosophy that emphasises whakapapa (genealogy and connections to ancestors and the land) and whanaungatanga (relationships between people).¹¹ Mason Durie, while acknowledging the varied meanings of the term, argues that there is "reasonable agreement" that the foundations of rangatiratanga include mana wairua (the spiritual dimension), mana whenua (tribal control of land and resources), mana tāngata (individual well-being and rights) and mana

6 Will Kymlicka and Wayne Norman "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104 *Ethics* 353, 354–381.

7 I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319.

8 Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai-9, Department of Justice, Wellington, 1987) para 11.5.19 ["Orakei Report"].

9 Mason Durie "Tino Rangatiratanga" (1995) 1 *He Pukenga Korero: A Journal of Māori Studies* 44, 45 ["Tino Rangatiratanga"].

10 Moana Jackson and others "Rangatiratanga: Nga Whakaaro Māori" in *Te Whakamarama: Māori Law Bulletin No 8 (Nga Kaiwhakamarama i nga Ture)* (Wellington, 1991) 6–7.

11 Pania Maikara Tuhokairangi Te Whaiti *Rangatiratanga* (He Parekereke Occasional Publication Series, Victoria University, Wellington, 1995) 37.

Ariki (authority of Ariki to guide their peoples).¹² From this perspective, rangatiratanga is not merely about political control, but is about mana¹³ and well-being in all spheres.

The practice of rangatiratanga is therefore not merely about the exercise of control over resources or the right to autonomous social and political institutions. It involves the protection of the concept of rangatiratanga and provision for tāngata whenua to live according to the philosophies and values that it embodies. In this sense, the relationship between rangatiratanga and citizenship values, which our constitutional debates must confront, is as much about the maintenance of cultural identity as it is about institutions or the distribution of power. The relationship also extends to the internal aspect of rangatiratanga, which requires that it be recognised not only between Māori and the wider society, but also within Māori society.¹⁴ Finally, as the philosophy and practice of rangatiratanga are not gifts or rights to be granted by the Crown, but must instead be exercised by the people who hold it,¹⁵ any citizenship model to emerge must provide the opportunities for that affirmation.

In practice, rangatiratanga might involve a range of outcomes including equal participation in dual governing structures (such as in the Anglican Church), special representation within a single structure (akin to the Māori seats currently allocated in Parliament), devolution of responsibilities for services to local hapu and iwi or even, some argue, separate Māori sovereignty. The location of rangatiratanga is, in practice, a controversial exercise. Debate exists over the degree to which non-tribal or non-traditional forms of association (such as urban iwi) can or should exercise rangatiratanga.¹⁶ A more conceptual dispute centres on attempts to characterise any one type of Māori grouping – iwi, hapu or whanau – as "fundamental".¹⁷ Whatever form it takes, however, and wherever

12 Te Whaiti, above n 11, 48.

13 The Waitangi Tribunal has considered mana to be the "Māori form" of rangatiratanga: *Orakei Report*, above n 8, para 11.5.19.

14 "Tino Rangatiratanga", above n 9, 46.

15 Te Whaiti, above n 11, 22. This also relates to the ideas of John Rangihau which ascribe rangatira status to everyone, and thereby rangatiratanga is sourced in the mana of the people rather than being a "top-down" variety of authority. See *Orakei Report*, above n 8, ch 4.

16 See the Waitangi Tribunal's discussion in *Te Whanau o Waipareira report (Wai-414)* (GP Publications, Wellington, 1998). See also Andrew Sharp "Blood, Custom and Consent: Three Kinds of Māori Groups in New Zealand and the Challenges they Present to Government and the Constitution" (2002) 52 U Toronto LJ 9.

17 Andrew Sharp "Traditional Authority and the Legitimation Crisis of Urban Tribes: the Waipareira Case" (2003) 6 *Ethnologies Comparées* 3–4. Available online at <<http://alor.univ-montp3.fr/cerce/r6/a.s.htm>> (last accessed 6 September 2005).

it is located, the practice of rangatiratanga is about the restoration of non-institutional cultural autonomy and mana Māori in all spheres, including those internal to Māori society.

At first glance, this affirmation and exercise of rangatiratanga may appear out of step with the ideal of citizenship at the heart of classical and modern liberal theory. As Will Kymlicka and Wayne Norman outline, the orthodox interpretation of democratic citizenship is one where citizenship is "by definition, a matter of treating people as individuals with equal rights under the law."¹⁸ Roman law similarly conceived of citizenship as conferring the freedom to act by law and the protection of the shared laws of the community.¹⁹ However, citizenship within that ideal was an exclusive concept. To be a citizen, one had to be deemed to have the rational capacity to act in accordance with a "general will" rather than for private interest.²⁰ In the historical development of the institution of citizenship, this ideal of a general will required homogeneity of citizens, with the exclusion of "groups judged not capable of adopting that general point of view".²¹

In modern times, pressure for universal citizenship has seen previously excluded groups (including women and ethnic minorities) given legal citizenship status, but it has also led to the reinforcement of two ideals that many now use to challenge any form of differentiated or separate citizenship. First, universalistic thinking has conceived of equality as "sameness", which supports a homogeneous citizenry concerned with general rather than particular interests. Secondly, this conception of universalism insists that laws and policies apply to all in the same way, regardless of individual and group difference.²² It is precisely this conception of citizenship that is articulated by policies appealing to "one people" and "one standard of citizenship for all",²³ and that denies the practice of rangatiratanga by tāngata whenua.

18 Kymlicka and Norman, above n 6, 370.

19 J G A Pocock "The Ideal of Citizenship Since Classical Times" in Ronald Beiner (ed) *Theorising Citizenship* (State University of New York Press, Albany, 1995) 35.

20 See generally the work of Jean-Jacques Rousseau and other Republican thinkers on citizenship. See discussion in Iris Marion Young "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship" (1989) 99 *Ethics* 250, 252-254.

21 Young, above n 20, 251.

22 Young, above n 20, 250.

23 See for example National Party leader Don Brash "Nationhood" (Speech to the Orewa Rotary Club, Orewa, 27 January 2004 <<http://www.national.org.nz/Article.aspx?ArticleID=1614>> (last accessed 6 September 2005).

Should this notion of citizenship be the one our constitution reflects or should the practice of rangatiratanga be accommodated by a reconstituted view of what citizenship ought to be? Arguments for the orthodox model maintain that it acts as the foundation of a healthy community and forms the basis of social bonds.²⁴ The appeal to unity is certainly a powerful one, appearing in many explanations of constitutionalism.²⁵ However, as James Tully has argued, evidence does not support the claim that the unity of a political association "depends on the uniformity of its members".²⁶ Instead, where states are home to multiple national groups, attempts at integration or assimilation of minority or indigenous nations have more often led to stronger affirmations of distinct identities and, in New Zealand, the emergence of what Roger Maaka and Augie Fleras call a "politics of indigeneity".²⁷ As Durie argues, "Māori in Aotearoa New Zealand want to remain Māori."²⁸ Although it might be expedient to ignore claims for differentiated citizenship and rights, doing so may only increase grievance and the alienation of groups within society.²⁹

Recent works by Iris Marion Young, James Tully and others argue for a new conception of citizenship that can better account for pluralism in multinational states and that would, in the New Zealand context, support a constitutionally-protected practice of rangatiratanga. The model of differentiated citizenship advocated here relates to liberal notions of justice, equality and democracy not by relegating them behind "cultural rights", but by holding the retention and exercise of group identity as being justified by liberal values. The conception re-examines the orthodox virtues of citizenship so that what it means to be a citizen includes the willingness to engage with difference, rather than the

24 Kymlicka and Norman, above n 6, 372.

25 See for example the works of Thomas Hobbes and Samuel Pufendorf on sovereignty, which both assume the link between uniformity, unity and power. For discussion see James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995) 184 ["*Strange Multiplicity: Constitutionalism in an Age of Diversity*"].

26 James Tully "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada" in Curtis Cook and Juan D Lindau (eds) *Aboriginal Rights and Self-Government: the Canadian and Mexican Experience in North American Perspective* (McGill-Queen's University Press, Montreal, 2000) 68 ["A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada"].

27 Roger Maaka and Augie Fleras "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 93.

28 Mason Durie *Te Mana Te Kawanatanga - The Politics of Self-Determination* (Oxford University Press, Auckland, 1998) 4-5.

29 Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, Princeton, New Jersey, 1992) 64.

seeking of a universal, general will. In application, such differentiated citizenship provides a basis for the practice of rangatiratanga through self-determination, the exercise of mana in all spheres and the promotion of philosophies consistent with tikanga.

Looking first at the liberal justifications for a differentiated conception of citizenship, Iris Young has argued that it is only through such differentiation that all people can be included and participate fully in society.³⁰ She considers that defining citizenship as generality has obscured the liberal requirement that all perspectives and needs have a voice and are respected.³¹ Furthermore, where there is or has been oppression of particular groups in society,³² the adoption of a universalistic and unified conception of citizenship "tend[s] to reproduce existing group oppression".³³

Other liberal arguments have been used to support the possible practical consequences of a differentiated conception of citizenship. At its fullest extent, the concept of differentiated citizenship supports arguments for aboriginal self-government and autonomy in public life. In Kymlicka's view, indigenous group rights, which might extend to self-government, must be thought of as "an essential component of liberal political practice".³⁴ Freedom, if it is to be meaningful, requires that citizens have access to a "societal culture", which may be best promoted by "group-differentiated measures".³⁵ More forcefully, James Tully argues that it is self-government which enables any people (indigenous or otherwise) to "regain their dignity as equal and active citizens."³⁶ The implication here is that people cannot be true citizens where they do not participate in governing their own societies. There is no greater value in Western civilisation, Tully argues, than "the liberty of self-rule".³⁷

30 Young, above n 20, 258.

31 Young, above n 20, 262.

32 Oppression here is broadly defined, and is based on Young's earlier work: Iris Young "Five Faces of Oppression" (1988) 19 *Philosophical Forum* 270. It includes matters of "cultural imperialism" and would seemingly fit the arguments made by those such as Moana Jackson in "The Colonisation of Māori Philosophy" in Graham Oddie and Roger Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 1.

33 Young, above n 20, 258-259.

34 Will Kymlicka *Liberalism, Community, and Culture* (Clarendon Press, Oxford, 1989) 154.

35 Will Kymlicka *Multicultural Citizenship: A Liberal Theory on Minority Rights* (Clarendon Press, Oxford, 1995) 84 ["*Multicultural Citizenship: A Liberal Theory on Minority Rights*"].

36 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 67.

37 *Strange Multiplicity: Constitutionalism in an Age of Diversity*, above n 25, 184.

The common grounds of such arguments are that if societies are to be truly liberal and constitutions are not to be oppressive they must account for the differences between peoples within those societies. This is especially the case in multinational states, where the assertion of a singular "Nation-State" involves the denial of both the ability of other national members to live and choose freely and their ability to participate fully in the legal or political institutions of the State on terms of their own making.

Most important, however, are the implications of these liberal defences for the content of a new citizenship conception. Rather than working for a general will, a differentiated notion of citizenship requires the recognition that there is no such will or uniformity of interest. As Kymlicka and Norman argue, the health of a society depends on the quality of its citizens' attitudes, which should include not only a desire to participate in legal and political processes and the exercise of personal responsibility, but also a sense of their own identity and how they can "work together with potentially competing forms of identities."³⁸ Young argues further that it is only through the maintenance and public expression of these group identities that the citizenship virtues of acknowledging responsibilities to others, and the equal worth of their interests, can be achieved.³⁹

In Aotearoa/New Zealand, this requirement of acknowledgment between multiple citizenship identities has proved troublesome in constitutional debates over Te Tiriti and the practice of rangatiratanga. Ranginui Walker has discussed how New Zealand's sense of nationhood has "sought symbolic expression" through the Treaty, yet the modern nation-building process has in substance been a "process predicated on nation-destroying".⁴⁰ Eva Rickard argued similarly in 1984 at the national hui in Ngaruawahia, stating that although the Treaty and its celebrations are "perhaps the only true symbol[s] uniting Māori and Pākehā in one nation ... [they are] also a symbol of the loss [Māori] have suffered."⁴¹ The Treaty, in this sense, provides at best a problematic basis on which a single nationhood could be grounded.

However, when the question is not one of grounding a single nationhood, but one of building a constitution which acknowledges distinct nations within a differentiated notion of citizenship, Te Tiriti and the practice of rangatiratanga provide more helpful bases for

38 Kymlicka and Norman, above n 6, 353.

39 Young, above n 20, 257–258.

40 R J Walker "The Treaty of Waitangi: as the focus of Māori protest" in Kawharu (ed), above n 7, 255–257.

41 Eva Rickard "Submission to the Economic Summit Conference" in Arapere Blank, Manuka Henare and Haare Williams (eds) *He Korero mo Waitangi 1984 - He Tohu Aroha, Ki Nga Tupuna*, (Te Runanga o Waitangi, Auckland, 1985) 42.

thought and practice. This much has been suggested by Parliaments of the past with the inclusion of Treaty-references in legislation, and it has been given meaning by the courts with the development of principles of partnership.⁴² The conclusion reached by the 1988 Royal Commission on Social Policy was that the Treaty "was not about sameness or the introduction of one social order at the expense of another."⁴³ Instead, as Durie has also argued, it was to be a document "for all New Zealanders".⁴⁴ What no official source has suggested is that for such standing to be achieved, the Treaty needs to be seen to fulfil a more complex role than simply providing for rights and duties. Rather than viewing the Treaty as providing for a citizenship allowing "diversity within agreed understandings",⁴⁵ it needs to be understood as a basis for a differentiated citizenship in which there may not be agreed understandings, only a willingness to accommodate differences. In this way, Te Tiriti and its guarantees lie at the heart of any constitutional expression of our citizenship ideals.

Accordingly, the Treaty today is not only about Māori rights, but contains the grounds on which our own differentiated citizenship might be modelled. Those who see Te Tiriti as creating only argument and grievance are correct in denying it a role as a basis for single nationhood, because it is only when we accept the need for a differentiated conception of citizenship, with multiple nations, that the Treaty can help us work out what citizenship is and requires. The rights and responsibilities of citizenship are not found in the Treaty alone: indeed, all of our constitutional principles give expression to important components, but with the adoption of the differentiated conception Te Tiriti provides several key pointers. It gives Māori status as *tāngata whenua*, while still giving Pākehā New Zealanders historical grounds for their citizenship. It also protects the practice of *rangatiratanga*, which is not subsumed under a singular British conception of the subject. In this regard, the Treaty is fundamentally about citizenship – not of a homogenised Nation-State, but of a multinational state where differentiated political communities must work out their ongoing interactions.

Within such a framework, it remains to consider how the practice of *rangatiratanga*, as autonomy, control and philosophy, relates to our prevailing understandings of justice,

42 See for example *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 ("Lands"); Waitangi Tribunal *Manukau Report* (Waitangi Tribunal, Wellington, 1985). For discussion see Te Puni Kokiri *He Tirohanga o Kawa kit e Tiriti o Waitangi* (Te Puni Kokiri, Wellington, 2001) 77–85.

43 Royal Commission on Social Policy *The April Report* (Vol II, Royal Commission on Social Policy, Wellington, 1988) 80 ["*The April Report*"].

44 M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in Kawharu (ed), above n 7, 280.

45 *The April Report*, above n 43, 80.

equality and democracy. The task here is to work on the details of legal, political and social practice which emerge from a differentiated conception of citizenship, on the basis that we should not or cannot allow differentiated citizenship to mean separate statehood. Any steps taken towards constitutional review will not be about partitioning legal or economic space, but about according proper standing to different conceptions thrust together; that is, although group loyalty is an enduring force, cultural communities are constantly "interacting and influencing each other".⁴⁶ On this view, there can never be a purity or separation of cultural communities that have developed complex personal, commercial and political relationships in their common territory.⁴⁷ Instead, what is required is a means of governing group interaction or, in Waldron's words, a "structure of rights" which "stand apart from attachments" to particular communities.⁴⁸ By differentiating the conception of citizenship to allow for multiple communities, each of those groups must be accorded value in the constitutional process of determining that structure of interaction.

What, then, is a workable conception of justice within this differentiated framework? Although no constitution can hope to settle concrete matters of justice, it can provide an indication of how general principles are to be balanced. To ask the question, however, is to raise not only issues surrounding what we believe is required to achieve justice, but also the fundamental problem of what we understand justice to mean. It is this fundamental question to which, Andrew Sharp has argued, we have no agreed answer.⁴⁹ In matters of reparative justice, he posits, we disagree about what acts are wrong and how reparation might put them right, while in matters of distributive justice, we not only disagree over the basis for distribution (need, desert, equality), but also over the meanings of those terms. In the New Zealand context, disagreements arise not only over liberal justice conceived as individual rights, but also over questions of the relationship between Māori and other groups and between Māori and the Crown. Given this lack of basic agreement, Sharp argues, injustice is inevitable and the only response is to uphold an artificial legal justice that comes closest to the competing conceptions.⁵⁰ It is the content of this best solution, not the particular content of justice from competing conceptions, to which a constitution ought to offer guidance.

46 Jacob T Levy *The Multiculturalism of Fear* (Oxford University Press, New York, 2000) 5–6.

47 Levy, above n 46, 47.

48 Jeremy Waldron *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, Cambridge, 1993) 379.

49 Andrew Sharp *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand since the 1970s* (2 ed, Oxford University Press, Auckland, 1997) 23 ["Justice and the Māori"].

50 *Justice and the Māori*, above n 49, 25.

Within a differentiated conception of citizenship, justice between Māori and Pākehā or Māori and the Crown can move beyond the simple theory of contractual justice relying on Te Tiriti as a basis for reparative claims.⁵¹ That conception, in which rangatiratanga is seen as a right and claims are made for reparation of past breaches, is insufficient for either providing a forward-looking account of what justice requires or for justifying the enactment of reparative justice against competing social imperatives.⁵² It is in these two areas that a differentiated citizenship model provides different answers to what justice means and requires.

First, and as James Tully argues, within a multinational democracy there must be a relationship between groups that "would meet the demands of justice and utility on both sides".⁵³ Tully outlines a set of principles to constitute such a relationship, which are forward-looking in providing for a process of group interaction, but at the same time derive from within each group's own philosophies and practices.⁵⁴ In the Canadian context, Tully identifies these principles as mutual recognition, intercultural negotiation, mutual respect, sharing and mutual responsibility.⁵⁵ In New Zealand, the practice of rangatiratanga as a philosophy of living according to tikanga offers a set of principles that, if also valued within Pākehā society, could form a comparable foundation. Although a full analysis of such principles is necessarily a matter for separate study, a starting point might be principles of kaitiakitanga (relating to Western ideals of responsibility, sustainability and care), utu (restoration of wrongs and rebalancing), recognition of Matatini (diversity)⁵⁶ balanced with the potential for whakakotahi (solidarity) and mana motuhake (autonomy and self-determination). A consensual interaction, upon any such principles, provides the only means of meeting the "exacting demands of justice in a postcolonial age."⁵⁷

The second element of justice emerging within the differentiated conception is one that deals with the weakness of justice itself. Not only is law an imperfect means of arriving at just outcomes, but, as Sharp argues, most New Zealanders do not see justice itself as "the

51 *Justice and the Māori*, above n 49, 32–33.

52 Jeremy Waldron "Historic Injustice: Its Remembrance and Supersession" in Oddie and Perrett (eds), above n 32, 156–159.

53 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 43.

54 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 44.

55 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 44–45.

56 "Tino Rangatiratanga", above n 9, 47.

57 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 44.

whole of political virtue".⁵⁸ Pragmatists and utilitarians may prefer solutions in which justice is not met, but political preferences are. In the example of demands for autonomy or rangatiratanga, denial is often founded on expedient concerns for political stability and unity.⁵⁹ However, if the model of the unified, homogenised citizenry is replaced with the view that citizenship must account for multiple nations, the goal of stability becomes a matter of addressing justice between groups rather than subjugating the interests of one. On this view, stability of the whole could not be a basis for denying the value of one nation's claims to justice. As Eddie Durie has argued, justice "in its broad sense requires fairness to all peoples".⁶⁰

If such a notion of justice is indeed possible, what appears vital is a method of participation in society that allows for the interaction of national groups. Here, the relationship between rangatiratanga and democracy can be investigated within the model of differentiated citizenship. The aim is to move past a Tocquevillian democracy in which unity is achieved through inclusion only of those with "like feelings and similar opinions",⁶¹ towards a model of non-national democracy that "transcends the image of the nation".⁶² As William Connolly argues, wherever pluralism (including ethnic and cultural pluralism) exists, there is a risk that democracy will degenerate into suppression of minority interests in favour of those of the majority.⁶³ While such majoritarian rule lies at the heart of the practice of democracy, it is necessary to move beyond a model where the majority need not take any account of the interests of minorities.

What is needed when differentiated citizenship is acknowledged is a model of democracy that both protects group representation of disadvantaged minority identities⁶⁴ and is underpinned by an "ethos of engagement"⁶⁵ between constituencies. As Young

58 *Justice and the Māori*, above n 49, 163.

59 Wayne Norman "Justice and Stability in Multinational Societies" in Alan G Gagnon and James Tully (eds) *Multinational Democracies* (Cambridge University Press, Cambridge, 2001) 91.

60 E T Durie "Justice, Biculturalism and the Politics of Law" in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) 33.

61 A de Tocqueville *Democracy in America* (Harper & Row, New York, 1966).

62 William Connolly "The Liberal Image of the Nation" in Ivison, Patton and Sanders (eds), above n 27, 188.

63 Connolly, above n 62, 190.

64 Young, above n 20, 263. Young believes that only groups describing the major identities, and which are in fact disadvantaged, deserve special representation. Thus her model is distinct from simply allowing freedom of expression.

65 Connolly, above n 62, 190.

argues, just democratic outcomes can best be achieved when everyone must confront others' opinions, yet without protection for group representation, majorities can too easily avoid this process of confrontation.⁶⁶ All represented groups must also approach the decision-making process with a mind to engagement, because once the ideal of the universal will is removed, each group (including the minority identities) must recognise that no single constituency embodies the values of the general public.⁶⁷

In New Zealand, the provision of the Māori seats in Parliament is often seen as a form of group representation that serves this model of multinational democracy. However, measured against the practice of rangatiratanga and differentiated citizenship, the seats appear of limited value, not only because they constitute a minority in the institution of the majority, but also because they do not serve the ethos of engagement required for this interactional democracy to work. Holders of the Māori seats tend to be put in positions where they can either be responsive only to the interests of their constituents without accounting for the claims of others or where they must subject constituents' interests to the perceived political needs of the wider public and the parties to which they belong.⁶⁸ The seats do not allow for the practice of rangatiratanga, nor do they effectively lead to just and interactive democratic decision-making.

A constitutional solution that would uphold rangatiratanga, but also provide for engagement through which to test the justice of indigenous claims, is currently an elusive one. Professor Whatarangi Winiata's controversial suggestion - that a Māori House of Parliament sit in parallel with a non-Māori body under an integrated upper house - has failed to gain traction and would require major constitutional reform.⁶⁹ The model or a version of it is, however, attractive in that it would allow the form of democratic participation in a Māori house to be in accordance with the practice of rangatiratanga as leadership and authority, which might see self-rule exercised in a similar but not identical way to the institutional model in Western democracy.⁷⁰ In practice, the ramifications of such a model are complex and difficult, but in essence the idea or a version of it might accord with an ideal of democracy and engagement in multinational states.

66 Young, above n 20, 263.

67 Connolly, above n 62, 192.

68 Compare here the responses of Māori Labour Party Members of Parliament to the Foreshore and Seabed Bill, where Tariana Turia MP took the first path and most other members favoured the latter.

69 Bernie Steeds "Leaders Debate Treaty Divisions" (2 ed, Hamilton, 13 April 2000) *Waikato Times* Hamilton 6.

70 "A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada", above n 26, 67.

Finally, the differentiated conception of citizenship might provide a response to the prevalent belief that the rule of law notion of equality cannot accommodate differential treatment. Such sentiments have been evident in the level of public support for the stance against special rights taken by some New Zealand political parties. As Andrew Sharp has outlined, the egalitarian ideology of equality, embraced by many in both Māori and Pākehā societies, has been a feature of debate since the courts first began recognising Treaty principles, customary rights and other Māori-specific entitlements.⁷¹ Such egalitarian sentiments, which compete against claims that past wrongs have led to present disadvantage justifying redress, reflect differing views of what distributive justice or social equity require.⁷²

However, and as Sharp persuasively argues, equality under the law does not mean that everyone is entitled to the same rights or is subject to the same duties. Instead, we accept that people do have different legal rights and duties by virtue of their past actions and present situations.⁷³ For Māori, as for any individual or group, "special treatment is justified by reference to something special which happened in the past."⁷⁴ Applying this argument to even the most understated assessment of what has happened to affect the position of Māori today, it becomes difficult to deny the justification for unequal treatment to compensate for past discrimination or for present disadvantages resulting from that past. These are arguments which persist even outside of an acknowledgment of differentiated citizenship.

More specific to the differentiated model, however, is the view that affirmative action policies warrant a departure from the liberal conception of equality on the grounds of past wrongs. They also serve to compensate for the result of the standard conception of the homogenous citizen. As Kymlicka argues, the State "unavoidably promotes certain cultural identities" to the detriment of others.⁷⁵ Iris Young takes the point further, arguing that under a universal conception of citizenship, everyone is measured according to the same standards and norms, which purport to be neutral.⁷⁶ However, once the universality ideal

71 *Justice and the Māori*, above n 49, 194–198.

72 *Justice and the Māori*, above n 49, 198.

73 Andrew Sharp "Justice, Self-government, and Current Theories of Māori Organisation" (Treasury Guest Lecture Series, Wellington, 17 February 2004) 9. Available online at <<http://www.treasury.govt.nz/academiclinkages/sharpa>> (last accessed 6 October 2005) ["Justice, Self-government, and Current Theories of Māori Organisation"].

74 "Justice, Self-government, and Current Theories of Māori Organisation", above n 73, 9.

75 *Multicultural Citizenship: A Liberal Theory on Minority Rights*, above n 35, 108.

76 Young, above n 20, 269.

is exposed as a myth,⁷⁷ it is apparent that there are "no 'neutral' norms of behaviour and performance."⁷⁸ Equal treatment conceived within an ideal of sameness ignores the differences in cultural values, behaviours and other characteristics that might hamper people in participating as equals in political and economic society.⁷⁹

The relationship between the practice of rangatiratanga and the notion of equality therefore becomes much easier to justify within a differentiated notion of citizenship. As Sharp has argued, the Treaty itself does not provide an agreed account of what justice and injustice involve, nor how rights and duties are distributed.⁸⁰ Instead, recourse to the Treaty often conflates the morality of keeping contracts with "questions of the justice and policy of current distributions of social goods".⁸¹ However, once we conceive of citizenship as differentiated so that norms and standards are never neutral between groups, we begin to get a picture of social equity that requires group-specific treatment to account for any disadvantages.

Thus the Western liberal notion of equality, like that of justice or democracy, can accord with the practice of rangatiratanga within a remodelled conception of citizenship. It is perhaps necessary to emphasise that a theory of citizenship is chosen as the framework for analysing the relationship between these notions because of its constitutional implications and the possibility it offers for dispelling the assumption that rangatiratanga cannot be reconciled with the standard liberal concepts to which our law has aspired.

However, the need for a citizenship theory to attempt this reconciliation is also revealed by the relative failings of separate theories of justice, equality or democracy to account for the interaction between indigenous and other groups in single territories. Although John Rawls saw the source of healthy societies as being a "shared conception of justice",⁸² justice theory does not help when we have basic disagreement about what justice requires and even what justice means. It cannot, on its own, suggest what the content of justice should be unless we first decide who the subjects of justice are, what their status is in society and how their interaction should proceed.

Theories of democracy, on the other hand, have too often required that participants act for a universal, public will, by claiming that it is possible to separate peoples' private

77 Young, above n 20, 257.

78 Young, above n 20, 269.

79 Young, above n 20, 269-270.

80 "Justice, Self-government, and Current Theories of Māori Organisation", above n 73, 8.

81 *Justice and the Māori*, above n 49, 167.

82 John Rawls "Kantian Constructivism in Moral Theory" (1980) 77 *Journal of Philosophy* 515, 540.

identities from their concern for public interest.⁸³ Theories of participation have not, furthermore, sought to explain how to ensure that participants act responsibly and with concern for others' interests, rather than in self-interested or prejudiced ways that are particularly detrimental to minority interests.⁸⁴ Unless we can identify different groups within society as being citizens on their own terms rather than through suppressing differences, it is unclear how just democratic decision-making can occur. As Kymlicka and Norman have argued, if democracy is rule by the people, then theories of citizenship must first determine who the people really are.⁸⁵

Finally, theories which insist on equality miss the spectrum of arguments surrounding need, desert, merit and the differentiation of circumstance which is a fact of the human condition. Relying on a universal conception of homogenised citizenship, they also assume that opportunities are equally open to all people because neutral standards apply irrespective of cultural or other differences. If this conception is not challenged, theories of equality would continue to overlook the very real disparities between groups in society, the differences in their values and the different conceptions of what standards are equitable.

Bound up with each body of theory are the specific arguments concerning the constitutional place of Te Tiriti and the justifications for the practice of rangatiratanga. These arguments are problematic on their own, due to the basic disagreement within and between Māori and Pākehā communities about the worth of the Treaty and its terms. Viewing Te Tiriti only as a basis for Māori rights will not offer any solutions to such disagreement. Instead, the Treaty should be seen as a basis for interaction which must first address the conception of citizenship and acknowledge the differentiated nations which constitute the citizens of Aotearoa/New Zealand. Citizenship is not just a status, it is an expression of identity, which, in New Zealand's case, involves multiple nations rather than homogeneity. The conception of citizenship which our constitution ought to reflect must, therefore, include these different identities and provide for their engagement, and it is in this model that the practice of rangatiratanga need no longer be seen as being in opposition to what justice requires, how democracy should work or what equality demands.

83 See for example Benjamin Barber *Strong Democracy* (University of California Press, Berkeley, 1984) chs 8-9.

84 Kymlicka and Norman, above n 6, 360.

85 Kymlicka and Norman, above n 6, 375.

