

**Te Ao Tūroa and Aotearoa's Adherence to the Indigenous Self-Determination
Norm: Past, Present and Future**

Te Ao Tūroa and Aotearoa's Adherence to the
Indigenous Self-Determination Norm: Past, Present
and Future

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Tuhika Whakarāpopoto – Abstract

In the wake of the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), self-determination has emerged as a norm applying to indigenous peoples globally. This is a positive step forward for some of the world’s most marginalised peoples and a potential means to achieve their decolonisation aspirations through economic, social and cultural development. However, many uncertainties remain as to what self-determination will provide indigenous peoples beyond the conceptual realm and in the ‘black letter’ laws that they are subject to. This thesis attempts to fill the void by considering how the norm can, and should, be operationalised in future. The framework for self-determination developed by James Anaya is adopted as the key analytical frame of reference. Given the importance of lands, waters and resources to indigenous peoples and their cultures, the narrative centres on self-determination through environment and resource management law. First, a stocktake of self-determination compliance is carried out by applying Anaya’s framework to various Aotearoa and foreign (Scandinavian Sami and Aboriginal Canadian) legal frameworks. These analyses reveal that there is currently widespread non-compliance with the norm in the examples studied. In spite of that, the analysis also demonstrates that there are certain legal mechanisms that go some way towards the expression of Anaya’s self-determination principles. These are: the operational expression of the legal

Tuhika Whakarāpopoto – Abstract

personality concept in the Te Urewera and Te Awa Tupua (Whanganui River) settlements, and the balancing of interests embodied in the draft Nordic Sami convention, the Canadian duty to consult and the Waitangi Tribunal's *Ko Aotearoa Tenei* report on the Wai 262 inquiry. This thesis concludes that while there is a long road head for the reclamation of indigenous self-determination, these matters potentially provide an insightful platform to begin this conversation in Aotearoa.

*Kā Kupu Māori – Glossary*¹

Aotearoa	Used as the Māori name for New Zealand.
Awa	River
Hapū	Kinship group, clan, tribe, subtribe.
Huia	Glossy black bird, now extinct, which had prized white-tipped tail feathers and orange wattles.
Iwi	Extended kinship group, tribe, nation, people.
Kaiaka ²	An adult tītī.
Kāi Tahu	The iwi which holds mana whenua and mana moana over most of Te Waipounamu and Rakiura.
Kaitiaki	Trustee, minder, guard, custodian, guardian.
Kaitiakitaka	Guardianship, stewardship, trusteeship.
Karakia	Incantation, ritual chant.
Kawa	Protocol and customs.
Kereru	New Zealand pigeon.
Kīngitanga	King Movement.
Kīwaha	Colloquialism, colloquial saying, slang.
Kōrero tuku iho	History, stories of the past, traditions.

¹ Unless otherwise footnoted, definitions are taken from <http://Māoridictionary.co.nz/>. The thesis adopts the Kāi Tahu dialect of te reo Māori in most instances by replacing the 'ng' with a 'k' in Māori words (except in direct quotes or where the context requires otherwise).

² Taken from author's own knowledge.

Kā kupu Māori – Glossary

Kotahitanga	Unity, togetherness, solidarity, collective action.
Mana	Prestige, authority, control, power, influence, status.
Mana motuhake	Separate identity, autonomy, self-government.
Mana whenua	Territorial rights, power from the land, authority over land or territory.
Manu	Bird.
Māori	Indigenous New Zealander.
Mauka / Maunga	Mountain.
Mauri	Life principle, life force, vital essence.
Motu	Island.
Ngāti Porou	Tribal group of East Coast area north of Gisborne to Tihirau.
Noa	To be free from the extensions of tapu, ordinary, unrestricted.
Pākehā	New Zealander of European descent.
Papatūānuku	Earth, Earth mother and wife of Rangi-nui.
Pepeha	Tribal saying, tribal motto, proverb.
Pōhā	Kelp bag – receptacle made of kelp and tōtara bark to hold preserved birds.
Rāhui	To put in place a temporary ritual prohibition.
Rakatira / Rangatira	To be of high rank, chief, chieftain.
Rangatiratanga	Chieftainship, right to exercise authority.

Raupatu	Confiscation.
Rimurapa	Bull kelp.
Rūnanga	Council, tribal council.
Takata whenua / Tangata whenua	Local people.
Takata / Tangata	Human, individual, person.
Taonga	Treasure, anything prized.
Tapu	To be sacred, prohibited, restricted.
Tauraka waka	Mooring.
Te ao Māori	Māori world.
Te ao tūroa	Natural world, earth, nature.
Te Ara a Kewa	Foveaux Strait.
Te Awa Tupua	The legal personality for the Whanganui River. ³
Te Heke Ngahuru Ki Te Awa Tupua	Te Awa Tupua strategy. ⁴
Te hopu tītī	The customary harvest of tītī. ⁵
Te Karewao	Advisory group to Te Pou Tupua. ⁶

³ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (**Te Awa Tupua Act**).

⁴ Te Awa Tupua Act, ss 35 to 37.

⁵ Michael Stevens, below n 653.

⁶ Te Awa Tupua Act, s 27.

Te Kōpuka nā Te Awa Tupua	Te Awa Tupua strategy group. ⁷
Te Moana-nui-a-Kiwa	Pacific Ocean.
Te Pā Auroa nā Te Awa Tupua	The new legal framework of Whanganui River. ⁸
Te Pou Tupua	The human face of Te Awa Tupua. ⁹
Te Tiriti o Waitangi	Treaty of Waitangi.
Te Urewera	The area that Tūhoe hold mana whenua over.
Tikanga	Correct procedure, custom, the customary system of values and practices that have developed over time and are deeply embedded in the social context.
Tītī	Muttonbird, sooty shearwater.
Tohu	Sign, mark, symbol.
Tūhoe	Tribal group of the Bay of Plenty, including the Kutarere-Ruātoki-Waimana-Waikaremoana area.
Tūhoe Te Uru Taumatua	The Tūhoe Trust established by trust deed dated 5 August 2011. ¹⁰
Tuna	Eel of various species.

⁷ Te Awa Tupua Act, s 29.

⁸ Te Awa Tupua Act, s 7.

⁹ Te Awa Tupua Act, s 18.

¹⁰ Te Urewera Act 2014.

Tupua te Kawa	The intrinsic values that represent the essence of Te Awa Tupua. ¹¹
Tūwharetoa	Tribal group of the Lake Taupō area.
Waahi tapu	Sacred place, sacred site.
Waiata	Song, chant.
Whaikōrero	Oratory, formal speech making.
Whakapapa	To place in layers, to recite in proper order, genealogy.
Whenua	Land, territory, domain.

¹¹ Te Awa Tupua Act, s 13.

*Te Tīmatāka Kōrero o te Tuhikarōa – Thesis
Introduction*

I Overview

This thesis concerns the ‘operationalisation’ of the ill-defined norm of indigenous peoples to self-determination pursuant to international law, particularly for Māori in Aotearoa.¹² After many decades of debate the international community has now confirmed in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) that indigenous peoples are owed a right to self-determination. While this is a positive step forward for some of the world’s most marginalised people, little is known what this means for indigenous peoples beyond the theoretical and into the realm of ‘black letter’ legal frameworks.

This thesis seeks to contribute to the lack of debate by considering Aotearoa’s adherence to the norm historically, presently and in future. James Anaya’s nuanced analytical framework (substantive and remedial self-determination) is adopted to carry out this exercise. Anaya’s framework helps to take stock and reveal how close Aotearoa has come to the expression of the norm both historically and currently. The same

¹² The thesis generally uses the term ‘Aotearoa’ to refer to Aotearoa/New Zealand, unless in the context it makes more sense to use the term ‘New Zealand’.

analysis is then applied to specific frameworks within two overseas case studies: the Sami in Scandinavia, and the Aboriginal peoples in Canada (adopting a comparative legal method). It is argued that the closer a legal framework is to the full expression of Anaya's principles, the more likely that framework can guide the future understandings of the norm's operational requirements. This thesis finds that the historical and existing frameworks are largely non-compliant, but some emerging concepts in the Treaty settlement process¹³ and in relation to the balancing of interests¹⁴ are insightful and go some way toward complying with Anaya's self-determination principles.

Using these analyses, this thesis posits a way to translate the underlying principles of the norm into practical expression. It concludes that while self-determination is a potentially revolutionary vehicle for indigenous peoples to realise their decolonisation and development aspirations, both law reform and greater debate are needed to make this a reality.

¹³ For example, the legal personality and pluralism concepts discussed in chapter 3 in respect of the Te Urewera and Whanganui River settlements.

¹⁴ See discussions in chapter 4 regarding the draft Nordic Sami convention and the Canadian common law duty to consult; and see chapter 5 for a discussion regarding the Wai 262 framework.

On the surface this thesis is about the operation of rules and norms that exist within the international law system. At essence, it is about the survival of indigenous peoples' cultures and ways of life, in the widest sense, and the extent that the international law system can be used to achieve this end.

II Background

Prior to colonisation, the groups of people now collectively referred to as 'indigenous peoples'¹⁵ were self-determining. In other words, they lived in accordance with their own rules, customs, and cultural institutions on their own lands and territories. This was until Europeans arrived and "started to lay claims to their lands, overpowering their political institutions and disrupting the integrity of their economies and cultures."¹⁶ In many instances, any resistance by the indigenous occupants was met

¹⁵ The term 'indigenous peoples' is generally defined as follows:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

José Martínez Cobo *Study of the Problem of Discrimination Against Indigenous Populations: Final Report submitted by the Special Rapporteur* (United Nations, New York, USA, 1981) at paras 379-382.

¹⁶ James Anaya *Indigenous peoples in international law* (Oxford University Press, New York, 1996) at 3.

with force by the newcomers, resulting in largescale murder. Those that survived the skirmishes were forced to navigate new diseases and, in some cases, the imposition of slavery.¹⁷

The processes of colonisation are the genesis for the social, economic and cultural repression of many generations of indigenous peoples. James Anaya captures this point accurately in his 1996 text *Indigenous Peoples in International Law*, which is worth quoting in full:¹⁸

In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them. Historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are on the lowest rung of the socioeconomic ladder, and they exist at the margins of power.

The history of indigenous peoples since colonisation is therefore a story of depravation, inequality and injustice.

¹⁷ At 3.

¹⁸ At 3-4.

During the latter half of the twentieth century the international community has attempted to address the colonial misdeeds of the previous centuries. One theatre for this attempted reconciliation, and the focus of this thesis, is the international human rights framework. Namely, the norm (or right) of peoples to self-determination.¹⁹ It is argued that the regaining of an indigenous peoples' self-determination will empower that group to achieve their social, cultural and economic aspirations.²⁰ Therefore, self-determination is a potential tool for indigenous peoples to wield in order to address the intergeneration inequities resulting from the colonial encounter.

Early articulations of a principle of 'self-determination' are generally attributed to Woodrow Wilson in his 1916 'Fourteen Points' speech.²¹ Throughout the course of the twentieth century self-determination

¹⁹ Although, as discussed in chapter 1, Corntassel notes there are inherent limitations regarding the extent at which the international law system can make amends for colonial misdeeds related to indigenous peoples given that this framework was created and is continually shaped by 'states'. See Jeff Corntassel "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" 2008 33(1) *Alternatives: Global, Local, Political*.

²⁰ And this is the focus of the key articulations of the right in international instruments: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." United Nations Declaration on the Rights of Indigenous Peoples, art 3.

²¹ Neil MacFarlane and Natalie Sabanadze "Sovereignty and self-determination: Where are we?" 2013 68(4) *International Journal*.

developed from a conceptual principle to an enforceable right of peoples under positive international law.²² From the 1950s onward there were major developments in the accepted application of the right, which was previously only considered to apply to a ‘people’ in the sense of an aggregate population of a sovereign state, opposed to sub-state groups such as indigenous peoples.²³ In other words, it applied in contexts such as the African decolonisation programme. With the decolonisation of Africa largely complete, the application of self-determination was forced to evolve to encompass new contexts. Following the ratification of the International Labour Organization’s *Indigenous and Tribal Peoples Convention 1989 (No. 169)*, and the adoption of the UNRIP by the UN General Assembly, it can be argued that an international law right of indigenous peoples to self-determination has crystallised pursuant to customary international law. It follows that international law requires the historical violations of indigenous peoples’ self-determination to be remediated.

²² For example, in the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR], and the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

²³ Erica-Irene Daes “Some considerations on the right of indigenous peoples to self-determination” 1993 3(1) *Transnational Law & Contemporary Problems*.

Now that the question as to whether the right is owed to indigenous peoples has been answered in the affirmative, questions remain as to how this norm will find expression in the laws of the modern-day states that have developed out of the historical territories of indigenous peoples. At international law, this necessitates consideration of the precise scope and content of the right owed to indigenous peoples. There is a general dearth of scholarly commentary on this topic. Although, one author adds much value and intellectual rigour to the existing scholarship: James Anaya. Anaya, the ex-UN Special Rapporteur on the Rights of Indigenous Peoples, theorises a nuanced framework that can be adapted to test domestic legal frameworks against the scope and content of the indigenous self-determination norm.

According to Anaya, there are two aspects to indigenous self-determination: ‘substantive’ and ‘remedial’. Substantive self-determination, as the name suggests, relates to the *substance* of the norm, which can be described as “the precepts that define a standard of governmental legitimacy”.²⁴ This consists of two strains: *constitutive* and *ongoing* self-determination. The constitutive inquiry considers whether the institutional framework was created through the participation and consent

²⁴ James Anaya “A contemporary definition of the international norm of self-determination” 1993 3(1) Transnational Law & Contemporary Problems.

of the relevant people (the right to freely determine political status).²⁵ Ongoing self-determination considers the legitimacy of the form and functioning of the institutional framework itself. The underlying inquiry is whether the institutional framework embodies principles of subsidiarity²⁶ and cultural pluralism,²⁷ and whether it enables individuals and groups to “live and develop freely on a continuous basis.”²⁸ The substantive aspect must be distinguished from the *remedial* aspect, which describes the remedial prescriptions that are implemented to remedy an historical violation of the substance of the norm.²⁹ Classical African decolonisation is a useful example to demonstrate the application of this framework. In this context, the unilateral imposition of systems of alien rule (and the discriminatory character of those imposed system) violated the substantive self-determination of those peoples. In many cases, independent states were created to remedy this violation (remedial self-determination).³⁰

²⁵ At 145.

²⁶ The idea that decisions should be made at the most local level possible. At 153.

²⁷ Anaya notes that “If the cultures of diverse groups are not valued, neither are their distinctive ways of life or interactive patterns which extend well into the social and political realms.” The cultural pluralism aspect of ongoing self-determination therefore enjoins respect for the unique cultural, social and economic characteristics of indigenous peoples, but also provision for these matters in the governing institutional order. At 154-155.

²⁸ At 157.

²⁹ At 144.

³⁰ This framework will be outlined in greater detail below in chapter 1.

Anaya’s framework is adopted for the purposes of this thesis to consider the extent at which various domestic environmental and resource management law frameworks (in Aotearoa and overseas) give expression to the norm. The purpose of this inquiry is twofold: (1) to take stock of the substantive violations of the indigenous right to self-determination at international law; and (2) to identify the instructive aspects of the analysed frameworks (i.e. those that should be a source of inspiration in other contexts). It is intended that (2) will uncover insights from the existing frameworks to inform the future application of the norm. This exercise is necessary as there is a general lack of material regarding the operationalisation of the indigenous self-determination norm. As Valmaine Toki notes, “Despite the international jurisprudence and constitutional examples articulating the recognition of Indigenous rights, including that of self-determination, how this right can be manifested, for Māori, is still unclear.”³¹

III Research questions

This thesis consists of two main inquiries that are weaved into the six substantive chapters: (1) whether Aotearoa *has* historically or *is* currently giving expression to the indigenous self-determination norm; and (2) the shape of law reform required to ensure Aotearoa adheres to the

³¹ Valmaine Toki “Maori seeking self-determination of Tino Rangatiratanga? A note” 2017 5 Journal of Maori and Indigenous Issues at 144.

norm in future. To address these foci, the following research questions are adopted for this thesis:

1. What is the scope and content of the indigenous self-determination norm?
2. What can this provide to indigenous peoples operationally?
3. Is there a coherent way to analyse domestic legal frameworks against the norm?
4. Has Aotearoa ever complied with the norm?
5. What lessons can be learnt from overseas jurisdictions (Sami and Canada)?
6. What is the future of indigenous self-determination in Aotearoa?

IV Overview of Chapters

Chapter 1 provides an overview of the international law material and the literature regarding the general development and the scope and content of the self-determination norm (particularly as it applies to indigenous peoples). It explores the various theories of indigenous self-determination before outlining why Anaya's framework is appropriate for this thesis.

Chapter 2 reorients this thesis to Aotearoa, as the key focus for this thesis is the operationalisation of indigenous self-determination in the

Aotearoa context. The Aotearoa portion of the thesis begins with an historical stocktake of the country’s adherence to the self-determination norm through the application of Anaya’s framework. Ultimately, it is concluded that Māori have suffered the same violations of substantive self-determination as virtually all indigenous peoples, leading to widespread social, cultural and economic disparities.³² It is demonstrated that in spite of Te Tiriti o Waitangi (the Treaty of Waitangi), a treaty purportedly guaranteeing certain rights for Māori in 1840,³³ and the development of various “experiments in Māori autonomy” by the Crown post-1840,³⁴ Aotearoa has not adhered to Anaya’s principles in the historical models studied. In fact, many of the historical examples are archetypal breaches of the constitutive aspect of self-determination as the frameworks were unilaterally imposed on Māori without any processes of consultation or consent.

Chapter 3 continues the Aotearoa analysis by considering various legal frameworks of the contemporary period against Anaya’s framework

³² Claire Charters and Tracey Whare “Shaky Foundations: The fundamental flaw at the heart of a “model” treaty involving New Zealand and the Indigenous Māori community” 2017 34(4) World Policy Journal

³³ Such as the art 2 right to “tino rangatiratanga”. This will be discussed in more detail in chapter 2.

³⁴ Paul McHugh *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (Oxford University Press, Auckland, N.Z., 1991). Native Exemption Ordinance 1844; Native Districts Regulation Act 1858; New Zealand Constitution Act 1852, s 71.

(including section 33 of the Resource Management Act 1991, the Te Urewera settlement and the Whanganui River settlement). The chapter concludes that, on the whole, each model fails to adhere to the principles of Anaya’s framework, and, therefore, law reform is required to remedy this deficit and to ensure Aotearoa’s compliance with the self-determination norm.

It will be shown that there are, although very few, certain promising aspects to the studied models. Chapter 3 concludes that the Te Urewera and Whanganui River settlements are insightful for their adherence to the cultural pluralism aspect of Anaya’s ongoing self-determination framework. For example, both frameworks give expression to the fundamental Māori principle of whakapapa, and the pre-European Māori view of the world as a nexus of kin relationships. The attribution of a legal personality to Te Urewera and the Whanganui awa can be seen as a modern expression of this idea.³⁵ Furthermore, the ability for executive decision-making bodies to apply tikanga Māori in their environmental decision-making is a laudable expression of the cultural pluralism principle. These insights can be adapted to inform the future operational character of indigenous self-determination in Aotearoa.

³⁵ Te Urewera Act 2014; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

Chapter 4 analyses the development of both Scandinavian Sami and Aboriginal Canadian models of self-determination. The chapter concludes that the Norwegian Sami parliament (and the associated Planning and Building Act³⁶ and Finnmark Act³⁷ processes) is ultimately non-compliant when viewed against Anaya’s framework. However, the draft Nordic Sami Convention, which is yet to be concluded between the Nordic states, is potentially insightful for its operationalisation of the free, prior and informed consent aspect of self-determination, and for its adoption of a ‘relativistic’ balancing approach.³⁸ In terms of the Aboriginal Canadian law, chapter 4 is scathing of the Indian Act 1876 and the paternalistic system of band governance, concluding that this framework is in breach of every aspect of Anaya’s self-determination framework.³⁹ In spite of this, there are insights to be obtained from the common law in Canada, which has developed a duty to consult and accommodate Aboriginal interests.⁴⁰ Chapter 4 considers how the balancing approach of this common law doctrine might assist the development of norm-compliant operational self-determination models in future.

³⁶ Planning and Building Act 2008 (Norway).

³⁷ Finnmark Act 2005 (Norway).

³⁸ Mattias Åhren *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, Oxford, United Kingdom, 2016). Draft Nordic Saami Convention (2005) *English version*.

³⁹ Indian Act 1876 (Canada).

⁴⁰ *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511.

Chapter 5 shifts focus and considers in detail the recommendations of the Waitangi Tribunal in its Wai 262 inquiry report: *Ko Aotearoa Tenei*.⁴¹ In the Wai 262 report the tribunal develops and applies an analytical framework for assessing whether the current environmental and resource management law regime is giving adequate expression to article 2 of Te Tiriti o Waitangi (the right to tino rangatiratanga). Chapter 5 concludes that the balancing of interests inherent in the tribunal’s approach is insightful, and that this dimension of pragmatism should inform the future operationalisation of indigenous self-determination in Aotearoa.

Finally, **chapter 6** weaves the strands of the preceding chapters together into an analysis regarding the future of self-determination in Aotearoa. While the preceding chapters are focused on Anaya’s substantive self-determination, chapter 6 looks to how the remedial aspect of self-determination can, and should, apply in light of the findings of this thesis. It is argued that a norm-compliant legal framework would give operational expression to the following ‘remedial principles’: the balancing of interests; an indigenous locus of decision-making; indigenous influence over decision-making; and pluralism. The Wai 262 framework

⁴¹ Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuatahi* (Wai 262, 2011).

is promoted as a vehicle to operationalise these remedial principles in any given case where there has been a breach of substantive self-determination. The model is then applied to a case study to demonstrate its application: the Rakiura tītī / muttonbird islands.

V Limitations

There were few limitations to this study, which was assisted by the fact that this was a ‘desktop study’. The main limitation was the side effects of the choice to undertake a Scandinavian case study, when the author is not familiar with any of the Nordic languages. This limited the scope of material that was able to be considered. However, there was ample English language material outside of the Nordic material, so this was not a major issue. The author managed to make direct contact with Norwegian government (Department of Sami and Minority Affairs) to obtain English language translations of the draft Nordic Sami convention.

Chapter 1: Indigenous Self-Determination – An Analytical Framework

I Chapter Introduction

If a right of self-determination has crystallised in favour of indigenous peoples pursuant to customary international law precepts, there is potential for this avenue to satisfy outstanding Māori self-determination claims.⁴² First, however, there is a need to assess the extent at which the Crown is currently giving expression to the norm. Accordingly, this chapter examines the current legal position of the scope and content of the right at international law. The chapter concludes by formulating an analytical framework, based on the scholarship of James Anaya, that can be adopted to test legal structures against the requirements of the indigenous self-determination norm. The balance of the thesis then adopts this framework to assess the extent at which Aotearoa is currently giving (and has historically given) expression to the norm. Chapter 4 adopts the analytical framework to assess whether any insights can be obtained from

⁴² Kiri Rangi Toki “What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples” 2010 16 *Te Mata Koi: Auckland University Law Review*.

various indigenous self-determination models applying to the Sami in Scandinavia and the Canadian Aboriginal⁴³ peoples.⁴⁴

II Self-Determination and International Law

A Overview

As this thesis concerns the implementation of indigenous peoples' right to self-determination under international law, it is pertinent to consider the source of such a right and to analyse the scope and content of that right under existing international law. This section undertakes such an analysis and concludes by formulating a framework for examining the levels of self-determination inherent in environmental law frameworks, based on the scholarship of James Anaya. This framework is then used in the balance of the thesis to analyse various legal structures (both domestic and foreign) for the extent that they provide for precepts of indigenous self-determination. Conclusions are then drawn as to whether the current Aotearoa legal framework adequately provides for indigenous self-determination, whether a new model is required in Aotearoa to implement the norm, and the potential foundations of a new model.

⁴³ Note, this thesis uses the term 'indigenous' to refer to all indigenous peoples generally, but it uses the term 'Aboriginal' to refer to the indigenous peoples of Canada to maintain consistency with the Canadian scholarship.

⁴⁴ The rationale for analysing these case studied in particular is discussed in chapter 4.

B Self-determination as a concept and right in international law

The conceptual underpinnings of the term ‘self-determination’ in international law are succinctly captured by Anaya as: “a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies.”⁴⁵ The concept came to be prominent in the international political arena around World War I, when President Woodrow Wilson linked the concept to Western liberal democracy and European nationalism, and Lenin/Stalin linked the idea to the fundamentals of Marxist class struggle. Self-determination justified the breakup of the Austro-Hungarian and Ottoman empires and the re-division of Europe at the beginning of the twentieth century, the downfall of classical colonialism, and more recently, the end of South African apartheid. In all of these cases, Anaya argues, self-determination was adopted as a “standard of legitimacy against which institutions of government were measured,” and deemed to be illegitimate.⁴⁶

Self-determination was first articulated in positive (i.e. written) international law as a *principle* of ‘peoples’ in the United Nations (UN)

⁴⁵ James Anaya *Indigenous Peoples in International Law* (Oxford University Press, New York, 2004).

⁴⁶ At 99.

Charter.⁴⁷ It was enunciated as a binding *right* of peoples in the major international human rights instruments,⁴⁸ and is now widely considered to be a general principle of international law,⁴⁹ a norm of customary international law, and, as Anaya notes, it has potentially reached the status of *jus cogens* (a peremptory norm).⁵⁰ The extent that the norm applies to, and is binding in respect of, indigenous peoples remains to be fully settled. However, recent events go some way toward settling this issue. In 2007, after some twenty years of negotiations, the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') was adopted by the General Assembly of the United Nations.⁵¹ The UNDRIP is significant for its contribution to the development of international indigenous rights law, particularly through its recognition of indigenous rights to self-determination, autonomy and self-government.⁵² As per the orthodox position, the UNDRIP, as a General Assembly resolution, is non-binding in-and-of-itself and can be described as 'soft-law.' While that may be the case, UN General Assembly declarations can develop a normative

⁴⁷ Charter of the United Nations, art 1, para 2.

⁴⁸ ICESCR; ICCPR.

⁴⁹ Reference re Secession of Quebec [1998] 2 SCR 217; Antonio Cassese Self-determination of peoples: a legal reappraisal (Cambridge University Press, Cambridge; New York, 1995).

⁵⁰ Anaya, above n 45.

⁵¹ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 UN Doc. A/RES/61/295 (2007) [UNDRIP].

⁵² Articles 3 and 4.

character and become a primary source of customary international law. Declarations can therefore act as a catalyst for the recognition and implementation of binding international standards. As Laura MacKay notes: “The Declaration’s potential to crystallise into international customary law ... means that a simple dismissal [of the UNDRIP] as an aspirational, non-binding document cannot be sustained.”⁵³

C Customary international law: a vehicle for the recognition of indigenous rights?

Various commentators contend that at least some of the provisions of the UNDRIP have crystallised into customary international law.⁵⁴ This includes the much-debated right to self-determination, and the related rights of autonomy and self-government⁵⁵ and free prior and informed consent (‘FPIC’).⁵⁶ Customary international law is a primary source of

⁵³ Laura MacKay “The United Nations Declaration on the Rights of Indigenous Peoples; a step forward of two back?” 2013(11) Public Interest Law Journal of New Zealand

⁵⁴ See Mauro Barelli “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” 2009 58(4) International and Comparative Law Quarterly; Megan Davis “To bind or not to bind: The United Nations declaration on the rights of indigenous peoples five years on” 2012 19 Australian International Law Journal; International Law Association “Rights of Indigenous Peoples” (The Hague Conference, The Hague, August 2010); Toki, above n 42.

⁵⁵ Federico Lenzerini “Sovereignty revisited: international law and parallel sovereignty of indigenous peoples” 2006 42(1) Texas International Law Journal; Siegfried Wiessner “Rights and status of indigenous peoples: a global comparative and international legal analysis” 1999 12 Harvard Human Rights Journal.

⁵⁶ Leena Heinämäki “The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them” in Nigel Bankes and Timo Koivurova (eds) *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, Oxford, UK; Portland, USA, 2013).

international law and forms part of Aotearoa’s common law. Because it is automatically incorporated into Aotearoa’s domestic law (unlike norms derived from international conventions), it is potentially significant for Māori wishing to implement a model of self-determination over their traditional resources.⁵⁷ There is no need for a *Te Heuheu Tukino*-esque statutory incorporation before a customary international norm is integrated into Aotearoa’s domestic framework.⁵⁸

A two-limb test exists for the establishment of a rule of customary international law. This test is found in Article 38 of the Statute of the International Court of Justice, and it requires (1) state practice; and (2) *opinio juris sive necessitates* (*opinio juris*).⁵⁹ State practice is the objective element, requiring actual practice of a custom, and the identification of state action as evidence of the existence of the custom. On the other hand, *opinio juris* is the subjective aspect of the test, requiring state practice to be undertaken with a belief that the law requires such action.⁶⁰ Evidence

⁵⁷ Dunworth points out that customary international law has traditionally been neglected in the Aotearoa legal context. Treasa Dunworth “Hidden Anxieties: Customary International Law in New Zealand” 2004 2(1) New Zealand Journal of Public and International Law.

⁵⁸ *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] QB (CA); *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1 (HC); *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA); and *Sellers v Marine Safety Inspector* [1999] 2 NZLR 44 (CA).

⁵⁹ *North Sea Continental Shelf Cases (Germany v Denmark; Germany Netherlands)* [1969] ICJ Reports 3.

⁶⁰ Dunworth, above n 57.

of *opinio juris* is found in statements of such a belief, “rather than actual beliefs.”⁶¹ According to Roberts there are two schools of approach to the test: the ‘traditional’ and ‘modern’ approaches. The traditional approach, emphasising the importance of state practice, is an inductive inquiry whereby the custom is derived from specific instances of state practice.⁶² The modern approach, however, deductive in nature, emphasises the importance of *opinio juris* and relies on statements of state intention in the formation of custom.⁶³

It is possible, and some commentators maintain, that a customary international norm of self-determination for indigenous peoples has crystallised since the adoption of the UNDRIP.⁶⁴ Evidence could be adduced to prove the existence of such a custom, such as the widespread support for the UNDRIP initially amongst the international community, and the subsequent endorsement of the CANZUS states.⁶⁵ However, the

⁶¹ Anthea Elizabeth Roberts “Traditional and Modern Approaches to Customary International Law: A Reconciliation” 2001 95(4) *The American Journal of International Law* at 758.

⁶² *North Sea Continental Shelf Cases (Germany v Denmark; Germany Netherlands)*, above n 59.

⁶³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14. See also Roberts, above n 61.

⁶⁴ International Law International Law Association, above n 54; Anaya, above n 45; Lorie Graham and Siegfried Wiessner “Indigenous sovereignty, culture, and international human rights law” 2011 110(2) *South Atlantic Quarterly*.

⁶⁵ ‘CANZUS’ is an acronym for Canada, Australia, New Zealand and the United States, all of whom failed to adopt the UNDRIP upon the final General Assembly vote in September 2007.

reality is that the test is exacting and “notoriously difficult to achieve.”⁶⁶ The conservative view is that certain provisions of the UNDRIP, including the rights to self-determination, autonomy and self-government, and FPIC, have yet to reach the status of customary international norms.⁶⁷ Nonetheless, it is possible that even if the difficult test for the establishment of customary norms was met, the New Zealand state would be insulated from any such norms as a persistent objector.⁶⁸ The New Zealand government could rely on the various statements made throughout the drafting process rejecting the adoption of the UNDRIP.⁶⁹ Although, ambiguities contained in New Zealand’s explanation of vote,⁷⁰ and their subsequent endorsement of the UNDRIP, means a finding of persistent objector would be far from certain.

⁶⁶ Davis, above n 54 at 40.

⁶⁷ See Davis, above n at 54. Davis contends that jurists such as Anaya and Wiessner have been “over-eager” in declaring that provisions of the UNDRIP have reached the status of customary international law (see James Anaya and Siegfried Wiessner “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment” (2007) *Jurist* <www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>).

⁶⁸ Ian Brownlie and James Crawford *Brownlie's principles of public international law* (8th ed, Oxford University Press, Oxford, 2012)

⁶⁹ For example, see New Zealand Ministry of Foreign Affairs and Trade Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations (2007), cited in Toki, above n 42 at 266.

⁷⁰ New Zealand’s 2007 Explanation of Vote, while rejecting the text of the proposed declaration, contains statements of support for the principles underpinning the declaration:

New Zealand fully supports the principles and aspirations of the Declaration on the Rights of Indigenous Peoples. New Zealand has been implementing most of the standards in this declaration for many years. We share the belief that a Declaration on the rights of indigenous peoples is long overdue, and the concern that, in many parts of the world, indigenous peoples continue to be deprived of basic human rights.

See above n 69.

Regardless of whether the strict test has been met, it is certainly arguable that a norm of self-determination for indigenous peoples is *developing* under customary international law. This is strongly influenced by the near universal adoption of UNDRIP amongst UN member states. It is entirely possible that binding norms will crystallise in favour of indigenous peoples based on the UNDRIP, in a similar way that provisions of the Universal Declaration of Human Rights⁷¹ eventually became binding norms of customary international law (and were later reflected in the major binding human rights conventions).⁷² In turn, these international norms would be incorporated into the common law of Aotearoa in accordance with Blackstone's thesis.⁷³ The potential for international law to provide a concrete avenue for the recognition of indigenous authority over traditional lands and resources, particularly for Māori in Aotearoa, is therefore an exciting prospect.⁷⁴ To reorient this discussion in terms of te ao Māori, the UNDRIP's potential for the ongoing development of indigenous rights may be seen as a tauraka waka, a place from which the

⁷¹ *Universal Declaration of Human Rights* GA Res 217 A (1948).

⁷² ICCPR/ICESCR above n 48.

⁷³ In his seminal work, Blackstone declared that “the law of nations [or customary international law] is part of the law of the land”. Sir William Blackstone *Commentaries on the Laws of England* (16th ed, Cadell & Butterworth, London, 1825) at ch 5 (cited in Dunworth, above n 60 at 69).

⁷⁴ Toki, above n 42.

waka can disembark toward a brighter horizon.⁷⁵ Given this, such a discussion would be incomplete without examining the precise content and scope of the right of indigenous people to self-determination. The following section explores the parameters of the right and considers a framework for testing whether the existing legal framework amounts to an operationalisation of the norm.

D Scope and content of the right to indigenous self-determination

There is no clear consensus on the precise parameters of the right to self-determination, one commentator noting the right generally is “imprecise, inconclusive and ill-defined”⁷⁶ and another that the field generally is a “conceptual morass”.⁷⁷ The definitional difficulties for indigenous peoples partly stems from the nature of the debate to date: in the past twenty years scholars and international lawyers in this field have been preoccupied with the fundamental question as to whether the right extends to indigenous peoples, i.e. a segment of society as opposed to the aggregate population of a state, the traditional beneficiary of the right. This plays into the traditional liberal tension between group and individuals’

⁷⁵ Sacha McMeeking UNDRIP presentation - Te Rūnanga o Ngāi Tahu.

⁷⁶ Russell Miller “Collective discursive democracy as the indigenous right to self-determination” 2007 31(2) *American Indian Law Review* at 343.

⁷⁷ Benedict Kingsbury “Reconstructing Self-Determination: A Relational Approach” in Pekka Aikio and Martin Scheinin (ed) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Gummerus Printing, Turku, Finland, 2000) at 20.

rights.⁷⁸ “Consequently, international legal sources offer limited guidance as to the content and scope of the internal aspect of the right to self-determination, when applied to indigenous peoples.”⁷⁹ Now that this debate has been somewhat resolved,⁸⁰ the question remains as to what exactly the right provides to rights-holders.

It makes sense to first consult the relevant international documentation. Article 3 of the UNDRIP provides: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This wording essentially mirrors that of common Article 1 of ICCPR, and the ICESCR.⁸¹ The UN Charter, however, provides that a key purpose of the United Nations is to uphold the *principle* of self-determination. It is helpful therefore to note that self-determination in international law manifests itself as both a *right* and a *principle*. This thesis, however, concerns the implementation of self-determination as a *right*, which indigenous rights scholar Helen Xanthaki considers is

⁷⁸ For example, see Will Kymlicka *Multicultural citizenship: a liberal theory of minority rights* (Clarendon Press, New York; Oxford [England], 1995).

⁷⁹ Åhren, above n at 133.

⁸⁰ The UNDRIP confirming the right to self-determination extends to indigenous peoples in article 3 and the potential for this right to develop under customary international law.

⁸¹ Note that these conventions refer to the “right *of* self-determination”, whereas the UNDRIP refers to the “right *to* self-determination”. New Zealand is a signatory to both of these conventions.

essentially the political control of a peoples' destiny.⁸² It will be established below that for indigenous peoples the political sphere of self-determination is about more than simply the transfer of authority to replicated 'Western' or pākehā political institutions. This thesis argues that political control is a means to an end; the means to enable indigenous rights-holders to achieve their economic, cultural and social development aspirations.

First, before considering what self-determination is, or could be, it is necessary to consider what it is not by dispelling the common misconception that the term simply refers to the pursuit of 'secession' or 'independence' from the so-called 'host state'.

1 Does self-determination simply mean secession or independence?

It is a widely held but misguided view that groups seeking recognition of a right to self-determination can unilaterally secede from their overarching sovereign state. This view has pervaded the discourse of self-determination, particularly for indigenous peoples, for decades, and has hindered the conversation, recognition and implementation of the right. The misconception has its genesis in the decolonisation programme of the

⁸² See Alexandra Xanthaki *Indigenous rights and United Nations standards: self-determination, culture and land* (Cambridge University Press, Cambridge, UK, 2007) at 155 for a discussion on the implications of self-determination as a *right* versus a *principle*.

international community following World War II, which “involved the transformation of colonial territories into new states under the normative aegis of self-determination.”⁸³ This led to states associating the right with secessionist movements, as this was the poignant frame of reference for the implementation of the right in that context.

As Anaya notes, the core of the misconception is that it fails to distinguish between the substance of the norm of self-determination and a prescribed remedy that was applied in various context specific breaches of self-determination. In other words, secession may be available as a remedy in very limited cases (i.e. in the case of gross human rights violations) when self-determination has been breached, but the remedy must not be conflated with the substance of the right itself.⁸⁴ It therefore cannot be said with any legitimacy that self-determination equates with independent statehood. In any case, there exists no general entitlement at international law to a remedy of secession. The legal instruments which contribute to the development of the general international law on self-determination are

⁸³ James Anaya “Self-Determination as a Collective Human Right under Contemporary International Law” in Pekka Aikio and Martin Scheinin (eds) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University, Turku, Finland, 2000) at 12.

⁸⁴ See Anaya, above n 45.

vehement that the territorial integrity of states must be protected, provided governments are:⁸⁵

conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction...

Myntti sums up this point as follows: “...there is no general unilateral right in international law to secession or independent statehood by part of the population of a sovereign democratic state.”⁸⁶ This, of course, applies to all peoples (including indigenous peoples). While Article 3 of the UNDRIP provides indigenous peoples with a right to self-determination, Article 46 essentially mirrors the restriction against the dismemberment of states’ territorial integrity contained in the Friendly Relations Declaration and the Vienna Declaration. In fact, it goes further in protecting the state by removing the proviso that territorial integrity may be impaired when a state is acting oppressively. With that said, secession may be available to indigenous peoples in very rare circumstances in spite of Article 46 of the UNDRIP (i.e. remedial secession, where there are

⁸⁵ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625 (XXV) (1970) [**Friendly Relations Declaration**]. *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993) [**Vienna Declaration**].

⁸⁶ Kristian Myntti “The Right of Indigenous Peoples to Self-Determination and Effective Participation” in Pekka Aikio and Martin Scheinin (eds) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (second ed, Institute for Human Rights, Åbo Akademi University, Turku, 2000) 85.

ongoing gross human rights breaches which prevent the expression of self-determination).⁸⁷

Nonetheless, as Åhren states, “No peoples, including indigenous peoples, are legally entitled to a general right of unilateral secession.”⁸⁸ As Erica-Irene Daes, a principal drafter of the UNDRIP, states “The right of self-determination, as it is contained in Article 3, according to the opinion of the Chairperson-Rapporteur, does not carry with it a right to secession.”⁸⁹ Regardless, it appears very unlikely that many indigenous peoples aspire to achieve independent statehood. In fact, the literature notes that most indigenous groups aspire for the recognition of their self-determination through constitutional reform within the framework of the existing sovereign state.⁹⁰ Anaya goes as far to say that secession would be “a cure worse than disease” for any peoples outside of the decolonisation context.⁹¹ This thesis does not consider that the right to self-determination

⁸⁷ See Xanthaki, above n 82 at 168-169; Mauro Barelli “Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?” 2011 13(4) International Community Law Review; and *Reference re Secession of Quebec*, above n 49.

⁸⁸ Åhren, above n 79.

⁸⁹ Erica-Irene Daes “An overview of the history of indigenous peoples: self-determination and the United Nations” 2008 21(1) Cambridge Review of International Affairs at 23.

⁹⁰ See Miller, above n 76; James Anaya “The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, Denmark, 2009); and Daes, above n 89.

⁹¹ Anaya, above n 45 at 109.

can (or should) be invoked to achieve independent statehood for Māori in Aotearoa.

2 *Traditional approach: external and internal self-determination*

Traditionally the right to self-determination was considered to have two spheres: external and internal. This conception of self-determination has continued to develop over time with changes in the international context. Under the classical decolonisation paradigm (discussed above), external self-determination provided the rights-holder with a right to be free from alien rule, and this led, in many cases, to decolonisation by secession.⁹² The internal aspect of the right in this context entailed a right to democratic government representing all peoples, and a right to participate in the democratic process. In both cases, the holder of the right was the aggregate population of individuals in the state, opposed to one identified group within the state.⁹³ This binary understanding of the content and beneficiary of the right evolved once the decolonisation process had largely concluded and novel contexts emerged for the application of self-determination. Conceptual questions arose as to whether sub-state groups (e.g. indigenous peoples) were owed a right of self-determination, in

⁹² But this could also lead to free association or integration with the overarching colonial state. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter* GA Res 1541 (1960) at vi; and *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514(XV) (1960).

⁹³ Daes, above n 23; Cassese, above n 49.

addition to the aggregate population of the state (the traditional beneficiary). In relation to indigenous peoples, while there were many who opposed such a view throughout the many years spent drafting, the UNDRIP has answered this question in the affirmative. As discussed, this is likely to influence the development of customary international law on this point. Given that the international community has accepted a right of self-determination applies to some sub-state groups opposed to aggregate populations only, at least in the context of non-binding General Assembly resolutions, the traditional binary understanding of self-determination has been forced to evolve. The section below examines how the internal aspect of self-determination has developed in the context of indigenous peoples' rights, particularly the manifestation as a right to autonomy and self-government.⁹⁴ Further below this chapter critiques the value of the binary framework and promote an alternative theory of indigenous self-determination at international law, consistent with Anaya's scholarship.⁹⁵

3 *Self-determination as 'autonomy'*

This section will now consider the more precise characteristics of self-determination in what is considered to be the internal aspect, as it

⁹⁴ While this will not be covered in any detail, it has been suggested that the external aspect of self-determination also applies to indigenous peoples, and entitles beneficiaries to representation within the international legal system (e.g. at United Nations fora). Åhren, above n 79.

⁹⁵ See Anaya, above n 45.

applies to indigenous peoples under international law. In light of the UNDRIP, the content of the right owed to indigenous peoples in the post-decolonisation context consists of the twin aims: (1) autonomy/self-government; and (2) participatory engagement in civil society (where it is desired by the indigenous group), in other words, the simultaneous right to be both distinct from, and attached to, the modern democratic majoritarian society.⁹⁶ Susan Ferrell views this as a form of “hybrid autonomy,” and explains that “The goal is neither the complete independence of Indigenous Peoples nor the kind of local autonomy which would lead to social or political isolation and continuing vulnerability of Indigenous Peoples.” Instead, Ferrell notes, most indigenous peoples seek effective participation in all matters affecting their destinies, a measure of control over their own affairs, and a “sharing of power in national politics.”⁹⁷ This thesis focusses mostly on the autonomous aspect of the right, rather than the participatory aspect.⁹⁸ Article 4 of the UNDRIP elaborates on how the right to self-determination guaranteed by Article 3 is to be exercised. It states:

⁹⁶ Barelli, above n 87; UNDRIP, arts 3, 4, 5, 18 and 19.

⁹⁷ Susan J. Ferrell “The concepts of self-determination and autonomy of indigenous peoples in the draft United Nations Declaration on the Rights of Indigenous Peoples” 2001 14(2) *St. Thomas Law Review* at 269.

⁹⁸ While the participation of indigenous peoples in the state’s civil procedures is an undoubtedly important aspect of the right to self-determination, it is outside the scope of this thesis.

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government⁹⁹ in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 4 signals that self-determination for indigenous peoples tends to manifest in the internal aspect, and is to encompass autonomy exercised within the confines of the state's overarching sovereignty.¹⁰⁰ This is consistent with the orthodox position that indigenous peoples are not entitled, as of right, to 'external' self-determination, at least as that concept was previously understood in the decolonisation context (i.e. secession).¹⁰¹ Article 46 further ensures this is the case by protecting the territorial integrity of states, reflecting the position of the Friendly Relations Declaration and the Vienna Declaration. Precisely what the entitlement to 'autonomy' or 'self-government' provides the indigenous beneficiary remains to be seen, particularly because the right has scarcely been

⁹⁹ 'Autonomy' and 'self-government' are considered to be "coterminus" in the UNDRIP and therefore in this thesis as well. For ease of reference, I adopt the term 'autonomy' generally in place of using both terms. See International Law Association, above n 54 at 13.

¹⁰⁰ Whereas, external self-determination for indigenous peoples in the post-classical decolonisation environment is a more contentious matter. Scholars and international lawyers disagree on the extent that indigenous peoples are beneficiaries of self-determination in the external aspect (discussed above). Whether external self-determination applies for indigenous peoples and the content of that right is outside the scope of this thesis. However, it is interesting to note that some scholars argue the external aspect is beginning to manifest itself in innovative ways for sub-state groups such as indigenous peoples. In particular, the international legal personality enjoyed by indigenous peoples throughout the drafting of the UNDRIP. See Åhren, above n 79.

¹⁰¹ Although, some scholars, including Åhren, argue that a right to secession may be available for indigenous peoples in very rare circumstances, e.g. where they are suffering under gross discrimination and human rights violations. At 121.

‘operationalised’ since the UNDRIP was adopted. Further, the articulation of a *right* to autonomy in the UNDRIP is an innovation as groups have no general *right* to autonomy itself under international law.¹⁰² Many international legal scholars consider that a right of indigenous peoples to *autonomy* under international law has crystallised (i.e. separate from, but related to, the right to self-determination), reaching the status of general international law principle as confirmed by state practice and evidence of *opinio juris*.¹⁰³ Given this, it is necessary to consider the traditional definitions and manifestations of autonomy articulated by scholars and international lawyers.¹⁰⁴ It is likely these conceptual understandings of autonomy would inform the parameters of the autonomous arrangements permitted under Article 4, given that autonomy and self-government have not been conceptualised as a general *right* under international law prior to the UNDRIP.¹⁰⁵

¹⁰² Stefania Errico “The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview” 2007 7(4) Human Rights Law Review.

¹⁰³ International Law Association, above n 54; Anaya and Wiessner, above n 67; Siegfried Wiessner “Indigenous sovereignty: a reassessment in light of the UN Declaration on the Rights of Indigenous Peoples” 2008 41(4) Vanderbilt Journal of Transnational Law.

¹⁰⁴ To build on this, chapter 3 analyses models of self-determination in other jurisdictions to explore ways that the norm could be better implemented in Aotearoa.

¹⁰⁵ Anna Cowan “UNDRIP and the intervention: Indigenous self-determination, participation, and racial discrimination in the Northern Territory of Australia” 2013 22(2) Pacific Rim Law and Policy Journal.

4 *What is 'autonomy' generally?*

As Hurst Hannum notes, autonomy “is not a term of art in international or constitutional law.”¹⁰⁶ Autonomy, like self-determination, does not have one universally accepted definition.¹⁰⁷ However, there is a consensus on many aspects of the concept. Marc Weller and Stefan Wolff note that common definitions all refer “directly or indirectly [to] the transfer of certain powers from a central government to that of the (thereby created) autonomous entity.” They define autonomy generally as:¹⁰⁸

the legally entrenched power of ethnic or territorial communities to exercise public policy functions (legislative, executive and adjudicative) independently of other sources of authority in the state, but subject to the overall legal order of the state.”

Similarly, James Crawford envisages that autonomous communities are districts of a state “usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part.”¹⁰⁹ Building on Crawford, Stefania Errico considers

¹⁰⁶ Hurst Hannum *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (2nd ed, University of Pennsylvania Press, Philadelphia, 2011) at 4.

¹⁰⁷ Errico, above n 102.

¹⁰⁸ Marc Weller and Stefan Wolff (eds) *Autonomy, self-governance, and conflict resolution: innovative approaches to institutional design in divided societies* (Routledge, New York; London, 2005) at 12-13.

¹⁰⁹ James Crawford *The creation of states in international law* (Clarendon Press, Oxford; New York, 1979) at 211-212.

autonomy to generally encompass “the devolution of a range of powers to a part of a State’s population so as to enable that population to manage its internal affairs.”¹¹⁰

It is generally accepted that different forms of autonomy exist: territorial, non-territorial/personal and cultural autonomy. Territorial autonomy is predicated on the idea that the autonomous entity is “defined in territorial terms,”¹¹¹ and “in its most general sense, describes self-governance of a demographically distinct territorial unity within the state.”¹¹² Territorial autonomy therefore refers to the phenomenon of a sub-state group exercising law making and enforcement powers (in relation to defined subject matters) within a specifically defined portion of territory, subject to the overarching powers of the host-state. Errico contends that this would only be feasible where indigenous communities live in or occupy a clearly demarcated geographical territory and comprise a majority in that area.¹¹³ One example of territorial autonomy is the reserve

¹¹⁰ Errico, above n 102.

¹¹¹ Weller and Wolff, above n 108.

¹¹² Marc Weller *Towards a General Comment on Self-Determination and Autonomy* (Commission on Human Rights, E/CN.4/Sub.2/AC.5/2005/WP.5, 2005) at 5.

¹¹³ Errico, above n 102.

system applying to First Nations in Canada (irrespective of how problematic this system is).¹¹⁴

For personal (or *non*-territorial) autonomy the subjects of the autonomous entity are defined in personal terms i.e. “a particular (ethnic) group is granted autonomy rights and all its members can enjoy these rights, regardless of where they live on the territory of their host-state.”¹¹⁵ This is similar to territorial autonomy except the jurisdiction is not limited to a specific territorial area, and can apply regardless of where a person lives or the locale of their landholdings. Cultural autonomy can refer to the ability of a minority cultural group to assume a corporate or legal identity to foster and promote the unique characteristics of the group (i.e. cultural and linguistic matters) within the framework of the state.¹¹⁶ There is no clear differentiation between non-territorial and cultural autonomy in the scholarship – some authors treat these as separate categories of autonomy¹¹⁷ while others group them together.¹¹⁸ Regardless of the

¹¹⁴ The legal framework of autonomy for First Nations in Canada will be discussed further below in chapter 3.

¹¹⁵ Weller and Wolff, above n 108 at 15.

¹¹⁶ Weller, above n 112. Also see Bertus de Villiers “Self-determination for aboriginal and Torres strait islander people: Is the answer outside the territorial-square?” 2014 16(Dec 2014) University of Notre Dame Australia Law Review. Arguably modern iwi organisations in New Zealand exercise cultural autonomy to some extent, but not territorial autonomy. Richard Hill “New Zealand Maori: The Quest for Indigenous Autonomy” 2016 15(1) Ethnopolitics.

¹¹⁷ Weller, above n 112.

¹¹⁸ Errico, above n 102.

semantic arguments, the Sami parliaments of Scandinavia provide an example of non-territorial autonomy in practice. The Sami parliaments have certain delegated powers relating to language and cultural preservation and these are exercised irrespective of the territorial residence of their members.¹¹⁹

While article 4 does not expressly mention that *territorial* autonomy is the version of autonomy envisaged, some form of control over traditional lands must be contemplated by the provision given the strong spiritual connection indigenous peoples have in relation to their lands, and the recognition of this view in the UNDRIP (in preambular paragraph 7 and article 25).¹²⁰ With that said, certain provisions of the UNDRIP indicate that the right to autonomy can also be expressed through cultural autonomy.¹²¹ In any given case, it is likely that the overarching form of autonomy that is adopted to give effect to the UNDRIP will be dependent upon what is appropriate in the circumstances, such as the social context.

¹¹⁹ This will be further discussed in chapter 3 below.

¹²⁰ Steven Wheatley “Conceptualizing the Authority of the Sovereign State over Indigenous Peoples” 2014 27(2) *Leiden Journal of International Law*; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* 276/2003.

¹²¹ For example, art 14: “the right to establish and control their educational systems and institutions providing education in their own languages”; art 16: “the right to establish their own media in their own languages”; and art 24: the right to traditional medicines and health practices. See also Errico, above n 102.

5 *Self-determination as 'free, prior and informed consent'*

Another contested feature of indigenous peoples' right to self-determination is the requirement for free, prior and informed consent ('FPIC'). As Heinämäki notes, the general meaning of FPIC can largely be found in its phrasing: "it is the right of indigenous peoples to make free and informed choices about the development of their culture, lands and resources."¹²² Accordingly, the basis for the concept is that when major decisions or development proposals that will substantially impact indigenous peoples' land, territories or resources are being considered, that those peoples are not coerced or threatened as a part of that process. Their consent must also be actively sought out and given before any proposal is allowed to go ahead by public authorities. The precise scope, content and status of the right for indigenous peoples is a matter of international law that remains unsettled. One view is that indigenous peoples only have a right to culturally appropriate, prior, and good faith consultation in relation to resource development proposals.¹²³ This section will consider these matters and discuss whether a binding right to FPIC exists for indigenous

¹²² Leena Heinämäki "The Rapidly Evolving International Status of Indigenous Peoples: The Example of the Sami People in Finland" in Christina Allard and Susan Funderud Skogvang (eds) *Indigenous Rights in Scandinavia: Autonomous Sami Law* (Ashgate, Farnham, Surrey (UK); Burlington, VT (USA), 2015) at 196.

¹²³ Tara Ward "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" 2011 10(2) *Northwestern Journal of International Human Rights* 125. This view is reflected in the second draft version of the Nordic Sami Convention, concluded in late 2016, which removes the right to FPIC contained in articles 16 and 36 of the 2005 version.

peoples under international law, based on the development of a customary norm.

Prior to the UNDRIP there existed no codified articulation of FPIC under positive international law. Instead, UN treaty supervisory bodies recognised a right of indigenous peoples to participation in resource decision-making derived from other rights in existing human rights conventions. For example, the Human Rights Committee ('HRC') has consistently concluded that article 27 of the ICCPR (the right to culture) requires states to positively consult with indigenous peoples regarding proposed resource developments on their lands and territories.¹²⁴ Further, the Committee on the Elimination of Racial Discrimination ('CERD'), in applying the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), has stated that decisions relating directly to indigenous peoples' land and resources should not be made without prior and informed consent.¹²⁵ While these interpretations by UN supervisory bodies are non-binding outside of their immediate context, they are nonetheless important for their influence over a developing customary international norm of FPIC in favour of indigenous peoples.

¹²⁴ UN High Commissioner for Human Rights *General Comment No. 23: The rights of minorities (Art. 27)* (U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994)

¹²⁵ UN Commission on the Elimination of Racial Discrimination *Report of the Committee on the Elimination of Racial Discrimination: Annex V - General Recommendation XXIII* (UN Doc. Supplement No. 18 (A/52/18) (Sept. 26, 1997), 1997); Ward, above n .

There have been many recent developments in this area of international human rights law, many of them occurring within the Inter-American regional system. This system regulates the application and interpretation of the American Convention on Human Rights¹²⁶ (a binding international treaty) and the non-binding, American Declaration on the Rights and Duties of Man.¹²⁷ Recent developments have led to the crystallisation of a binding norm in the Inter-American system requiring full FPIC in certain contexts, opposed to mere consultation. This was most clearly articulated in a recent case of the Inter-American Court: *Saramaka People v Suriname*.¹²⁸ In that case, the Suriname government granted logging and mining concessions to private companies to extract resources within the territories of the Saramaka People, without consultation with, or the consent of, the latter. The Court held that the state had failed to uphold the Saramaka peoples' right to judicial protection and property in granting the concessions. Furthermore, the Court held:

... that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain

¹²⁶ *American Convention on Human Rights* (1969).

¹²⁷ *American Declaration of the Rights and Duties of Man* (1948).

¹²⁸ *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* IACtHR (ser. C) No. 172 (28 November 2007).

their free, prior, and informed consent, according to their customs and traditions.

Therefore, *Saramaka* identified an unequivocal and binding norm in the Inter-American system that the consent of the indigenous people is required when a project is of such a scale that it will have major negative implications on the future survival of the people (i.e. by disrupting their traditional food sources and forms of economy). It is necessary to consider the extent at which a similar norm may have developed outside of the Inter-American system.

The UNDRIP contained the first clear articulation of a right to FPIC in positive international law (previously, FPIC or other participation rights were derived from other positive law sources). As Ward contends, the UNDRIP clearly re-orientates the right to FPIC within the rubric of self-determination, whereas it has previously been associated with rights to property, culture and non-discrimination in the human rights conventions.¹²⁹ The UNDRIP makes provision for FPIC in articles 10, 19, 29 and 32.¹³⁰ As discussed above, although the UNDRIP is technically

¹²⁹ Ward, above n 125.

¹³⁰ For example, article 32 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other

non-binding, its primary value is that it has created norms that can develop into customary international law (including the right to FPIC). The near universal adoption of the UNDRIP by UN member states gives this argument strong credence, as does the subsequent adoption by the initial objector states.¹³¹

Soon after the UNDRIP was adopted, the Human Rights Committee in *Poma Poma v Peru*¹³² further contributed to the development of an FPIC norm (albeit not referring to the UNDRIP itself). This case concerned the development of freshwater infrastructure in rural Peru. The diversion of water from a natural spring to a coastal city deprived indigenous peoples of access to their water resource, and this removed their ability to graze livestock in accordance with their cultural traditions. In applying the right to culture under article 27 ICCPR, the HRC held that where resource exploitation will have a substantially negative impact on the “culturally

resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

¹³¹ E.g. New Zealand, Australia, Canada and the United States all objected to the UNDRIP initially in 2007, but all have since changed their position and adopted the resolution (albeit, with reservations). CBC “Canada votes 'no' as UN native rights declaration passes” (2007) www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160.

¹³² *Poma Poma v Peru* Human Rights Committee, Communication No 1457/2006, Doc CCPR/C/95/D/1457/2006 of 27 March 2009.

significant economic activities of ... [an] indigenous community,” FPIC is required and mere consultation is not enough.¹³³

The draft Nordic Sami Convention is also important in this context for its contribution toward the development of an FPIC norm. The Nordic states involved (Norway, Sweden and Finland) have sanctioned the drafting of a convention to codify the existing international norms applying to Scandinavia’s indigenous Sami. A draft version of this document was agreed upon by the expert drafting group in 2005. The 2005 draft contains strong references to a Sami right to FPIC: article 16(2) states that the state shall not sanction activities or measures that may significantly damage the basic conditions for Sami culture, livelihoods or society, unless *consented* to by the Sami.¹³⁴ Given its mandate, the expert committee evidently considered that this was current international practise applying to the Sami as an indigenous people.

As Heinämäki points out, given the delivery of the judgments in *Saramaka* and *Poma Poma*, and the widespread adoption of the UNDRIP (containing FPIC provisions), an indigenous right to FPIC, encompassing the ability to withhold consent when projects will have a substantial impact

¹³³ At para 7.6.

¹³⁴ Article 36(3) contains a similar provision creating a right of FPIC over permits for natural resource prospecting or extraction.

on the fundamentals of the indigenous peoples' survival "does not necessarily exceed the present international commitments [of the Nordic states]."¹³⁵ The International Law Association, in its 2010 Hague Conference report seems to concur: "the existence of the right of veto in favour of indigenous peoples seems to be confirmed by [the UNDRIP], as well as by pertinent international practice [referring to the draft Nordic Sami Convention]."¹³⁶ It appears arguable that the requisite state practice and *opinio juris* exists, and a binding right to FPIC has crystallised in favour of indigenous peoples, or is in the latter phases of development. This encompasses a right to withhold consent for developments relating to their traditional lands, territories or resources, that will have a substantial impact on the survival of the people, their livelihoods and/or their wellbeing (for example, a nickel strip mine that interferes with a traditional food source). It is more than a mere right to consultation. This thesis will promote the adoption of such a view in implementing indigenous self-determination in Aotearoa.

6 Parametres of the right of indigenous peoples to self-determination under international law

The precise design of autonomous arrangements that indigenous peoples are entitled to under international law remains unclear and will

¹³⁵ Heinämäki, above n 56.

¹³⁶ International Law Association, above n 54 at 14-15.

differ depending on the context the indigenous people exist within (regional, national, cultural, geographical and legal).¹³⁷ It should first be stated that fulfilling indigenous self-determination does not require creation of one specific political/institutional structure within the state (an essentialist view of implementing self-determination).¹³⁸ Even so, the salient characteristics of autonomous arrangements can be identified and elaborated on, based on the existing understandings of autonomy and self-government.

a. Devolved, autonomous powers

It is possible for the indigenous self-determination norm to find expression through forms of autonomy. As discussed above, autonomy can encompass the devolution of legislative, administrative and/or judicial powers relating to the “internal affairs” of the indigenous people, to that people.¹³⁹ Under this conception of autonomy, an indigenous group would be vested with authority from the state through legislative delegation or constitutional restructuring, effecting a division of competences between the state and the sub-state indigenous group. Additionally, it can allow the latter to make/enforce laws and execute administrative functions with respect to various specified subject matter relating to their ‘internal and

¹³⁷ Åhren, above n 79.

¹³⁸ Anaya, above n 90; Brenda Gunn “Moving beyond rhetoric: working toward reconciliation through self-determination” 2015 38(1) Dalhousie Law Journal.

¹³⁹ See the “What is ‘autonomy?’” section above.

local affairs.’¹⁴⁰ There is no precise definition for the “internal and local affairs” of the indigenous people. It is clear that matters usually exclusively associated with the overarching state are not encompassed by this right, e.g. foreign affairs and military matters.¹⁴¹ An earlier draft version of article 4 of the UNDRIP, which was omitted from the final adopted version,¹⁴² set out a positive list of subject matter over which the indigenous autonomy contemplated by that provision would apply. This included:¹⁴³

... culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

As the operationalisation of indigenous self-determination under international law depends upon the particular circumstances of the state and the indigenous people, it is not possible to prescribe the specific subject matters that will apply to all autonomous arrangements. Although, the matters set out above provide an authoritative guide for the character

¹⁴⁰ International Law Association, above n 54; Daes, above n 89.

¹⁴¹ Ferrell, above n 97.

¹⁴² Throughout the lengthy negotiations of the UNDRIP this provision was removed.

¹⁴³ *Draft United Nations declaration on the rights of indigenous peoples* Sub-Comm Res. 1994/45 (1994). This is the first draft Declaration and is commonly known as the ‘original draft’ or ‘Daes draft’ of the UNDRIP, after the Chairperson-Special Rapporteur of the WGIP, Erica-Irene Daes.

of ‘internal and local affairs’ that article 4 of the UNDRIP intends to address. It is possible for a number of permutations to occur, depending on the situation. This will likely depend upon factors such as: the degree of geographical concentration on traditional territory; the extent that the indigenous people are a majority or a minority in that territory; the degree of integration with the majority population; socio-economic indices; and the performance of the overarching state economy (inter alia).

b. Cultural pluralism – expression of indigenous cultural values and legal traditions

Articles 5 and 20 of the UNDRIP provide that an indigenous peoples’ own cultural institutions, laws, customs and/or practices (i.e. those existing prior to colonisation) should be embodied in the operationalisation of indigenous self-determination. As Anaya notes, this aspect of the norm entitles indigenous peoples to have their unique character and cultural preferences reflected in the operational regime.¹⁴⁴ That is, the practical institutions for implementing autonomy are reflective of the bespoke values of that group, and the regime of law that is ‘created’ and applied by the institutions reflects the groups laws, customs or legal traditions.¹⁴⁵ The ILA’s Hague report sums up this aspect of the right succinctly:¹⁴⁶

¹⁴⁴ Anaya, above n 45.

¹⁴⁵ Arts 5 and 20, UNDRIP.

¹⁴⁶ International Law Association, above n 54 at 16.

Chapter 1: Indigenous Self-Determination – An Analytical Framework

States are therefore obliged to recognize the right of indigenous peoples to autonomy or self-government – which finds expression in *their own* political and legal institutions, structured and managed in accordance with *their own* laws, traditions and customs – in the context of national law. [emphasis added]

And as Steven Wheatley puts it:¹⁴⁷

... the idea of ... autonomy of indigenous peoples is also to be understood in terms of allowing the communities concerned to organize their social, economic and political life through *their own laws, customs and practices*. [emphasis added]

In other words, the practical implementation of indigenous self-determination should be framed less by ‘Western’ liberal democratic institutions and legal systems,¹⁴⁸ and more by the unique cultural values or legal traditions of that group.¹⁴⁹ This applies both to the underlying nature of the institutions that are imbued with the devolved authority outlined above, as well as the ‘rules’ that those institutions are authorised to apply. For example, in the Aotearoa context, this aspect of indigenous self-determination requires the ability for autonomous institutions regulating the environment to apply tikanga Māori when exercising their regulatory powers.

¹⁴⁷ At 54 at 13.

¹⁴⁸ See Eruera Prendergast Tarena “Indigenising the Corporation - Indigenous Organisation Design: An Analysis of Their Design, Features, and the Influence of Indigenous Cultural Values” (PhD Thesis, University of Canterbury, 2015) for an analysis of ‘western’ corporate institutions and the incorporation of indigenous values into modern indigenous entities.

¹⁴⁹ Carwyn Jones *New treaty, new tradition: reconciling New Zealand and Maori law* (UBC Press, Vancouver; Toronto, 2016).

c. Host-state's 'sovereignty' remains intact

A crucial feature of the right to autonomy for indigenous peoples under international law is that the framework of political and legal empowerment (discussed above) is to be exercised within the context of the state's overarching sovereignty. That is, the right is not an entitlement to secession, and the territorial integrity of the 'host-state' must be maintained in the exercise of the right.¹⁵⁰ As Åhren puts it, "it is inherent in the concept of autonomy that the autonomous people enjoy considerable decision-making powers, albeit within the framework of the state."¹⁵¹ It should come as no surprise that international law reflects this stance as international norms are largely developed through the consent of states, and states continue to uphold the primacy of the Hobbesian view of state sovereignty.¹⁵² In practice, this means any autonomy arrangement born of this context will always be subject to the oversight of the central government claiming and exercising sovereignty over the indigenous lands. For as long as states are the agents of creation for international law, and indigenous self-determination is a creature of international law, this is likely to remain the case.¹⁵³

¹⁵⁰ Art 46, UNDRIP; Friendly Relations Declaration; Vienna Declaration.

¹⁵¹ Åhren, above n 79 at 138.

¹⁵² Heinämäki, above n 122.

¹⁵³ Weller and Wolff, above n 108.

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This aspect of indigenous self-determination affects the ability of indigenous peoples to negotiate, design and implement meaningful autonomous structures, ones that incorporate and provide for indigenous institutions, traditions and customs (as discussed above) in a meaningful manner. The state machinery will likely remain largely intact, with the state maintaining a near monopoly on sovereign decision-making power in the realm. This notion, and the fact that the existing understandings of autonomy and self-determination are crafted by state parties, is discussed in further detail below with reference to Corntassel’s scholarship.

To offset this power imbalance, and to ensure the longevity of autonomous arrangements, the right may require some form of constitutional protection. Daes comments on the need for some form of protection of autonomous arrangements within the legal and constitutional framework of the state: “...self-determination is never secured if it depends entirely on legislation and high-level political decision-making.”¹⁵⁴ This could be achieved through the entrenchment of the legislation which creates (or empowers the establishment of) the autonomous arrangement. However, it is not clear whether this factor is part of the norm currently. Given the above point regarding the supremacy of state sovereignty, there

¹⁵⁴ Erica-Irene Daes “The concepts of self-determination and autonomy of indigenous peoples in the draft United Nations Declaration on the Rights of Indigenous Peoples” 2001 14(2) St. Thomas Law Review at 265.

is likely to be little constitutional protection of arrangements for indigenous autonomy.

Article 4 of the UNDRIP also encompasses the indigenous right to “ways and means for financing their autonomous functions.” Any institution with regulatory and/or enforcement powers requires resources to constitute and fund their day-to-day operations and long-term goals. Governments (local and central) fund their functions mainly through taxation (direct and indirect). At its essence, the right to self-determination and autonomy envisages that indigenous peoples will assume similar functions to a central or local government, albeit in a culturally bespoke manner and over specifically defined subject matters. That being the case, the right requires that any autonomous arrangement created under this regime must be financially sustainable. This could be achieved through the enactment of laws providing tax jurisdiction for the indigenous people,¹⁵⁵ or, less desirably, via the provision of central government funds to the autonomous entity.¹⁵⁶

¹⁵⁵ It will be demonstrated in chapter 3 that the Canadian aboriginal peoples are able to levy taxes to finance their ongoing functions.

¹⁵⁶ International Law Association, above n 54.

E Does self-determination entail more than the establishment of autonomous institutions?

Does the right of self-determination simply entitle indigenous peoples to replicate existing precedents of autonomous institutions, explored above? Or is there a more nuanced way to view the substance to the right? Xanthaki contends that the essential core of the right is “political power” and the “political control of the peoples’ destiny...”. In reaching this conclusion Xanthaki discredits the ‘maximalist’ approach to self-determination, whose proponents argue that self-determination is “an umbrella right that accommodates all claims” (i.e. international rights to land and natural resources, rights to intellectual property, as well as rights to autonomy and self-government).¹⁵⁷ Xanthaki believes a wide approach distorts the importance of the right and is ultimately a poor tactic for those seeking recognition of their rights. Applying Xanthaki’s ‘political essence’ approach, self-determination involves little more than the implementation of the machinery of political power (such as legislative, executive and judicial institutions) subject to overarching state supervision. However, to adopt such an approach, this thesis argues, would be too narrow and would

¹⁵⁷ Xanthaki, above n 82 at 154.

involve acceptance of the state-framed definitions of the right.¹⁵⁸ As Daes contends:¹⁵⁹

The true test of self-determination is not whether Indigenous Peoples have their own institutions of self-determination, legislative authorities, laws, police or judges. The true test ... is whether Indigenous Peoples themselves actually feel they have choices about their way of life... [and therefore] to live well and humanly in their own ways.

This mirrors Anna Cowan's view that: "The key to defining self-determination is not to incorporate the specific substantive content of all other rights related to its exercise, but to distil the overarching right to its normative essence."¹⁶⁰ In other words, the effective implementation of self-determination requires more than simply describing and creating a regime of institutions to allow an indigenous people to exercise political power over their traditional territory. Granted, autonomous institutions exercising political power are an important aspect of the implementation of the right, but they are not the essence of the right, as Xanthaki contends.¹⁶¹ Applying Cowan's view, it is argued that the normative

¹⁵⁸ As Jeff Corntassel contends, indigenous rights, as with all human rights at international law, are a product of the state-based international legal system and therefore the discourse of indigenous rights, such as the right of self-determination, continues to be framed by states and international or regional institutions. Corntassel, above n 19.

¹⁵⁹ Daes, above n 154 at 263-264.

¹⁶⁰ Cowan, above n 105 at 262.

¹⁶¹ Xanthaki, above n 82.

essence of the right is whether the governing institutions empower a people to flourish in all spheres of life, including culturally, economically and socially. Therefore, the successful implementation of self-determination must also involve an assessment of the extent at which the dominant system of power and authority over lands, resources, and people (and therefore the worldview and cultural practices of the indigenous people) allows that indigenous way of life to be sustained. To the extent that way of life is at risk, self-determination requires the deficiency to be remediated, potentially through the creation of autonomous institutions. Applying this view, that implementing indigenous self-determination requires more than simply the transfer of competences from the central government to replicated Western institutions, requires us to consider alternatives to the dominant self-determination theories (i.e. those built on the internal/external paradigm).¹⁶²

Kingsbury promotes an alternative theory of indigenous self-determination, a so-called ‘relational’ approach, based on a reconstruction of the current understandings of the international law norm.¹⁶³ While autonomy may be a desirable mechanism to protect indigenous ways of life from the encroachment of non-indigenous majoritarian society,

¹⁶² As discussed above in this chapter.

¹⁶³ Malgosia Fitzmaurice “The New Developments Regarding the Saami Peoples of the North” 2009 16(1) *International Journal on Minority and Group Rights*.

Kingsbury underlines the limitations associated with viewing autonomy as a panacea, which is often based on an ‘end-state’ paradigm view of self-determination.¹⁶⁴ This view holds that the majority of the indigenous peoples of the modern world and non-indigenous societies and governments are interdependent and subject to a complex web of relationships. According to Murphy, relational self-determination therefore:¹⁶⁵

encourages the view that indigenous peoples must seek influence in a variety of different political forums to manage the complex web of relationships in which they have become entangled with non-indigenous communities and governments.

Kingsbury and Murphy’s point is that autonomous governance alone may not be enough to ensure the full expression of indigenous self-determination. Exclusively relying on such an approach leads to missed opportunities for the indigenous people to utilise political capital through collaboration with the wider political community and non-indigenous people (i.e. to exercise influence inside and outside of state institutions).¹⁶⁶ A wider degree of influence can be achieved through guaranteed indigenous representation in government forums, consultation

¹⁶⁴ Kingsbury, above n 77.

¹⁶⁵ Michael Murphy “Representing Indigenous Self-Determination” 2008 58(2) *The University of Toronto Law Journal* at 203.

¹⁶⁶ Else Grete Broderstod “The Finnmark estate: dilution of indigenous rights or a robust compromise?” 2015(39) *Northern Review*.

mechanisms, and, at times, alternative methods such as litigation or less conventional methods such as civil disobedience.¹⁶⁷ Thus, a relational approach recognises that a wide scope of influence is preferable when implementing indigenous self-determination.

Similarly, Corntassel criticises the utility of autonomy as a vehicle for indigenous self-determination, particularly as the current understandings of autonomous governance in international law are prescribed by the state hegemony, with little thought given to indigenous ways of knowing, governance or values. As the current discourse of the right is driven by states, international institutions, and their officials, the legal definitions for the right are inherently state favoured and flavoured. Therefore, a ‘ground-up’, indigenous community based approach to the implementation of self-determination is to be preferred, one that is “rearticulated on indigenous terms as part of a sustainable, community-based process rather than as narrowly constructed political/legal entitlement.”¹⁶⁸ He argues that self-determination needs to be sustainable: “In order for indigenous self-determination to be meaningful, it should be

¹⁶⁷ Murphy, above n 165.

¹⁶⁸ Corntassel, above n 158.

economically, environmentally, and culturally viable and inextricably linked to indigenous relationships to the natural world.”¹⁶⁹

Clearly, when positing the implementation of indigenous self-determination at international law, it is not sufficient to simply articulate the salient characteristics of autonomy and propose that a similar framework be implemented within states to satisfy their indigenous self-determination claims. Such an approach lacks depth and fails to consider the normative value of the proposed remedial framework. It also fails to touch on the core nature of self-determination claims: whether the current or proposed institutional structure enables the free pursuit of economic, social and cultural development as indigenous peoples. Instead, it becomes clear that Anaya’s conception of the right, described by Anna Cowan as “persuasive and illuminating”,¹⁷⁰ is appropriate for this thesis. Anaya transcends the binary internal/external approach to self-determination and offers an alternative framework, one which appreciates that the substance of the norm encompasses much more than replicating the existing operational institutions which claim to give effect to the norm.¹⁷¹

¹⁶⁹ At 108.

¹⁷⁰ Cowan, above n 105 at 268.

¹⁷¹ Anaya, above n 45; Anaya, above n 90; Anaya, above n .

F Anaya's framework

Anaya deviates from traditional scholarly analyses of self-determination which aim to dissect the wording of international instruments to identify the scope and content of the norm. Instead, while he bears in mind the text of the written instruments, he focuses “primarily on the common ground of normative precepts and patterns of behavior that are fairly associated with the concept of self-determination.”¹⁷² Anaya considers these are the core values of freedom and equality, and notes that it is “concerned broadly with individuals and groups as they relate to the structure of government under which they live.”¹⁷³

Anaya is critical of the traditional internal/external self-determination dichotomy, arguing this approach to the content of the norm is distorting as it is premised on a world divided into mutually exclusive spheres of community (i.e. monolithic ‘peoples’). He argues this view is not applicable in a globalised and interconnected world as the human experience consists of “multiple, overlapping spheres of community, authority, and interdependency”.¹⁷⁴ The binary approach also perceives self-determination in terms of states’ rights opposed to human rights.

¹⁷² Anaya, above n 171 [A Contemporary Definition] at 133.

¹⁷³ At 133.

¹⁷⁴ Anaya, above n 45 at 101.

Accordingly, a more holistic approach to the content of the norm ought to be preferred, one that recognises the substance of the norm and enables the assessment of institutional structures against this substance.

Anaya contends that the *substance* of the norm of self-determination becomes easier to perceive once it is distinguished from the *remedial* aspects of the norm. Further above it was argued that to consider self-determination as a right to secession is to conflate the substance of the right with a bespoke remedy that was applied in certain specific situations of breach (e.g. under classical decolonisation, the historical denial of the self-determination of African peoples was remedied through the creation of new states). In that sense, secession was a remedy that was applied when the substance of self-determination had been breached by colonial imperialism. The same logic applies to the idea that indigenous self-determination, manifested as a right to territorial autonomy, merely entitles the beneficiary to a regime of institutions holding political power over their traditional territory. Again, this logic confuses the *substance* of the right with the possible *remedies* available in situations of its breach (i.e. the latter could involve the creation of autonomous institutions). The substance of the right to self-determination, under Anaya's conception, is more nuanced than simply articulating the architecture for a scheme of autonomous governance. For this reason, the thesis contends that implementing indigenous self-determination requires more than simply

replicating the existing understandings of autonomous arrangements that were outlined above. A deeper assessment of the institutional framework is required, one which tests the existing institutional framework (and the proposed remedy) against the substantive aspects of self-determination. The following section discusses Anaya’s analytical framework, and this will be applied in the balance of this thesis to assess whether Aotearoa has or is currently giving expression to the norm.

1 Substantive self-determination: constitutive

According to Anaya, the substance of the norm can be divided into two normative strains: constitutive and ongoing. The first, the realm of ‘constitutive self-determination’, concerns the procedures whereby governing institutions are developed. When such governing institutions are created or altered “it imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people...”.¹⁷⁵ It does not impose the outcome of such procedures. This aspect of self-determination corresponds with the provision in the ICCPR, ICESCR and the UNDRIP that peoples “freely determine their political status”.¹⁷⁶ This aspect therefore exists as a standard against which the *procedures* of institutional birth are measured,

¹⁷⁵ At 105.

¹⁷⁶ ICCPR and ICESCR, arts 1. UNDRIP, art 3.

so that the result is not imposed from external authorities.¹⁷⁷ The essential question here is whether the *processes* leading to the creation of the governing (or proposed) institutional order encapsulate the will of the people. For example, when African nations were colonised by European empire-builders, this entailed the illegitimate expansion of authority by one people over another. The result was the imposition of foreign government structures on the existing inhabitants. The African inhabitants were not afforded any input into the establishment of the ensuing governing order.¹⁷⁸

2 *Substantive self-determination: ongoing*

The second realm, ‘ongoing self-determination’, is not concerned with the *procedures* leading to the creation of governing institutional orders, nor their expansion of authority. It is concerned with the *ongoing nature of the order* itself.

Anaya notes that since the height of the classic decolonisation movement there have been two developments in the international community’s requirements for a legitimate government. These concepts

¹⁷⁷ Also see Cassese, above n 49 at 352.

¹⁷⁸ This has similarities to the principle of ‘kompetenz kompetenz’. This principle relates to the question of which body holds the competence to determine the extent of the competence of another body, hence it describes “the competence of competence”. Gunnar Beck “The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor” 2011 17(4) European Law Journal.

strongly influence the understanding of self-determination in its ongoing aspect.

Firstly, the decline of Marxism and the embrace of non-authoritarian notions of democracy. The international community now requires that the governing institutional order promotes democracy, civil participation and the principle of subsidiarity (the idea that government decisions should be made at the most local level possible).¹⁷⁹

Second, the international community has increasingly embraced diversity and cultural pluralism in place of the promotion of cultural homogeneity (e.g. the views promoted by movements such as national socialism),¹⁸⁰ such that “the contemporary global trend is toward securing for cultural groups and their members contextually appropriate

¹⁷⁹ Anaya, above n 171 [A Contemporary Definition]. An example given by Anaya is the break-up of the USSR and the subsequent constitutional reform which promoted devolution of authority to the constituent parts. Anaya further notes the indigenous communities of North America and elsewhere traditionally maintained decentralised systems of governance. This applies to pre-contact Aotearoa, where decentralised hapū or subtribes were generally the primary unit of social organisation in Māori society. Angela Ballara Iwi: *the dynamics of Maori tribal organisation from c.1769 to c.1945* (Victoria University Press, Wellington [NZ], 1998).

¹⁸⁰ Anaya, above n 171 [A Contemporary Definition]. The example given is the international community’s adoption of minority and indigenous rights schemes, e.g. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities* G.A. Res. 47/135 (1992) and *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169) (opened for signature 27 June 1989, entered into force 5 September 1991) [ILO 169].

accommodations in the governing order.”¹⁸¹ These trends underpin Anaya’s conception of ongoing self-determination.

Ongoing self-determination therefore requires the form and function of the governing institutional order (i.e. the character of the governance structures themselves and their role respectively) to empower individuals and groups to develop and make meaningful choices in all spheres of life, on a continuous basis. Anaya links this aspect to the wording adopted in the ICCPR, ICESCR and the UNDRIP – the right of peoples to “freely pursue their economic, social and cultural development.”¹⁸² To continue the African example, European government institutions were imposed on African inhabitants via colonisation, structures that have their foundations in European political and constitutional theory and have very little in common with the pre-existing indigenous government structures. This also entailed foreign domination by the European powers: the African nations were denied the freedom to govern themselves, let alone select the character of the governing institutions.

Incorporating these precepts, an inquiry of the ongoing aspect of self-determination would consider a number of factors relating to the form and

¹⁸¹ Anaya, above n 171 at 155 [A Contemporary Definition].

¹⁸² ICCPR and ICESCR, arts 1; UNDRIP, art 3.

function of the governing (or proposed) institutional structure. Chief among these are considerations as to:

- (1) whether authority is exercised at the most local level possible (subsidiarity or decentralised government precepts); and
- (2) whether the design of the institutional structure itself reflects the unique cultural characteristics and preferences of the group (cultural pluralism or integrity principles).

The overall question in each case is whether the institutional structure actively enables the indigenous people to develop and make meaningful choices about their economic, social, and cultural development

3 Remedial self-determination

Under Anaya's framework, if the substantive self-determination of a people has been transgressed, an entitlement to a remedy will likely crystallise. As discussed above, only in very rare circumstances will the international community impose a remedy of secession in the case of a substantive breach of self-determination. In any case, there is no general right to such a remedy, even if a breach is established. Rather, it appears the international law has developed so that remedial self-determination for indigenous peoples will entail a remedy of autonomy, or internal self-determination (the potential parameters of this remedy have been discussed

above). However, remedies are ultimately to be determined with regard to the particular circumstances, cultural patterns and preferences of the aggrieved group. As Anaya contends, “A wide range of possibilities exists for developing within a remedial context a new institutional order within which all concerned can be said to be in control of their own destiny.”¹⁸³

The approach articulated above is adopted in this thesis because it recognises that simply articulating a remedy for the breach of self-determination (i.e. a suite of autonomous institutions) ignores questions surrounding the substance of the right. Instead, analysing the ongoing form and function of the governing institutional framework shifts the focus away from a remedial analysis to the substance of self-determination, which could be described as “the precepts that define a standard of governmental legitimacy.”¹⁸⁴ Once a breach is established, by analysing the institutional structure against Anaya’s constitutive and ongoing self-determination, the possibility of a remedy can then be considered.

This thesis adopts Anaya’s framework to analyse whether Aotearoa is currently giving effect to the self-determination norm through its environmental law framework. This thesis will apply the *constitutive* self-

¹⁸³ Anaya, above n 163 [A Contemporary Definition].

¹⁸⁴ At 144 [A Contemporary Definition].

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determination standard to assess the extent at which Māori were able to participate and consent to the governing institutional orders that they have been subjected to historically. This thesis also applies the *ongoing* self-determination standard, which looks at the heart of the legal framework governing indigenous peoples and analyses it against minimum standards based on the principles of subsidiarity¹⁸⁵ and cultural pluralism.¹⁸⁶

¹⁸⁵ The idea that decision-making should occur at the most local level possible, unless it would be more efficient for decisions to be made at a higher level. See Christopher Alcantara “Aboriginal policy reform and the subsidiarity principle: A case study of the division of matrimonial real property on Canadian Indian reserves” 2008 51(2) Canadian Public Administration.

¹⁸⁶ Cultural pluralism perceives the value of diverse cultural backgrounds, an idea which is strongly linked to self-determination. For example, if distinct cultures are not respected nor are their distinct institutions of governance or their legal traditions/customs. Cultural pluralism in this context requires contextually appropriate accommodations within the governing institutional order to ensure the group’s distinct character and preferences are reflected. See Anaya, above n ; Anaya, above n 171.

III Chapter Conclusion

Overall, this thesis concerns the operationalisation of the indigenous self-determination norm within Aotearoa's environmental law framework. The chapter has attempted to cover the vast scholarship relating to this field to delineate the source, content, scope and general approach to the indigenous rights of self-determination, autonomy and free, prior and informed consent under the current international law. It has presented an analytical framework for the 'measurement' of institutional and legal structures against the indigenous self-determination norm, based on the scholarship of Anaya. The analytical foci for the model are: (1) the processes leading to the development of institutional structures (constitutive self-determination); and (2) the ongoing form and functioning of the institutional structure itself and whether it embodies indigenous subsidiarity and cultural pluralism (ongoing self-determination).

The chapter first noted that an international law right of indigenous peoples to self-determination may have crystallised or has the potential to develop in the near future as customary international law, based on the UNDRIP. If such a right has/does crystallise(d), this is an exciting prospect for Māori as Aotearoa common law automatically incorporates customary international norms into the domestic legal system. Requirements for statutory incorporation of international norms derived from treaties (under

the rule in *Te Heuheu Tukino*) could therefore be circumvented to attain the goals of Māori self-determination claims.

While the salient characteristics of the right were identified (e.g. devolved autonomous governance, cultural pluralism, consistency with state sovereignty etc.), it was argued that the implementation of indigenous self-determination cannot be solely considered from the point of view of the institutional framework a right-holder proposes to implement. To do so would conflate the substance of the right with its remedial manifestations.¹⁸⁷

Instead, the analysis must as a first step consider whether the institutional framework is giving effect to the substance of the norm. Anaya's conception of the self-determination right is therefore appropriate as it considers both the processes of creation (*constitutive* self-determination) and the ongoing form and functioning of the existing and/or proposed governing institutional structure (*ongoing* self-determination). Additionally, based on the above mentioned, Anaya's inquires whether the structure is giving expression to the norm. Only once a breach of substantive self-determination is established can the remedial aspect of the right be invoked to consider the type of institutional structures appropriate

¹⁸⁷ Anaya, above n 45.

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to remedy the transgression (and this may encompass some of the salient features of autonomous structures discussed above).

The balance of this thesis applies Anaya's analytical framework to consider whether Aotearoa's environmental law framework is currently giving (or has historically given) expression to the indigenous self-determination norm. The framework will also be used to assess whether any insights can be obtained from the Sami and Canadian case studies that would aid the formation of a norm compliant model in Aotearoa.¹⁸⁸

¹⁸⁸ The rationale for selecting these case studies will be discussed in chapter 4.

Chapter 2: Historical Approaches to Māori Self-Determination – Were they Compliant?

I Chapter Introduction

The purpose of this chapter is to consider, by applying the analytical framework developed in chapter 1, whether various historical legal developments regarding Māori in Aotearoa have enabled the expression of the indigenous self-determination norm. The chapter first provides some necessary background relating to Te Tiriti o Waitangi or the Treaty of Waitangi ('Te Tiriti'). It then examines, against Anaya's framework, various proposals of the early New Zealand government that would have enabled Māori to exercise forms of autonomous governance. The chapter concludes that the state's historical frameworks have failed to give expression to Anaya's conception of the norm.

II Background

A Te Tiriti o Waitangi

A discussion about Māori self-determination is incomplete without considering Te Tiriti. Te Tiriti was initially signed by northern Māori rākatira (chiefs) and the British Crown on 6 February 1840.¹⁸⁹ The document consists of two versions, a Māori and an English text, the former

¹⁸⁹ Te Tiriti o Waitangi 1840.

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being the one signed by the majority of Māori rākatira. Textual inconsistencies in these versions have caused issues that remain extant today (and may never be fully resolved).¹⁹⁰ The crux of the issue is that the text of Articles 1 and 2 in the two different versions are not direct translations of one another, and there are differences of approach as to which text shall govern the treaty relationship (i.e. whether the contra proferentum principle should apply).

Modern Māori language experts have pointed out the inconsistencies in these articles in the context of major case law or Waitangi Tribunal reports. The Māori text of article 1 states that the chiefs relinquished “te Kawanatanga katoa o o ratou wenua”. Professor Sir Hugh Kawharu, in his translation of Te Tiriti adopted by then President Cooke of the Court of Appeal in the *New Zealand Māori Council v Attorney-General* (‘*SOE case*’) case, translated this as the giving of “complete government”. This is regarded by the Court of Appeal as something less than ‘full’ sovereignty, akin to ‘governance.’¹⁹¹ Article 1 of the English Treaty, on the other hand, purported to formalise the cession of ‘sovereignty’ from

¹⁹⁰ Claudia Orange *The story of a treaty* (Bridget Williams Books, Wellington, N.Z, 2015).

¹⁹¹ *New Zealand Maori Council v Attorney-General* 1 NZLR 641 (previously known as the ‘*Lands case*’ but now referred to as the ‘*SOE case*’).

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Māori to the Crown.¹⁹² The Māori text of article 2 provided that the chiefs were guaranteed “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa”. Kawharu’s translation adopted in the *SOE* case interpreted this as: “the unqualified exercise of their chieftainship over their lands, villages and all their treasures.”¹⁹³ The English version of Article 2 provided the chiefs retained the “full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and properties.” As the Waitangi Tribunal has said: “...it is the meaning of kāwanatanga – and indeed its relationship to rangatiratanga – that lies at the heart of the debate about the meaning of Te Tiriti.”¹⁹⁴ While the language was not available at the time, the core of this debate is about the historical recognition of the indigenous right to self-determination (when viewed against general international law precepts).

In the decades following the signing of Te Tiriti the early colonial government developed various legislative mechanisms which temporarily extended to (some) Māori kin groups the jurisdiction to regulate the affairs of their people and lands, on their own terms, operating within the context

¹⁹² Although, this proposition remains controversial. In their *Te Paparahi o te Raki* report the Waitangi Tribunal determined that the northern rangatira who signed the treaty in 1840 did not intend to cede their sovereignty through this act. Waitangi Tribunal *He Whakaputanga me te Tiriti - The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o te Raki Inquiry* (Wai 1040, 2014)

¹⁹³ At 663.

¹⁹⁴ Waitangi Tribunal, above n 192 at 512.

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of the Crown’s sovereignty. It is arguable that these mechanisms gave some expression to the promises of rangatiratanga, and, when viewed retrospectively, aspects of the indigenous self-determination norm. Nonetheless, as is discussed below, the mechanisms were ultimately crafted exclusively by Crown officials in order to obtain the Crown’s own objectives. These mechanisms will be critiqued against Anaya’s framework below to demonstrate that the Crown has failed to give expression to the indigenous self-determination norm historically.

III Genuine attempts to recognise Māori self-determination?

Immediately following the signing of Te Tiriti, for practical reasons, British law was not immediately applied and enforced outside the boundaries of the early British settlements – it slowly ‘leaked’ into the Māori communities which remained, by de facto, regulated by tikanga Māori.¹⁹⁵ The colonial government faced practical difficulties in extending their authority and law over Māori settlements and in securing land from Māori for the increasing numbers of incoming settlers. To address these issues, various statutory instruments, described by Paul G. McHugh as “experiments” in Māori autonomy,¹⁹⁶ were promulgated in the mid-1800s.

¹⁹⁵ John Farrar “Early conceptions of the state in New Zealand” 2012 13/14 Yearbook of New Zealand Jurisprudence. See also Alan Ward *A show of justice: racial 'amalgamation' in nineteenth century New Zealand* (Auckland University Press, Auckland, N.Z, 1995). Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, N.Z, 2013).

¹⁹⁶ McHugh, above n 34.

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While they may not have reflected a genuine attempt by the government to give effect to rights of rangatiratanga (or self-determination),¹⁹⁷ they reflect an early willingness for the British to allow Māori to regulate their own affairs according to their own rules and customs. This section outlines the various instruments and considers whether they give expression to Anaya's conception of self-determination.

A Tikanga and criminal justice

1 Native Exemption Ordinance 1844 and Resident Magistrates Court Ordinance 1846

A series of incidents tested the enforceability of English criminal law over Māori following the signing of the Treaty.¹⁹⁸ For the British these events underlined the need for concerted efforts to extend English law into areas that remained under Māori influence. To that end, George Clark Senior, the 'Protector of Aborigines', proposed the 'legalisation' of Māori customs to obtain Māori obedience to English law.¹⁹⁹ In 1844 the Native

¹⁹⁷ Vincent O'Malley contends there was never any intention to allow these mechanisms to "develop into state-sanctioned instruments of genuine self-government." See Vincent O'Malley "English Law and the Māori Response: A Case Study from the Runanga System in Northland, 1861-65" 2007 116(1) *The Journal of the Polynesian Society* at 7.

¹⁹⁸ Such as the Maketu case, which was the first major test of the application of English law to a Māori offender. Maketu, a young chief from the Bay of Islands, had confessed to killing a European family. However, Maketu had also inadvertently killed the granddaughter of chief Rewa of Ngāpuhi. The offender was handed over voluntarily by his whānau, primarily for him to receive utu and to prevent an inter-tribal war between Bay of Plenty and Northland iwi. He was the first person executed under English law in Aotearoa. At 9 to 11.

¹⁹⁹ At 11.

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Exemption Ordinance was passed which gave iwi the ability to regulate criminal justice within their communities through the application of aspects of tikanga Māori (and, significantly, to the exclusion of English law). Under the scheme, chiefs were tasked with arresting offenders and bringing them through the justice system. The British could only intervene in crimes between Māori at the request of chiefs. The Māori concepts of utu (the restoration of balance) and muru ('plundering parties')²⁰⁰ were also adopted in sentencing.²⁰¹ Governor Grey's Resident Magistrates Court Ordinance 1846, built on the 1844 ordinance by providing for the appointment of 'Native Assessors' who were usually chiefs that "were charged with working alongside the Resident Magistrates to resolve various disputes."²⁰² The preamble to this ordinance stated its aim as: "the adaptation of law to the circumstances of both races."

2 Analysis against Anaya's framework

Constitutive self-determination

The 1844 and the 1846 ordinances both fail when viewed against Anaya's constitutive self-determination principle, which considers

²⁰⁰ Vincent O'Malley "Reinventing tribal mechanisms of governance: The emergence of maori runanga and komiti in New Zealand before 1900" 2009 56(1) Ethnohistory. Early academic analyses of muru have led to the concept taking on the negative connotation of 'plunder'. The concept is more appropriately seen as a form of restitution or reparation.

²⁰¹ Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Ward, above n 195.

²⁰² O'Malley, above n 197, at 12; Ward, above n 195.

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whether the *procedures* which lead to the development of institutional arrangements facilitate indigenous participation and consent.²⁰³ While the two ordinances were ostensibly promising as tools to enable Māori self-determination in the area of criminal law, the legislation was wholly drafted by the colonial government with no involvement from Māori in the process. The mechanisms were designed to fulfil the Crown's own objectives, outlined by the preamble to the Native Exemption Ordinance, which states:

WHEREAS it is greatly to be desired that the whole aboriginal native population of these Islands, in their relations and dealings amongst themselves, be brought to yield a ready obedience to the laws and customs of England: And whereas this end may more speedily and peaceably be attained by the gradual than by the immediate and indiscriminate enforcement of the said laws, so that in course of time, the force of ancient usages being weakened and the nature and administration of our laws being understood, the Native population may in all cases seek and willingly submit to the application of the same.

Given that the underlying rationale for the two ordinances was to erode the expression and character of traditional Māori authority, it cannot be said that the procedures leading to the development of the ordinances encapsulated the will of the Māori people, and therefore, these mechanisms strongly fail to give expression to Anaya's constitutive self-

²⁰³ Anaya, above n 45. See chapter 1 for a discussion on this aspect of Anaya's framework.

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determination.²⁰⁴ In fact, the assimilative underpinnings of the framework (evidenced by the above preamble) suggest the criminal ordinances are an archetypal example of a violation of this principle.

Ongoing self-determination: subsidiarity

While the ordinances contain positive aspects when viewed against Anaya's ongoing self-determination principle, which considers the ongoing form and functioning of the institutional order itself,²⁰⁵ ultimately the regime fails to give expression to this principle. Together, the legislative measures gave Māori communities a significant degree of autonomy over the regulation of criminal justice in Māori communities, on a Māori basis, and many chiefs saw them as a belated recognition of their chiefly authority.²⁰⁶ This authority was exclusive in that chiefs alone were empowered to regulate the administration of justice when crimes occurred between Māori, strongly linking the framework to subsidiarity principles.

Ongoing self-determination: cultural pluralism

As noted, that framework also enabled chiefs to apply certain central facets of Māori criminal justice, such as *utu* and *mu*. Therefore, the

²⁰⁴ O'Malley, above n 197.

²⁰⁵ See chapter 1 for a discussion on this aspect of Anaya's framework.

²⁰⁶ O'Malley, above n 197.

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framework was not wholly deficient when viewed against the requirements of cultural pluralism.

With that said, it is a stretch to conclude that the two ordinances are an expression of Anaya's notions of ongoing self-determination. The authority was limited to very narrow aspects of criminal law, as prescribed by the Crown. The adoption of *murū* and *utu* in the legislation, while positive, was ultimately framed by *pākehā* understandings of these Māori concepts. Overall, as the framework was wholly developed by Crown officials to ensure the eventual subjugation of Māori to European conceptions of law, it cannot be said that the form and functioning of the framework enabled Māori to freely develop economically, socially and culturally.

Later mechanisms developed by the colonial government to establish autonomous 'native districts' will now be considered against the analytical framework developed in chapter 1.

B 'Native Districts' frameworks

1 New Zealand Constitution Act 1852

The New Zealand Constitution Act, passed by the English legislature in 1852, would have advanced the recognition of Māori autonomy further than ever before, if the mechanism had been applied. The statute generally

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introduced representative government to the fledgling colony and was intended to extend significant powers to the provinces. Significantly, section 71 enabled the creation of ‘native districts’, which could be regulated through principles of tikanga Māori, “so far as they [were] not repugnant to the general principles of humanity”. As Brookfield contends, the level of autonomy provided under section 71 was “not slight” and under the scheme Māori could have “overridden any conflicting local New Zealand legislation”.²⁰⁷ No native districts were formally set apart under the Act, and it was eventually repealed by the Constitution Act 1986.²⁰⁸ The potential for recognising Māori self-determination and for giving expression to the right to rangatiratanga under this framework was left unrealised.

2 Native Districts Regulation Act 1858 and Native Circuit Courts Act 1858

Later schemes incorporated the principles envisaged by section 71 (autonomous Māori or ‘native’ districts). By the mid-1850s, raketira were becoming increasingly concerned with the loss of land and mana they were facing with the extension of Crown influence and the ever-increasing demand for land by new settlers. The Kīngitanga movement was gaining traction in the north island, advocating for Māori kotahitanga (unity) under

²⁰⁷ F. M. Brookfield *Waitangi and indigenous rights: revolution, law, and legitimation* (Updated, Auckland University Press, Auckland, N.Z., 2006) at 117.

²⁰⁸ Section 26.

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a united Māori king, and an end to land sales to Pākehā. At the same time, in response to the steady extension of British authority into Māori communities, the pre-contact institutions of rūnanga (village governing councils) were being revitalised and adopted by Māori in many parts of the country as a means to regulate Māori areas in accordance with tikanga.²⁰⁹ The Governor hoped to bring these informal rūnanga institutions under the influence of the Crown in order to undermine the Kīngitanga movement and to influence the expansion of English law and British authority into Māori settlements. In 1858 the General Assembly passed the Native Districts Regulation Act and the Native Circuit Courts Act.²¹⁰ Under these frameworks, ‘native districts’ could be proclaimed by the Governor over areas where native title had not yet been extinguished. Bylaws to regulate local matters within the native district could be promulgated by the Governor-in-Council. Native Circuit Courts were to be responsible for the enforcement of the bylaws along with the common law (through ‘resident magistrates’ and ‘Māori assessors’). Bylaws could be made for such local

²⁰⁹ O'Malley, above n 197; Ward, above n 195.

²¹⁰ O'Malley, above n ; Native Districts Regulation Act 1858; Native Circuit Courts Act 1858.

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matters as fencing,²¹¹ cattle trespass,²¹² weed control,²¹³ and, significantly:²¹⁴

For ascertaining, prescribing, and providing for the observance and enforcement of the rights, duties, and liabilities, amongst themselves, of Tribes, Communities, or Individuals of the Native Race, in relation to the use, occupation, and receipt of the Profits of Lands and Hereditaments.

In other words, the scheme envisaged raketira having a degree of control over matters of resource management, land use and local taxation within the villages and lands under their mana. It was effectively the power to constitute and exercise power as a form of local government, over areas where native title remained extant (albeit to a narrowly prescribed degree). The 1858 legislation largely sat dormant, and while Mangonui was the first district constituted under the legislation in March 1859,²¹⁵ it was Governor Grey who would have the most influence under the 1858 legislation when he returned for his second term as Governor in September 1861.

²¹¹ Section 3.

²¹² Section 1.

²¹³ Section 6.

²¹⁴ Section 7.

²¹⁵ Order in Council Constituting District of “Mangonui” under the “Native Circuit Courts Act, 1858” 1859; Order in Council Constituting District of “Mangonui” under the “Native Districts Regulation Act, 1858” 1859.

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3 Governor Grey's 'new institutions'

Grey arrived back in Aotearoa with a comprehensive plan for the government of the country, including areas that remained under Māori influence. His plan for governance of Māori areas came to be known as 'the new institutions' or the 'rūnanga system'. Grey's plan was simply to allow limited Māori autonomy to "harness the energies of [the unofficial rūnanga] in pursuit of government objectives", i.e. to undermine the Kīngitanga and extend Crown authority and English law into Māori communities.²¹⁶ Legislative authority for the scheme was to be found in the 1858 legislation.²¹⁷ Under Grey's scheme the North Island was to be demarcated into 'native districts', each governed by a 'district rūnanga.' Each district would contain up to six 'hundreds' (or villages, each one having their own rūnanga). The 'village rūnanga' would appoint two representatives to the district rūnanga. Significantly, the rūnanga in conjunction with resident magistrates and the 'civil commissioner' could make bylaws relating to matters of local concern, such as infrastructure development, and land use, as well as to facilitate land alienation (customary or native title investigation). These would be enforced by salaried Māori officials (wardens and constables) under the guise of native

²¹⁶ O'Malley, above n 197 at 7; Ward, above n 195.

²¹⁷ Native Districts Regulation Act 1858 and Native Circuit Courts Act 1858.

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assessors. Proposed bylaws would need the approval of the Governor-in-Council.²¹⁸

4 Analysis against Anaya's framework

This section groups together the above 'native districts' frameworks (section 71 of the New Zealand Constitution Act 1852, Native Districts Regulation Act 1858, Native Circuit Courts Act 1858 and Grey's 'new institutions') and analyses them against Anaya's self-determination principles.

Constitutive self-determination

As with the criminal justice ordinances passed in the 1840s, and for similar reasons, the native district frameworks fail to give expression to Anaya's conception of constitutive self-determination. The native districts frameworks were wholly crafted by Crown officials with no involvement of iwi in the process. The frameworks, while ostensibly resembling vehicles to give expression to article two rights to tino rangatiratanga, were ultimately designed to further Crown objectives. As O'Malley notes, the various schemes were intended to undermine the influence of the developing Kīngitanga movement by extending British law into the

²¹⁸ See Ward, above n 195; O'Malley, above n 197; and O'Malley, above n 200.

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influential Māori settlements and Europeanising the applicable systems of law. They also prioritised the identification of customary land holders with the objective of freeing up Māori owned land, subject to native title, for alienation to settlers. Given the underlying objectives, and the lack of involvement of Māori in their development, it cannot be said that the processes leading to the creation of the various native districts frameworks enabled the will of the people to be heard in their development. Accordingly, these frameworks, as with the 1840s ordinances, are archetypal breaches of the constitutive self-determination principle.²¹⁹

Ongoing self-determination: subsidiarity

The various native districts arrangements were ostensibly promising when viewed against the subsidiarity precepts of Anaya's ongoing self-determination principle. The systems involved the devolution of a degree of autonomy to Māori communities (i.e. powers of law-making and enforcement). For some chiefs, this is what was envisaged by Te Tiriti. Alan Ward argues: "For the first time comprehensive machinery was being set in motion to involve the Māori in a substantial measure of legislative, judicial and administrative authority in their own districts."²²⁰ The schemes

²¹⁹ See chapter 1 for a discussion on Anaya's self-determination framework. Anaya, above n 45.

²²⁰ Ward, above n 195 at 126.

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allowed the setting aside of exclusive areas of Māori jurisdiction, where upon Māori would have authority to regulate areas of law prescribed by the governing legislation, subject to the overarching authority of the Crown. The arrangements exhibited some of the hallmark attributes of ‘autonomy’ outlined in chapter 1.

However, the native district systems failed to recognise the inherent nature of the authority of chiefs, instead, delegating powers through legislation. The autonomous decision-making powers were narrowly prescribed in legislation by the Crown, and any autonomous laws created were subject to the approval and ongoing oversight of the Crown. It is difficult to come to any other conclusion than that the native districts scheme was designed to Europeanise the long term and day-to-day regulation of Māori villages, to secure British colonial objectives. The preamble to the Native Districts Regulation Act stated:

WHEREAS it is expedient, in order to promote the civilization of the Native Race, that the Governor in Council be enabled to make and put in force ... such Regulations on matters of Local concernment, or relating to the Social Economy of the Native Race... [emphasis added]

Ongoing self-determination: cultural pluralism

Furthermore, the native districts frameworks failed to embrace or incorporate tikanga Māori to any material extent (aside from section 71 of

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the Constitution Act 1852, which was never applied and contained the proviso that Māori custom could only be applied so long as it was not “repugnant to the general principles of humanity.”). The framework itself, and any secondary legislation (i.e. bylaws) created and applied under the framework, was wholly framed by European conceptions of the law (Māori legal tradition or *tikanga* could not form the basis of decision-making). The native districts frameworks fail to embody the two underlying facets of Anaya’s ongoing self-determination principle: subsidiarity and cultural pluralism. Ultimately, as O’Malley says:²²¹

A half-hearted effort at co-opting Māori *runanga* was never going to succeed in the absence of any willingness to grant them real powers and to acknowledge Māori custom within the framework of the legal system.

On these bases, the native districts frameworks, when retrospectively viewed against Anaya’s self-determination principles, failed to embody the principles of indigenous self-determination as required by modern international law.

²²¹ O’Malley, above n 197 at 30.

IV Chapter Conclusion

This chapter has adopted the analytical framework developed in chapter 1 to consider whether various colonial legislative mechanisms, when viewed retrospectively, adhere to the indigenous self-determination norm. The mechanisms analysed ostensibly provided Māori with a significant level of autonomous decision-making authority over both the criminal law and the general regulation of life within Māori villages (i.e. areas where native title was not yet extinguished). The objective of these mechanisms was the erosion of traditional Māori institutions of authority and the replacement of Māori legal traditions with more ‘civilised’, European, notions of law. This is clearly evidenced by the preambles to the Native Exemption Ordinance and the Native Districts Regulation Act. Both the criminal ordinances and the native districts frameworks were wholly developed by Crown agents and imposed on Māori to achieve the Crown’s objectives (the extension of European law and authority into Māori village, the Europeanisation/civilisation of the governing legal framework, and the identification of customary land holdings to catalyse alienation). This is an archetypal violation of both Anaya’s constitutive and ongoing self-determination principles. This chapter therefore concludes that Aotearoa has historically failed to give expression to the self-determination norm when these mechanisms are viewed against Anaya’s framework. This thesis now moves to consider various contemporary

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environmental law frameworks in Aotearoa to consider whether the Crown is currently giving adequate expression to the norm. The chapter focuses on the interrelationship between the Crown, local authorities and Māori groups in relation to natural resources.

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I Chapter Introduction

This chapter has two key foci: (1) to consider whether the Crown is adequately implementing the indigenous self-determination norm in Aotearoa (by applying Anaya’s analytical framework to various resource frameworks);²²² and (2) if the current system is failing to comply, to consider whether any specific insights can be observed from the Aotearoa examples to formulate a model that *is* compliant. While the chapter concludes that the Crown is overall failing to comply with the norm, there are positive aspects of the emerging legal framework that go some way toward demonstrating compliance with the norm. For example, both the Whanganui River and Te Urewera settlement frameworks provide promising insights under Anaya’s cultural pluralism heading.

The chapter first takes stock of current Aotearoa law and examines whether any current mechanisms are implementing the indigenous self-determination norm. Because the underlying thesis of this work is concerned with the reclamation of indigenous agency in environmental management, the chapter focuses specifically on tools and mechanisms in

²²² Based on Anaya’s conception of ongoing self-determination, discussed in chapter 1.

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this field. While there are many such tools in Aotearoa law, the chapter specifically focuses on mechanisms that provide takata whenua with forms of ‘partnership’ (the Whanganui River settlement arrangement), and ‘control’ (the Te Urewera settlement and section 33 of the Resource Management Act 1991 (RMA)).²²³ Anaya’s framework is then adopted to consider whether these models comply with Aotearoa’s international obligations, i.e. whether they provide for the expression of indigenous self-determination. While there are aspects of the models which go some way toward realising the requirements of the norm (e.g. the legal personality examples and their expression of cultural pluralism), ultimately the mechanisms are non-compliant, and this speaks to a general dearth of norm-compliant tools in Aotearoa’s environmental law.

²²³ These ‘partnership’ and ‘control’ categories are explored in more depth below.

II Existing Tools under Aotearoa Law

The Crown might contend that many tools in Aotearoa law provide for the expression of Māori self-determination. This notion can be tested using the normative framework developed in chapter 1. For convenience, the existing tools can be conceptualised into three overarching categories: ‘influence’ (reactive participatory or consultative models), ‘partnership’ (power-sharing models) and ‘control’ (autonomy-based models).²²⁴ Each category provides Māori with a different level of influence over environmental decision-making, outlined below.

A Influence tools

Influence mechanisms are those that provide Māori with an opportunity to incorporate their views into public decision-making processes, usually by way of consultation, such as the mechanisms contained in Part II of the RMA. These mechanisms are reactive in nature,

²²⁴ This schema is taken from the Waitangi Tribunal’s report on the Wai 262 inquiry. In this inquiry the tribunal considered whether Aotearoa’s environmental management framework complies with Te Tiriti and its principles. In answering this question, the tribunal contended that a treaty compliant system would, depending on the circumstances, allow Māori to influence environmental management through either a control, partnership or influence model. Under this framework, the presence of all legitimate Māori and third party interests in a particular resource is first considered. The interests are then balanced and an appropriate level of Māori authority is selected, depending upon the priority to be afforded to extant interests.

While the Wai 262 framework was developed in the context of treaty jurisprudence (i.e. external to the general international law context), it is nonetheless insightful when measuring the existing environmental management tools against self-determination standards, given the similarities between self-determination and treaty based rangatiratanga or article two claims. Waitangi Tribunal, above n .

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enabling Māori groups to react to the priorities or decisions of third parties whom hold the ultimate decision authority, such as local authorities under the local government and resource management legislation.

Part II of the RMA is an example of this (sections 6, 7 and 8).²²⁵ These sections govern the incorporation and consideration of Māori views in resource management decision-making (inter alia). They apply, to “all persons exercising functions and powers” under the RMA, for example, when regional or district plans are developed or amended by local authorities, or when resource consent applications are considered by consent authorities. The mechanism allows Māori to attempt to influence resource development proposals in such cases, but only once the process has been initiated. Section 6 provides that decision-makers must “*recognise and provide for*” matters of national importance, including “the relationship of Māori and their culture and traditions with their ancestral lands, water ... and other taonga.” Section 7 provides that decision-makers must “*have particular regard to*” ‘kaitiakitanga,’ defined in section 2 as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship.” Finally, section 8 states

²²⁵ At 115.

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that decision-makers must “*take into account*” the principles of Te Tiriti o Waitangi.

These tools provide a mere opportunity for Māori to participate in resource management decision-making: no decision-making authority itself is provided to Māori, nor are their interests afforded any priority above other interests in the process.²²⁶ Under this influence model, Māori are “consigned to the less positive role of objectors.”²²⁷ While Māori are able to appeal local authority decisions to the Environment Court under this mechanism (i.e. on the basis that a council has not recognised or provided for their relationship with their lands, waters or taonga, under section 6), Māori have had little success with this approach in the past.²²⁸

Influence models are ultimately an ineffective vehicle for the expression of indigenous self-determination. When viewed against Anaya’s framework, they do not provide for the requirements of subsidiarity or cultural pluralism to any material extent. They provide

²²⁶ Linda Te Aho “Indigenous challenges to enhance freshwater governance and management in Aotearoa New Zealand - The Waikato river settlement” 2009 20(5-6) *Journal of Water Law* at 292.

²²⁷ Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. Te Taumata Tuarua volume 1* (Wai 262, 2011) at 280.

²²⁸ Jacinta Ruru “Indigenous restitution in settling water claims: the developing cultural and commercial redress opportunities in Aotearoa, New Zealand” 2013 22(2) *Pacific Rim Law and Policy Journal*.

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Māori with no competency to regulate environment management directly. Instead, existing power structures are maintained, and Māori are given the opportunity to submit their views to processes initiated and adjudicated on by third party public bodies. Māori views have no priority over non-Māori interests in this process. Influence tools such as Part II of the RMA are arguably the antithesis of indigenous subsidiarity contemplated by Anaya's framework, especially where a local authority is tasked with regulating the management of resources of high importance to Māori and very little importance to anyone else, e.g. waahi tapu (sacred sites). It cannot be argued that such mechanisms enable the decentralisation of governance to indigenous peoples.

Furthermore, Māori cultural precepts are not given expression via the influence mechanisms to any genuine extent. It is positive that the RMA and related local government instruments have begun to express the language of Māori environmental management concepts (e.g. the adoption of concepts such as kaitiakitaka (guardianship), taonga (treasured things) and waahi tapu into the RMA). However, as alluded to above, these concepts play a very limited role in genuine environmental decision-making under the RMA (they are but one consideration for third party decision-makers to bear in mind). There is little room for Māori concepts of environmental management (i.e. tikanga Māori) to form the basis of decision-making under these influence tools. Therefore, these tools fail to

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give expression to the cultural pluralism principles promoting by Anaya's self-determination framework.

These conclusions apply equally to other influence mechanisms, such as the statutory acknowledgments tool contained in various Treaty settlements²²⁹ and the recent Mana Whakahono-a-Rohe amendments to the RMA (iwi participation arrangements).²³⁰ This chapter will not consider influence tools in any further detail because they do not enable the expression of indigenous self-determination, at least in terms of Anaya's subsidiarity and cultural pluralism principles.

B Partnership tools

Partnership tools can be characterised as power sharing, co-management or co-governance arrangements. Such models generally entail a spectrum of arrangements involving, to various degrees, “the

²²⁹ Many Treaty settlements incorporate a statutory acknowledgment regime which recognises the mana of a tangata whenua group over a specified area of cultural, spiritual or historical importance. This has implications for resource management processes. Generally, councils must: forward summaries of resource consent applications relating to the statutory area to the iwi governance entity; have regard to the statutory acknowledgement when considering if the iwi may be adversely affected by a consent application (for the purposes of the notification processes); and record all relevant statutory acknowledgements on plans and policy statements. For example, see sections 205 to 222 Ngai Tahu Claims Settlement Act 1998.

²³⁰ Section 58M, RMA. Mana Whakahono-a-Rohe arrangements provide a mechanism for iwi and local authorities to discuss, agree and record ways in which tangata whenua may participate in resource management decisions-making processes under the RMA (for example, the development of planning documents).

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sharing of power between governments and local communities.”²³¹ Partnership tools therefore allow Māori to exercise shared decision-making authority in conjunction with public authorities over resources, a form of supervised or shared autonomy. This thesis contends that the partnership model can be used to operationalise indigenous self-determination in certain cases,²³² provided the principles of subsidiarity and cultural pluralism are given expression to a material extent. As was discussed in chapter 1, the operationalisation of the self-determination norm does not require any one specific type of institutional arrangement.²³³ Such an analysis unduly focuses on the remedial rather than the substantive aspects of the norm (i.e. the line of reasoning that generalises and equates self-determination claims with secessionist movements).

There are many potential examples of the partnership models that developed through the RMA and the treaty settlement process. It is questionable, though, whether these models adhere to the requirements of the self-determination norm applied in this thesis (Anaya’s framework).

²³¹ Fikret Berkes and others “The Benefits of the Commons” 1989 *Nature* 91 at 93. See also Rachael Caroline Harris “The changing face of co-governance in New Zealand: how are Ngāi Tahu and Ngāi Tūhoe promoting the interests of their people through power-sharing arrangements in resource management?” (LLM Thesis, University of Canterbury, 2015) for a general overview of co-management and its application to the Kāi Tahu context in Aotearoa.

²³² See chapter 5 below for a discussion on the balancing test suggested by the Waitangi Tribunal in Wai 262. The tribunal’s conceptual model suggests that partnership models may be appropriate when there are many third parties interested in the resource, as well as iwi. Waitangi Tribunal, above n 224.

²³³ Anaya, above n 90.

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For example, under ss 36B to 36E of the RMA, a local authority may conclude a joint management agreement ('JMA') with an iwi authority, provided certain statutory requirements are satisfied by the parties (including an 'efficiency' test). JMAs enable the parties to jointly perform the local authority's functions relating to natural or physical resources in the region/district. For example, a JMA has been concluded between the Tūwharetoa Māori Trust Board and Taupō District Council.²³⁴ This provides that publicly notified resource consents and private plan changes relating to Māori freehold land in the district can be heard by a joint panel of decision-makers.²³⁵ It effectively provides the Tūwharetoa entity with an equal share in statutory decision-making power, although this is limited to a narrow and specific context. Other, similar, examples are the JMA entered into between Te Rūnanganui o Ngāti Porou Trustee Limited and Gisborne District Council,²³⁶ and the various Waikato River co-management arrangements.²³⁷

²³⁴ *Joint Management Agreement between Taupō District Council and The Tūwharetoa Māori Trust Board on behalf of Ngāti Tūwharetoa Iwi* (2008).

²³⁵ Consisting of two commissioners appointed by each party and a jointly chosen chairperson.

²³⁶ This JMA provides for the sharing of functions relating to notified resource consent applications and planning which relate to the Waiapu catchment. *Joint Management Agreement between Gisborne District Council and Te Rūnanganui o Ngāti Porou Trustee Limited* (2015).

²³⁷ Waikato-Tainui Rauptau Claims (Waikato River) Settlement Act 2010, which gives effect to a Deed of Settlement dated 22 August 2008. This agreement resulted from the resolution of Waikato-Tainui's historical grievances regarding the Crown's management of the Waikato River. It provides for the co-management of the awa by various Crown and iwi entities, and the formulation of a 'vision and strategy' for its restoration. Various statutory decision-makers when exercising their powers/functions must 'give effect to' the strategy and vision (e.g. those exercising decision powers under

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While the mentioned partnership models are a positive development for the incorporation of Māori views in resource management, they are not without criticism for their lack of ability to provide for genuine self-determination. As Linda Te Aho notes:²³⁸

There are some who are deeply concerned about whether co-management can ever truly work in New Zealand when there is such an imbalance of power and resourcing and when the Crown partner is the ultimate decision-maker.

The shared nature of the decision-making locus, and the lack of overall influence available to Māori under the frameworks²³⁹ means that the partnership category ranks lower against Anaya's conception of ongoing self-determination than the control models.²⁴⁰ A case study of the Whanganui River settlement, a partnership model, will be considered

RMA, Conservation Act 1987 and National Parks Act 1980); or 'have particular regard to it' (Local Government Act). The legislation also created an obligation for the parties to enter into a JMA within 18 months from settlement date. Other parts of the Waikato River are now subject to JMAs with other river iwi/hapū: see Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 (s 43) and Nga Wai o Maniapoto (Waipa River) Act 2012 (s 17).

²³⁸ Linda Te Aho, above n ; at at 292.

²³⁹ Gail Tipa "Indigenous communities and the co-management of natural resources: the case of New Zealand freshwater management" (PhD Thesis, University of Otago, 2002).

²⁴⁰ See Natalie Coates "Joint-management agreements in New Zealand : simply empty promises?" 2009 13(1) Journal of South Pacific Law for an overview of other criticisms relating to the JMA regime. These include: the requirement for the JMA to meet an 'efficiency test'; the fact that JMAs can be cancelled at any time; and the lack of political willingness of local authorities to adopt a JMA.

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further below to assess whether this partnership model complies with Anaya's requirements of the self-determination norm.

C Control tools

Legal mechanisms that provide Māori with the ability to manage, control or exercise authority directly and unilaterally over natural resources (within the rubric of central government's overarching sovereignty) can be described as control tools. These are the tools that most resemble forms of autonomous governance, whether territorial or non-territorial.²⁴¹ Control models can be adopted to implement self-determination, provided they give expression to the subsidiarity and cultural pluralism requirements. The examples explored under this category are: (1) the Te Urewera framework; and (2) section 33 transfers under the RMA. The Crown is likely to identify these two models as prime examples of the self-determination norm. The chapter considers this position and analyses whether these case studies adequately operationalise the self-determination norm, or whether better control models are needed to give effect to the norm. The concept of a legal personality for natural resources will be explored first to provide necessary background to the Whanganui River (partnership) and Te Urewera (control) case studies.

²⁴¹ See chapter 1 for a discussion regarding the types of autonomy (e.g. territorial, non-territorial and cultural).

III Legal Personality - Background

A Theoretical foundations

The idea of attributing rights to nature has many proponents but the most cohesive exegesis of the idea comes from Christopher Stone in his seminal work: “Should Trees Have Standing? – Toward Legal Rights for Natural Objects.”²⁴² Stone advocated for all ‘natural objects’ (i.e. forests, oceans, rivers etc.) and the entire natural environment to be recognised as legal personalities, equipped with their own bundle of rights. Stone, who contended that the concept would lead to better environmental outcomes for society, argued that the extension of rights to nature was a natural progression of rights in law. He noted that the extension of human rights to African-Americans and women was seen as radical at the time because the dominant social theories perceived African-Americans and women effectively as chattels to be productively utilised by civilised European men. Stone refers to Lockean theory to demonstrate similarly how natural resources have “traditionally been regarded by the common law ... as objects for man to conquer and master and use – in such a way as the law once looked upon “man’s” relationship to African Negroes.”²⁴³ Stone’s idea, in the context of the dominant political theories, therefore offers an

²⁴² Christopher Stone “Should Trees Have Standing? - Toward Legal Rights for Natural Objects” 1972 45 Southern California Law Review.

²⁴³ At 463.

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alternative way of viewing the world, natural resources and the human relationship between the two (vis-a-vis previously dominant social paradigms).

Stone's legal personality idea encompassed three aspects: (1) the "natural object" would have legal standing in its own capacity (an action could be brought in the name of the resource itself where harm is caused); (2) the quantification of loss assessment would consider the actual impact of the harm to the resource (rather than the diminution in economic value to human right holders);²⁴⁴ and (3) any remedies would be applied to the resource directly (rather than compensating human rights holders).

The governments of two South American states have adopted Stone's concept in the drafting of their constitutional documents. Bolivia has restructured its constitutional and legal frameworks to extend rights to nature, based on indigenous philosophies of 'Pachamama' (mother earth) as a living being.²⁴⁵ The reforms have created 11 new rights for the environment, including a right to life and a right to continue vital cycles and processes free from human alteration.²⁴⁶ Similarly, Ecuador amended

²⁴⁴ E.g. riparian owners adjacent to a river.

²⁴⁵ Law of the Rights of Mother Earth 2010 (Bolivia).

²⁴⁶ Articles 7 and 8.

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its constitution in 2008 to include a section on the rights of nature, including the right to exist and maintain its lifecycles, and the right to be restored.²⁴⁷ As mentioned above, Stone’s concept has now penetrated Aotearoa’s legal system with the conclusion of the Whanganui River and Te Urewera settlements in 2017 and 2014 respectively. Before examining these frameworks in detail, the section will now assess the extent at which the concept aligns with the Māori worldview.

B Link to Māori worldviews

Stone’s concept is important because it aligns with many fundamental Māori environmental concepts, evidenced with reference to the Whanganui River and Te Urewera case studies. It will be demonstrated throughout this chapter that these two case studies, which reflect Stone’s concept, also strongly align with Anaya’s conception of cultural pluralism. Therefore, aspects of these frameworks are insightful when considering the future shape of Māori self-determination in Aotearoa. First, this section examines the connection between tikanga Māori and Stone’s legal personality concept.

In the author’s view it can be risky to refer to a homogenous ‘Māori worldview’, especially in twenty-first century Aotearoa society, given the

²⁴⁷ Constitution of the Republic of Ecuador 2008 (Ecuador), arts 71 and 72.

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history of colonisation and racial integration, and the wide range of contexts that modern Māori derive from and live within.²⁴⁸ Clearly, not all Māori hold, or historically held, the same views regarding their own personal relationship with the natural world. Nonetheless, the salient characteristics, or principles, of pre-contact Māori understandings of the natural world (te ao tūroa) can be identified, and it is useful to use this idea in contexts such as this thesis.

Pre-contact Māori generally viewed the world through a holistic lens, perceiving inextricable links between people, the natural environment and the metaphysical. In Māori cosmogony and anthropogony, all things were ordered in accordance with whakapapa, which means literally ‘to place in layers’. Michael Stevens explains this meant that “everything from flora and fauna to the weather, emotions, as well as humankind, were arranged into genealogical groups.”²⁴⁹ Te Aho notes that each iwi/hapū had its own traditions, but:²⁵⁰

...all are inextricably bound to the environment ... by virtue of whakapapa (genealogy) which derives from the creation stories of human-kind in cosmology. We see ourselves as direct descendants

²⁴⁸ Tānia Ka'ai (ed) *Ki te whaiao: an introduction to Māori culture and society* (Pearson Longman, Auckland, NZ, 2004).

²⁴⁹ Michael Stevens “Muttonbirds and Modernity in Murihiku: Continuity and Change in Kāi Tahu Knowledge” (PhD Thesis, University of Otago, 2009) at 21.

²⁵⁰ Linda Te Aho, above n ; at 285.

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of our earth mother and sky father and consequently not only ‘of the land’ but ‘as the land.’

Such perspectives are interspersed through pepeha (tribal sayings), whaikōrero (oratory), karakia (incantations), waiata (songs), kīwaha (idioms) etc. For example, in introductory pepeha it is common for a person to introduce where they are from with reference to the significant geographical features of their tribal area (i.e. mountains, rivers, lakes etc.).²⁵¹ The common saying “Ko au te awa, ko te awa ko au,” which translates as “I am the river, the river is me,” encapsulates the view that humans and their environment are intrinsically connected.²⁵² Over many generations Māori developed tikanga (Māori laws, customs and practices) founded on this worldview and relating to human respect for their personified environment.²⁵³ This tikanga recognised that if people cared for the environment, the environment would continue to sustain them.²⁵⁴

²⁵¹ It is customary for the author to exclaim: Ko Takitimu te mauka; Ko Aparima te awa; Ko Te Ara-a-Kewa te Moana – Takitimu is the mountain; Aparima is the river; Foveaux Strait is the ocean [from whence I come].

²⁵² James Morris and Jacinta Ruru “Giving voice to rivers : legal personality as a vehicle for recognising Indigenous peoples' relationships to water?” 2010 14(2) Australian Indigenous Law Review at 299.

²⁵³ This has been described as a ‘chthonic’ system of law by authors such as Glenn Patrick. Glenn Patrick *Legal traditions of the world: sustainable diversity in law* (Oxford University Press, Oxford; New York, 2007).

²⁵⁴ Linda Te Aho, above n 226. See also *Re Tipene [2016] NZHC 3199*, an application to the High Court for an order recognising customary marine title over the marine and coastal area surrounding Pohowaitai and Tamaitemioka (Tīti Islands). In this judgment, the court-appointed pūkenga, Jane Davis, refers to the tikanga of the Tīti Islands which she was taught by her grandmother and mother. They were taught, “if you look after the island, the island will look after you.” (At [116]).

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Given the nature of the Māori relationship with the environment, it can be argued that the Māori worldview, so far as one can be identified, aligns with the legal personality concept proposed by Stone in that it moves away from the idea that humans are the sovereign conquerors of the natural world and its resources. Instead, the idea recognises the fundamental connection between humans and the natural world, the intrinsic value of the latter and the responsibilities of care which therefore arise. Perhaps, though, it is better to say that in a legal environment founded on Western liberal concepts of law, society and environmental management, the legal personality concept is a shift toward incorporating within our legal system alternate (i.e. indigenous) ways of seeing the world (i.e. cultural and legal pluralism). This is what Glenn describes as a ‘sustainable diversity in law’, a theory promoting the incorporation of differing legal traditions or normative orders.²⁵⁵ The section will now consider the ways in which these concepts have been adopted in partnership and control models under two recent Treaty of Waitangi settlements (the Whanganui River and Te Urewera settlements). It analyses: (1) whether each framework gives adequate expression to the indigenous self-determination norm, and (2) the

²⁵⁵ Patrick Glenn “Sustainable Diversity in Law” 2011 3(1) Hague Journal on the Rule of Law 39.

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extent at which any insights can be drawn from the case study for future reference.

IV Te Awa Tupua – Whanganui River

A Introduction

After many years of petitioning the government to remedy historical breaches of the Treaty of Waitangi, Ruruku Whakatupua, the Whanganui iwi Deed of Settlement,²⁵⁶ was signed in 2014 and given effect through Te Awa Tupua Act in 2017.²⁵⁷ Te Awa Tupua Act establishes a new legal framework for Te Awa Tupua based on the legal personality concept, called ‘Te Pā Auroa nā Te Awa Tupua’.²⁵⁸ The framework is designed to involve all stakeholders²⁵⁹ in the management of the river, predicated on the idea of ‘upholding the mana’ of the awa and improving it’s mauri (life force).²⁶⁰ This section will explore the partnership model embodied in the 2017 legislation and the Deed of Settlement.

B Te Pā Auroa – legal framework

1 Overview of framework

Section 12 recognises Te Awa Tupua as “an indivisible and living whole, comprising the Whanganui River from the mountains to the sea,

²⁵⁶ Ruruku Whakatupua - Te Mana o Te Awa Tupua (Whanganui River Deed of Settlement).

²⁵⁷ Signed in 2014 and given effect by the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 [“Te Awa Tupua Act”].

²⁵⁸ Which translates as ‘the broad eel weir’.

²⁵⁹ Aside from the various Whanganui iwi, there are many different stakeholders whom rely on the river for sustenance and to support industry and energy generation.

²⁶⁰ Linda Te Aho “Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River” May 2014 Māori Law Review 12.

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incorporating all its physical and metaphysical elements.” The awa is attributed a legal personality in section 14, and as such it “has all the rights, powers, duties, and liabilities of a legal person.” These two sections together are referred to as the ‘Te Awa Tupua status’.²⁶¹ Section 13 articulates ‘Tupua te Kawa’: the four ‘intrinsic values’ representing the essence of the awa, based on the iwi’s pre-European notions of resource management. The four kawa are:

- “*Ko te Awa te mātāpuna o te ora*: the River is the source of spiritual and physical sustenance.”²⁶² The awa is a spiritual and physical entity that supports the life and resources within it, as well as the people.
- “*E rere kau mai te Awa nui mai te Kahui Maunga ki Tangaroa*: the great River flows from the mountains to the sea.”²⁶³ The awa is an indivisible and living whole from the mountains to the sea, encompassing all of its physical and metaphysical elements.
- “*Ko au te Awa ko te Awa ko au*: I am the River and the River is me.”²⁶⁴ The iwi and hapū of the awa have an inalienable

²⁶¹ Section 7.

²⁶² Kawa Tuatahi. Section 13(a).

²⁶³ Kawa Tuarua. Section 13(b).

²⁶⁴ Kawa Tuatoru. Section 13(c).

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connection with, and responsibility to, the awa and its health and wellbeing.

- “*Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua: the small and the large streams that flow into one another and form one River.*”²⁶⁵ The awa is a singular entity comprised of many elements and communities working together for the common purpose of the health and wellbeing of the awa.

The practical effect of the Tupua te Kawa is that specified statutory decision-makers,²⁶⁶ when making decisions regarding the river or its catchment, must either “recognise and provide for” or “have particular regard to” Tupua te Kawa.²⁶⁷ In other words, these iwi conceptual understandings of the environment must be considered in environmental decision-making when this is undertaken by non-iwi public authorities. The importance of this to Anaya’s cultural pluralism principles will be discussed in further detail below.

²⁶⁵ Kawa Tuawhā. Section 13(d).

²⁶⁶ I.e. non-iwi decision-makers who exercise certain functions, powers or duties under one of a number of specified statutes.

²⁶⁷ The applicable statutory directive (e.g. ‘recognise and provide’ or ‘have particular regard to’) depends on the statutory power, function or duty being exercised. Schedule 2, Te Awa Tupua Act.

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2 *Formal institutions of partnership*

The various institutions established to give effect to the Whanganui settlement framework reflect a power-sharing approach to resource management, which demonstrates the partnership nature of this example. This is evidenced by the joint nature of the appointment processes to the governance structure, and the joint management of the institutions themselves (i.e. between both iwi and other stakeholders).

A ‘human face’ known as Te Pou Tupua is established to act in the name of the awa.²⁶⁸ The function of Te Pou Tupua is to: act and speak on behalf of the awa;²⁶⁹ to uphold both the new legal status of the awa and Tupua te Kawa;²⁷⁰ and to promote and protect the health and wellbeing of the awa²⁷¹ (inter alia). Te Pou Tupua consists of two people jointly appointed by the Crown and the iwi,²⁷² and it administers a \$30 million contestable fund designed to support the health and wellbeing of the awa.²⁷³ An advisory group known as Te Karewao (supplejack vine) is

²⁶⁸ Section 18.

²⁶⁹ Section 19(1)(a).

²⁷⁰ Section 19(1)(b).

²⁷¹ Section 19(1)(c).

²⁷² Section 20. The first two appointees are Dame Tariana Turia and Turama Hawira, which were made on 4 September 2017. Hon Christopher Finlayson and Gerrard Albert “First Te Pou Tupua appointed [4/9/17]” (2017) www.scoop.co.nz/stories/PA1709/S00132/first-te-pou-tupua-appointed-4917.htm.

²⁷³ Known as Te Korotete (Subpart 6).

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established to provide practical advice and support to Te Pou Tupua, comprising appointees by the iwi with interests in the awa and the local authorities of the area.²⁷⁴

A strategy is to be developed identifying the issues relating to the environmental, social, cultural and economic health and wellbeing of the river (known as Te Heke Ngahuru Ki Te Awa Tupua or “the first autumn migration of tuna [eels] signifying well-stocked storehouses for winter”).²⁷⁵ Like other resource management instruments,²⁷⁶ Te Heke Ngahuru must provide strategies to deal with the identified issues and recommend specific actions to be taken. The strategy document is to be developed collaboratively by all stakeholders and persons with interests in the river, in order to address and advance the health of the awa. Accordingly, the strategy group, Te Kōpuka nā Te Awa Tupua (white mānuka, the material used to build the pā auroa), will prepare and monitor the implementation of the strategy and will comprise representation from all community stakeholders (e.g. iwi, local authorities, conservation groups, commercial interests etc.).²⁷⁷

²⁷⁴ Sections 27 and 28.

²⁷⁵ Section 35.

²⁷⁶ E.g. regional and district plans under the RMA.

²⁷⁷ Section 29 to 33.

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3 Decision-making procedures

Existing non-iwi decision-makers, exercising a statutory function, power or duty in relation to the river or its catchment, derived from specified enactments,²⁷⁸ must '*recognise and provide for*' the Te Awa Tupua status and Tupua te Kawa.²⁷⁹ A lower standard applies to a different set of specified statutory decision-makers,²⁸⁰ whom must, under the same circumstances, '*have particular regard to*' the Te Awa Tupua status and Tupua te Kawa.²⁸¹ These provisions will be analysed against Anaya's framework below.

Furthermore, under the legislation, Te Pā Auroa (the name for the new legal framework) is deemed to be a relevant consideration for the exercise of *all* statutory functions, powers and duties relating to the awa, or to activities in the catchment which affect the river.²⁸² It further follows that where a statutory decision-maker makes an administrative decision

²⁷⁸ The enactments listed in clause 1 of Schedule 2. These include: the RMA (specifically with respect to the preparation or amendment of regional policy statements, regional or district plans), Conservation Act 1987 and Local Government Act 2002 (inter alia).

²⁷⁹ Section 15(2).

²⁸⁰ The powers, functions or duties derived from clause 2 of Schedule 2. These are: Heritage New Zealand Pouhere Taonga Act 2014, Public Works Act 1981 and the RMA to the extent it is not captured by s 15(2)/clause 1 (in other words, all statutory powers of decision under the RMA except the development or amendment of regional policy statements, regional or district plans – such as the consideration of resource consent applications).

²⁸¹ Section 15(3).

²⁸² Section 11.

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without considering Te Pā Auroa, that decision is amenable to judicial review on the grounds of illegality (and there is potential for the decision to be set aside). Additionally, specified statutory decision-makers must “*have particular regard to*” Te Heke Ngāhuru, the awa strategy.²⁸³

C Analysis against Anaya’s framework

1 Constitutive self-determination

This section will now consider the extent at which the Whanganui framework adheres to Anaya’s principles of self-determination. To recap, as discussed in chapter 1, the constitutive aspect considers whether the *procedures* which led to the creation of the institutional structure can be said to have encompassed the will of the people. In other words, were the requirements of participation and consent embodied by this principle adhered to in the negotiation of the Whanganui settlement, such that the settlement can be said to reflect the will of the Whanganui people?

As discussed in chapter 1, Anaya’s key frame of reference for the constitutive standard is African colonialism, which resulted in the illegitimate expansion of European authority over existing nations, and the imposition of foreign government structures over another people. While there are parallels between the colonisation of Africa and the original

²⁸³ Section 37.

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colonisation of Aotearoa that the Whanganui people experienced (discussed in the introduction), the immediate inquiry instead focuses on the establishment of the Whanganui settlement itself. As such, the thesis does not explore the colonial history of each indigenous group against this heading, except as far as that history concerns the negotiation and establishment of the institutional structure in question (in this case, the Te Awa Tupua settlement).

In this context, constitutive self-determination raises questions regarding the vastly different negotiating positions of the Whanganui people vis-à-vis the Crown (through its Office of Treaty Settlements organ). This equally applies to all other Treaty settlement negotiations.²⁸⁴ As canvassed above, the recognition and implementation of Māori rights (at international law generally and pursuant to rights sourced from Te Tiriti o Waitangi) is subject to the exercise of the Crown's discretion. There is no legal mechanism available to iwi to have their general international law or Treaty of Waitangi rights invoked and recognised unilaterally (i.e. through the judicial process), transferring questions around the recognition of Māori rights from the legal and into the discretionary political realm. Given this, and the fact that the Crown has a significant resource base (it

²⁸⁴ Nicola R. Wheen and Janine Hayward *Treaty of Waitangi settlements* (Bridget Williams Books with the New Zealand Law Foundation, Wellington, N.Z, 2012); Ann Sullivan "The politics of reconciliation in New Zealand" 2016 68(2) Political Science.

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has the power to tax, enforce laws and compel compliance through the police and army), especially compared to pre-settlement iwi groupings (which often have very limited financial resources available to them), in the author's view, it cannot be said that any agreement born of the treaty settlement process is fully capable of giving expression to Anaya's constitutive self-determination. Given these inherent power imbalances, it can be concluded that on the basis of Anaya's framework, the processes leading to the conclusion of the Whanganui settlement ultimately did not allow the Whanganui iwi to freely determine their own political status.²⁸⁵

2 Ongoing self-determination: subsidiarity

The most pertinent question under Anaya's ongoing self-determination for the Whanganui settlement is the extent at which the iwi is practically able to influence the outcome of natural resource management decision-making under the framework (based on subsidiarity precepts). Included here are considerations regarding whether the manawhenua are able to truly influence proposals that might be detrimental to the awa and its catchment. Under this consideration, the example ranks lower than it does against Anaya's cultural pluralism precepts (discussed below).

²⁸⁵ Nan Seuffert "Nation as Partnership: Law, "Race," and Gender in Aotearoa New Zealand's Treaty Settlements" 2005 39(3) Law & Society Review.

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The first significant feature of the legal framework is that it does not give any exclusive decision-making powers to the manawhenua. The pre-existing powers of decision relating to the awa and its catchment are retained by those who held them prior to the passage of the Te Awa Tupua Act. This includes all functions, powers or duties under the RMA, which remain the responsibility of the pre-existing, non-iwi, decision-makers. No direct autonomous powers in relation to the regulation of the resource are given to the iwi under the settlement.

While the existing public authorities retain their decision-making competences regarding the awa/catchment, their decision-making framework is modified by the settlement legislation. Under the new arrangement iwi are able to influence environmental outcomes, however the ability to do so depends upon the application of a set of ‘RMA-esque’ statutory provisions contained in the Te Awa Tupua Act. As discussed, specified (non-iwi) statutory decision-makers must either “recognise and provide for” or “have particular regard to” Tupua te Kawa (the intrinsic values) and the Te Awa Tupua status (recognition of the awa as: an indivisible and living whole with physical and metaphysical elements; and as a legal person).²⁸⁶ Specified decision-makers must also “have particular

²⁸⁶ Sections 15, 12 and 14.

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regard to” to Te Heke Ngahuru (the river strategy).²⁸⁷ These provisions are distinctive in that they mirror the wording and hierarchical manner that Māori views are directed to be accounted for under Part II of the RMA itself. Under the RMA certain matters relating to Māori interests must be “recognised and provided for”,²⁸⁸ “had particular regard to”,²⁸⁹ or “taken into account” by local authorities when exercising powers of decision under the RMA.²⁹⁰ RMA jurisprudence has, in the context of these RMA sections, characterised these statutory directives as hierarchical in the extent at which they constrain local authority decision-making.²⁹¹ For example, the High Court has held that the direction to ‘recognise and provide for’ in section 6 means that the factors listed must actually be provided for by the decision-maker – they cannot merely be considered and discarded.²⁹² Similarly, the Environment Court has noted that the direction to ‘have particular regard to’ the factors listed in section 7 is

²⁸⁷ Section 37. The specified decision-makers are: those listed in cl 1 of sch 2; Heritage New Zealand Pouhere Taonga Act 2014; and the balance of the RMA.

²⁸⁸ Section 6. This relates to matters of national importance, including: the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

²⁸⁹ Section 7. This includes kaitiakitanga.

²⁹⁰ Section 8. This relates to the principles of the Treaty of Waitangi.

²⁹¹ *Long Bay-Okura Great Park Society Inc. v North Shore City Council* EnvC A078/08.

²⁹² Similar to the ‘matters of national significance’ under s 6 RMA. See *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).

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weaker than section 6 – there is no obligation to make provision for the listed factors so long as they are considered by the decision-maker.²⁹³

While sections 6, 7 and 8 of the RMA apply to persons exercising powers of decision-making under the RMA (i.e. local authorities), the Whanganui framework applies to a much wider range of statutory decision-makers (set out in Schedule 2, clauses 1 and 2).²⁹⁴ As Rodgers notes:²⁹⁵

This applies to the most important environmental governance measures in New Zealand and is intended to ensure that the unique status of the Te Awa Tupua is reflected in plans and project governance under, *inter alia*, the National Parks Act 1980, Local Government Acts 1974 and 2002, the River Boards Act 1908, the Walking Access Act 2008, the Reserves Act 1977 and the Resource Management Act 1991.

While the framework ostensibly establishes a ‘power-sharing’ arrangement over the management of the awa. For example, appointments to/the operational running of the ‘human face,’ the advisory group, and the strategy group are shared between manawhenua, local/central government and/or other interested parties. The framework is more appropriately

²⁹³ Long Bay-Okura Great Park Society Inc.

²⁹⁴ These are set out in cls 1 and 2 of sch 2, Te Awa Tupua Act.

²⁹⁵ Christopher Rodgers “A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017” 2017 19(4) Environmental Law Review at 269.

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characterised as a reactive influence model.²⁹⁶ The extent that the various Whanganui iwi can influence the outcome of proposals relating to the awa and its catchment under this framework will depend upon the discretion of the non-iwi statutory decision-maker itself (i.e. local authorities in considering resource consents or drafting planning documents) and their palate for interpreting and applying pre-European Māori management concepts (Tupua te Kawa), as well as the Te Awa Tupua status. This will likely exist on a spectrum of minimal to a very high degree of provision for these matters. These tools are reactive in nature and provide very little ability for the Whanganui iwi to directly influence environmental decision-making. Therefore the Whanganui model is more appropriately characterised as a ‘reactive influence’ model (discussed at the beginning of chapter 3) and it fails to adhere to Anaya’s subsidiarity principle to any material extent.

3 Ongoing self-determination: cultural pluralism

The obvious starting point for this assessment is the extent that the mechanism aligns with Māori ways of seeing the world and allows the expression of these concepts in environmental management. As Morris and Ruru point out, the legal personality model provides for “the Māori legal

²⁹⁶ In fact, it resembles the archetypal influence model discussed above (Part II of the RMA and the provisions for incorporating Māori interests).

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concept of a personified natural world.”²⁹⁷ It diverts from many traditional principles underpinning Western liberal legal systems and their systems for resource management, namely that ‘man’ is the sovereign conqueror of the natural world, which is a divisible resource designed to be exploited for the value it can provide to human people.²⁹⁸ Instead, as discussed above, the pre-European Māori worldview perceived an inherent connection between all physical and metaphysical things, where order is established by whakapapa, and where natural features are personified as ancestors. Under this system, humans have distinct responsibilities to maintain balance and uphold the life sustaining essence of ecosystems (mauri). James Morris and Jacinta Ruru consider that the value of the concept is that it “takes a western legal precedent and gives life to a [resource] that better aligns with a Māori worldview that has always regarded [resources] as containing their own distinct life forces.”²⁹⁹

This worldview is translated into the legal framework for Te Awa Tupua, complementing the previous wholly anthropocentric management structure. The awa is recognised as a living and indivisible whole and attributed a legal personality. Part of the intrinsic value system of the

²⁹⁷ Morris and Ruru, above n 252 at 50.

²⁹⁸ Stone, above n 242.

²⁹⁹ Morris and Ruru, above n 252 at 58.

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Whanganui iwi is identified and articulated in the legislation as Tupua te Kawa.³⁰⁰ These capture the underlying values that tie the Whanganui iwi to their awa. Together, these fundamental Whanganui Māori concepts (Tupua te Kawa, the awa as a living and indivisible whole, and the personification of resources) are provided for in the management of the river (and its catchment) by statutory decision-makers (albeit, non-iwi).³⁰¹ In other words, distinctively Māori ways of perceiving and interacting with the world *can* form the basis of environmental decision-making.

To link this to Anaya's framework, the governing institutional order reflects the distinct character and preferences of the Whanganui manawhenua, to a high degree. Accordingly, when the Whanganui framework is viewed against Anaya's minimum standards of cultural pluralism, the legal personality concept as it is currently applied in this context ranks relatively highly and has a lot to offer any innovative tool for self-determination.³⁰²

³⁰⁰ These translate as follows: (1) the river is the source of spiritual and physical sustenance; (2) the great river flows from the mountains to the sea; (3) I am the river and the river is me; and (4) the small and large streams that flow into one another and form one river. Section 13.

³⁰¹ As discussed above, specified decision-makers *must* either 'recognise and provide for' or 'have particular regard to' these matters when exercising a specific function, power or duty. Section 15.

³⁰² This will be discussed further in chapter 4.

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Although, this conclusion must be tempered. As noted above, the extent that Māori concepts *will* practically form the basis of environmental decision-making depends upon how third-party decision-makers interpret and apply these inherently Māori concepts in accordance with their statutory mandate. The models positive adherence to cultural pluralism precepts (i.e. the ability for environmental decision-making to be based on Māori conceptual understandings of the world) is therefore limited by the model's lack of commitment to subsidiarity principles (i.e. iwi views will only be incorporated if non-iwi decision-makers consciously apply them to a material extent).

Overall, while self-determination can be expressed through power-sharing or partnership models, the Whanganui model ultimately fails to give effect to this when viewed against the subsidiarity standards. Little decision-making authority is shared with the manawhenua, and their influence over the awa is dependent upon third parties. It cannot be said that the Whanganui model is an operational expression of the self-determination norm, at least according to Anaya's conception of the norm.

Two case studies of the control model will now be considered (Te Urewera and section 33 of the RMA) to assess whether they comply with Anaya's conception of the self-determination norm.

V Te Urewera

A Introduction

The Tūhoe people of the central North Island have traditionally held manawhenua over the majority of the area known as Te Urewera, and prior to Pākehā contact the iwi expressed its rangatiratanga over this and surrounding areas. The area is highly isolated and densely forested, and mainly the domain of the Tūhoe people.³⁰³ The iwi suffered many generations of injustice at the hands of the settler government. In 1865 most of Tūhoe peoples' productive lands were confiscated by the Crown under the so-called New Zealand Settlements Act 1863. The Crown waged war in Te Urewera until 1871, during which the involved Crown agents employed 'scorched earth' tactics against the Tūhoe people. The introduction of the Native Land Court to the region between the 1870s and the 1890s led to the transfer of large parcels of land out of the hands of the iwi. Interestingly for the present purposes, local self-government was intended to be provided to Tūhoe over the 656,000-acre Te Urewera reserve under the Urewera District Native Reserve Act 1896, which would have enabled the iwi to make decisions regarding resource use based on Tūhoe tikanga or Tūhoe legal tradition. The Act was never implemented. In 1954 Te Urewera National Park was created without consultation or any

³⁰³ Judith Binney *Encircled lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, NZ, 2009).

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consideration of Tūhoe’s interest in the whenua. National park policies led to restrictions over Tūhoe’s customary use of the land.³⁰⁴ After many years of claims negotiations the Tūhoe Deed of Settlement was signed on 4 June 2013, and Te Urewera Act passed in 2014 (giving effect to the Deed).³⁰⁵ The settlement attempts to give effect to the long held Tūhoe principle of mana motuhake.³⁰⁶ The framework establishes Te Urewera as a legal personality in its own right, giving expression to Stone’s concept. The following section will outline the Te Urewera framework and then analyse it against Anaya’s conception of the self-determination norm.

B Legal framework

1 Overview of framework and board

Under the new legal framework, Te Urewera’s previous national park status is removed, the area ceases to be Crown land and is attributed

³⁰⁴ Section 8, Tūhoe Claims Settlement Act 2014.

³⁰⁵ The Tūhoe Claims Settlement Act deals with the balance of the Tūhoe settlement (i.e. all matters external to the new Te Urewera framework). Te Uru Taumatua and The Crown Te Whakatauna o Na Tohe Raupatu Tawhito - Deed of Settlement of Historical Claims [**Tūhoe Deed**].

³⁰⁶ Mana motuhake has been loosely be translated as self-determination, although it has many different meanings for different iwi/hapū. As Te Rangimārie Williams points out: “Tūhoe inherited their obsession for mana motuhake from their eponymous ancestor, Tūhoe-Pōtiki and have always strove and will continue to strive for independence and self-determination.” The mana motuhake provisions of the settlement empower the PSGE to deliver some Crown social services directly to Tūhoe communities. This is directed by a social service management plan, the goal of which is that “Tūhoe become well housed, in good health, with good educational opportunity and social support so that they may manage their own affairs to the maximum practical extent.” Te Rangimārie Williams “Crown offer to settle the historical claims of Ngāi Tūhoe” 2012 October Māori Law Review 19 at 20; Ministry of Business Innovation and Employment, Ministry of Education and Ministry of Social Development Ngāi Tūhoe Service Management Plan.

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its own legal personality. Te Urewera has all the rights, powers, duties and liabilities of a legal person.³⁰⁷ Instead of the Department of Conservation, Te Urewera is governed by a new board which is tasked to “act on behalf of, and in the name of, Te Urewera,”³⁰⁸ in a similar manner as the “human face” of Te Awa Tupua. In its first three years the board consisted of eight appointees, four appointed by the iwi and four by the Crown. After three years the board will increase to nine members, six appointed by the iwi and three by the Crown. The board is empowered to: prepare, approve and advise on the management plan applying to Te Urewera;³⁰⁹ make bylaws to regulate a wide range of matters with respect to Te Urewera (including the management, safety and preservation of Te Urewera; controlling the use of internal combustion engines; and excluding the public from any specified part of Te Urewera);³¹⁰ authorise certain activities (e.g. activity permits and concessions);³¹¹ and generally to advocate on Te Urewera’s behalf “in any statutory process or at any public forum.”³¹² (These mechanisms will be elaborated further below.) At the operational

³⁰⁷ Section 11.

³⁰⁸ Section 17(a).

³⁰⁹ Section 44. The purpose of the management plan is to identify how the purpose of the Act will be achieved through management of Te Urewera and to set objectives and policies for Te Urewera: s 45.

³¹⁰ Section 70.

³¹¹ Subpart 4, ss 55 to 62.

³¹² Section 18.

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management level, the Chief Executive of Tūhoe Te Uru Taumatua³¹³ and the Director-General of Conservation are jointly responsible for the day-to-day running of Te Urewera.³¹⁴

2 *Decision-making procedures*

The purpose of the Act is set out in section 4. Its stated purpose is:

to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to – (a) strengthen and maintain the connection between Tūhoe and Te Urewera ...

The principles for implementing the Act and achieving the purpose are set out in section 5. It states that persons performing functions or exercising powers under the Act must act so that, as far as possible: “Tūhoetanga, which gives expression to Te Urewera, is valued and respected” (inter alia).³¹⁵ Sections 4 and 5 therefore clearly signal to the Board that Tūhoe understandings of resource management are to have a level of priority within its decision-making processes.

Section 18 provides further direction to the Board in its discretionary decision-making. It states that the Board in performing its functions *may*

³¹³ The post-settlement governance entity for Ngāi Tūhoe.

³¹⁴ Section 50.

³¹⁵ Section 5.

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“consider and give expression to ... Tūhoetanga” and “Tūhoe concepts of management” such as rāhui, tapu me noa, mana me mauri and tohu.³¹⁶ In other words, it can apply pre-European Tūhoe concepts of management when making resource use decisions. The specified Tūhoe management concepts are elaborated in subsection (3):

Mana me mauri conveys a sense of the sensitive perception of a living and spiritual force in a place;

Rāhui conveys the sense of the prohibition or limitation of a use for an appropriate reason;

Tapu means a state or condition that requires certain respectful human conduct, including raising awareness or knowledge of the spiritual qualities requiring respect;

Tapu me noa conveys, in tapu, the concept of sanctity, a state that requires respectful human behaviour in a place; and in noa, the sense that when the tapu is lifted from the place, the place returns to a normal state;

Tohu connotes the metaphysical or symbolic depiction of things.

Further elaboration of these concepts is contained within the Deed of Settlement. For tapu/noa, the Deed provides the example of discovering the existence of a huia in Te Urewera.³¹⁷ In such a case, the location would

³¹⁶ Section 18(2).

³¹⁷ A species of wattle thought to be extinct. Michael Szabo “Huia” (2013) <http://nzbirdsonline.org.nz/species/huia>.

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be recognised as tapu and a rāhui implemented to prevent human entry. However, if the discovery was sadly disproved, the tapu and rāhui would be lifted and the valley would become normal, or noa.³¹⁸

With respect to mana me mauri, the Deed states:³¹⁹

In a conservation context "mana" resonates with the apprehension of the five senses: feel, sight, smell, taste, hearing. One may feel the moss in the bush; see the coursing waves of Waikaremoana; smell the burst of buds on harakeke; taste the water; thrill to the sound of birdsong at the dawn.

But then there is mauri, the living and spiritual force and context of mana. Why has the moss flourished or perished? Why are the waves so ragged? Why is the flax bush barren? Why do the birds sing, or not? Why is the water sour?

Further, the Deed outlines the anthropomorphic nature of the tohu concept. Tohu thus has the effect of:³²⁰

...investing things, including ideas, with human qualities or associations. Thus, ahikāroa, which invokes the image and comfort of a fire. The associations are manifold: that it is safe to light a fire because one is at home; stalking through the bush one sees the fire of one's whanau and knows that it assures comfort, companionship, sustenance, albeit that it may also mark the frontier of darkness. The ethos is conservation.

³¹⁸ Tūhoe Deed, pp. 99-100.

³¹⁹ Tūhoe Deed, p. 100.

³²⁰ Tūhoe Deed, p. 100.

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Therefore, when the board exercises a function, power or duty it has the opportunity to form its decision on the basis of these pre-European Tūhoe concepts of management.

3 Tūhoe ability to control activities

In addition to the general decision-making direction provided in section 18, the board is also mandated to control many different types of activity in Te Urewera. A continuum exists whereby some activities require specific approval from the board and others may be carried out as of right. A ‘concession’ is required from the board for all commercial activities carried out within Te Urewera, and a concession may only be granted if the activity is consistent with the management plan.³²¹ Other non-commercial activities require an ‘activity permit’ from the board, including: taking indigenous or exotic plants; disturbing or hunting animals (except sports fish); possessing any dead protected wildlife for cultural or other purposes; entering specially protected areas; building roads; establishing accommodation; and farming.³²² Significantly, the board can authorise the customary harvest of indigenous foods such as

³²¹ Section 62. This is similar to the National Parks Act 1980’s concessions system. See also Schedule 3 which sets out a number of matters which apply to the concessions regime over Te Urewera.

³²² Section 58.

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kereru,³²³ provided: the preservation of the species is not adversely affected, the effects on Te Urewera are no more than minor and the permit is consistent with the management plan.³²⁴ In deciding such an application a number of factors must be considered by the board, including whether the proposed activity “is important for the restoration or maintenance of customary practices that are relevant to the relationship of iwi and hapū to Te Urewera.”³²⁵

It is noteworthy that one of possibly the most invasive resource activities in the modern world (mining) may be carried out as of right (i.e. without the need for a concession or an activity permit).³²⁶ The framework specifically reserves the right for resource extractors to mine the area, provided all other requisite permits are obtained. This fact is striking and a clear limitation on the ability of Tūhoe tangata to influence decision-making within their ancestral whenua.

³²³ Also known as New Zealand pigeon or *hemiphaga novaseelandiae novaseelandiae*. Philip Lyver and others “Tūhoe Tuawhenua mātauranga of kererū (*Hemiphaga novaseelandiae novaseelandiae*) in Te Urewera” 2008 32(1) *New Zealand Journal of Ecology*.

³²⁴ Schedule 3, cl 1.

³²⁵ See Schedule 3, cl 1(3).

³²⁶ See s 56(b). Mining may only be carried out if it is authorised under the Crown Minerals Act 1991. A miner must also obtain any other requisite authorisations under any other relevant statute (s 55(2)).

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Similarly, any cultural, recreational or educational activities that are undertaken without any specific gain or reward (i.e. financial) may be carried out without authorisation from the board.³²⁷ Another feature of the framework is that it remains subject to the usual local authority and RMA mechanisms (regional policy statements, regional and territorial plans).³²⁸ Although, similar to national parks, a resource consent is not required for work undertaken within Te Urewera by the board or DOC, provided that work is for the purpose of managing Te Urewera, is consistent with the Act and management plan, and does not have a significant adverse effect on the environment beyond the boundary of Te Urewera.³²⁹

4 *Management plan*

As at the date of writing, a draft management plan under section 44 has been developed by the board, known as Te Kawa o Te Urewera (“Te Kawa”).³³⁰ The statutory purpose for this document is to identify how the purpose of the Act will be achieved in the management of Te Urewera, and to set objectives and policies for the same.³³¹ Te Kawa continues the

³²⁷ Section 56(a). See also s 64(1) which states that Te Urewera shall be treated as if it were Crown land described in Schedule 4 of the Crown Minerals Act.

³²⁸ Section 41 states that the statutory functions and powers of local authorities over Te Urewera are not limited by the Act.

³²⁹ Section 43.

³³⁰ Te Urewera Board *Te Kawa o Te Urewera - The Te Urewera Management Plan (draft)* (2017). From the author’s understanding this is yet to be ratified at the time of writing.

³³¹ Section 45.

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overall scheme of the Deed and Te Urewera Act in that it is distinctively framed by the Tūhoe holistic perspective of the world, Tūhoetana. It notes “Te Kawa is about the management of *people* for the benefit of the land – it is not about land management.”³³² (emphasis added). Te Kawa is aimed at “resetting our human relationship and behaviour towards nature”³³³ and disrupting the norm. The document is forthright in noting that it does not seek to replicate the style of previous management plans (i.e. a code of rules), instead, Te Kawa focuses on principles, traditions and beliefs as a guide. It seeks to move away from ‘Western’ liberal conceptions of property rights, which have “hidden from view the concept of nature ... These human granted rights have displaced our devotion for Papatūānuku with ownership now serving individual advantage.”³³⁴ Overall, Te Kawa recognises the interconnectivity of all living things, Te Urewera itself being a living system, and connected to Papatūānuku, the personified earth mother. It emphasises the responsibilities that humans have for their environmental impact, the need for balance in the living system, the need to uphold the mauri of Te Urewera (the life force).

³³² At 5.

³³³ At 6.

³³⁴ At 17.

C Analysis against Anaya's framework

Constitutive self-determination

This aspect of Anaya's framework was considered above in the Whanganui settlement section. The reasoning outlined in that section, applies to treaty settlements generally (including the Te Urewera settlement). The inherent power imbalance in the Tūhoe treaty settlement negotiations and the fact that there is no legal mechanism available for the iwi to invoke and have their rights recognised means that the processes leading to the conclusion of the Te Urewera were incapable of fully satisfying Anaya's conception of constitutive self-determination.

Ongoing self-determination: subsidiarity

The Te Urewera settlement framework is of a different ilk to the Whanganui model. In comparison, the Te Urewera model is less tied to the RMA regime and embodies many characteristics of a control model. In this sense it is closer to the traditional understandings of autonomous governance or so-called internal self-determination.

The board is given the power to establish and enforce delegated legislation (and other executive functions) over a defined territorial area.³³⁵

³³⁵ This may be because the residents of Te Urewera are predominantly Tūhoe descendants, the area is fairly isolated from major urban society, the nature of the

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The board will soon be composed of 66% Tūhoe and 33% Crown appointees, which enables Tūhoe to steer decision-making at the executive level by virtue of their majority composition.³³⁶ The board is empowered to establish a number of components of the institutional framework, including: the management plan (setting the objectives and policies for how the purpose of the Act will be achieved in management of Te Urewera);³³⁷ an annual statement of priorities (outlining how the management plan will be implemented);³³⁸ and bylaws to regulate the use of Te Urewera.³³⁹ The board carries out other executive functions over Te Urewera, including the consideration of applications for concessions or activity permits.³⁴⁰ The overall institutional framework is similar to the national parks regime and is subject to a degree of Crown oversight (for example, any bylaws created by the board require ministerial approval).

While Tūhoe, through the board, has a quasi-executive and a quasi-legislative role in managing Te Urewera, the iwi is limited to working within the management parametres set by the Crown in legislation when

Crown's historical involvement in the area, and the historical fight of the Tūhoe people for recognition of their mana motuhake.

³³⁶ Section 21.

³³⁷ Subpart 2.

³³⁸ Section 51.

³³⁹ Section 70.

³⁴⁰ Subpart 4.

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carrying out these functions. Any bylaws promulgated by the board require ministerial approval. Furthermore, the potential for mining, one of the most invasive activities possible, is explicitly reserved under the framework. If a large-scale mining operation was tabled for Te Urewera the iwi would have limited ability to interfere with this under the settlement framework. (The iwi would, if they were inclined to do so, be forced to object to such proposals through the usual, reactive, processes such as Part II of the RMA). This clearly limits the ability of Tūhoe to manage the resources of Te Urewera in accordance with their own wishes. Accordingly, while it goes some way towards it, it cannot be maintained that this control framework adheres to the subsidiarity requirements of the self-determination norm to any material extent.

Ongoing self-determination: cultural pluralism

The above analyses regarding the adoption of a legal personality in the Whanganui partnership model, can be applied to the Te Urewera model. For Te Urewera, the new regime also marks a change in view from the previous national park governing structure, which embodies a mono-cultural approach to setting land aside based on Western liberal value systems (for example, the land is set aside for the benefit it can provide to

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humans).³⁴¹ The new framework moves toward a bicultural understanding of natural resource management, incorporating Tūhoe concepts into each layer of management.³⁴² It recognises that Tūhoe have a distinct perception of the relationship between humans and natural resources (and the responsibilities to care for the latter), and allows this to permeate decision-making structures. This is demonstrated through the purpose of the Act, which is: “to strengthen and maintain the connection between Tūhoe and Te Urewera”,³⁴³ through the direction for the board to value and respect Tūhoetanga in its decision-making,³⁴⁴ and through the discretionary power provided to the Board to “consider and give expression to” Tūhoetanga and Tūhoe concepts of management (including rāhui, tapu me noa, mana me mauri, and tohu).³⁴⁵ Furthermore, the draft management plan, Te Kawa o Te Urewera, is revolutionary as far as documentation for the management of natural resources is concerned. It embodies Tūhoetana in its entirety, ensuring that the Tūhoe voice and perspective is central to the future use of Te Urewera. As Jacinta Ruru states: “in contrast to nearly any other statutorily created body, including the Department of Conservation, [the

³⁴¹ Jacinta Ruru “A Maori right to own and manage national parks?” 2008 12(1) *Journal of South Pacific Law*.

³⁴² Jacinta Ruru “Tūhoe-Crown Settlement - Te Urewera Act 2014” 2014 October *Māori Law Review*.

³⁴³ Section 4.

³⁴⁴ Section 5.

³⁴⁵ Section 18.

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Board] is directed to reflect customary values and law.”³⁴⁶ This is comparable to Tupua te Kawa, the underlying iwi value system that applies to the decision-making of the Whanganui River.

While the framework ranks highly against Anaya’s cultural pluralism requirements, the poor ranking against subsidiarity standards (for example, the lack of ability to influence mining proposals under the settlement framework) means that ultimately this model fails to give expression to Anaya’s conception of the self-determination. The case study is nonetheless insightful for the way that the institutional structure prioritises uniquely Tūhoe (i.e. Māori) concepts of environmental management. These insights can (and should) be adapted into any future model for operationalising the self-determination norm in Aotearoa.

³⁴⁶ Ruru, above n 342 at 16.

VI Section 33 of the RMA

A Introduction

This section considers whether section 33 of the RMA (another control model) is capable of giving expression to Anaya’s conception of the self-determination norm. Section 33 enables local authorities to transfer one or more of their RMA functions, powers or duties to “public authorities”, which was defined to include “iwi authorities”. The mechanism is regarded by some as “one of the most potentially rewarding provisions in the [RMA] for Māori seeking direct access to decision-making authority.”³⁴⁷ While section 33 might have had potential initially, there are a number of deficiencies in the drafting and operation of the mechanism itself which must be canvassed. While some deficiencies in the mechanism have been amended and resolved since 1991,³⁴⁸ section 33 remains in force today, virtually un-utilised and entirely unused in the context of iwi authorities. This section will now examine the workings of the mechanism itself.

³⁴⁷ Elizabeth Clark “Section 33 of the Resource Management Act 1991” in Janine Hayward (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Auckland, NZ, 2003) at 43.

³⁴⁸ E.g. subsection (3) has been repealed. This subsection provided that the transferor local authority retained ultimate responsibility for the transferred function, power or duty. Also, under the original formulation, the approval of policy statements or plans (or amendment thereof) could not be transferred. This has been removed. Resource Management Amendment Act 2003.

B Operational aspects of the tool

The first thing to note is that the transfer power provided to local authorities is discretionary: it is not mandatory for any local authority to execute a transfer if an iwi authority requests it. Nor does the local authority need to even consider the proposal, and, if it decides not to, there is no right of appeal against declinature. There is therefore no compulsion under section 33 (the effect of this will be discussed in more detail below).³⁴⁹

1 “Iwi authority”

Secondly, it is not clear what an “iwi authority” is. Section 33 was originally intended to exist beside the Runanga Iwi Act 1990, which enabled iwi representative organisations known as rūnanga to become bodies corporate, based on a principle of self-identification.³⁵⁰ When that statute was repealed in 1991, the reference to iwi authorities in section 33 of the RMA lost its context,³⁵¹ and as a result the precise definition of iwi authority under section 33 still remains unclear. Under section 33 local authorities appear to have the unilateral ability to define ‘iwi authority’

³⁴⁹ Waitangi Tribunal, above n 224.

³⁵⁰ The Runanga Iwi Act 1990 was designed to further the government’s privatisation agenda by devolving the delivery of the Crown’s Māori development services to iwi organisations. See Kirsty Gover and Natalie Baird “Identifying the Māori Treaty Partner” 2002 52(1) *The University of Toronto Law Journal*.

³⁵¹ Hamish Rennie, Jill Thomson and Tikitu Tutua-Nathan *Factors facilitating and inhibiting Section 33 transfers to iwi* (Dept. of Geography, University of Waikato, Cambridge [NZ]; Hamilton [NZ], 2000).

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based on any criteria they deem appropriate, which removes any element of iwi self-identification based on tikanga or kawa. The only case interpreting this phrase is *Whakarewarewa Village Charitable Trust*,³⁵² where the Planning Tribunal considered that the village, a Ngāti Wahaio hapū area of Te Arawa iwi, which consisted of well-defined lots and boundaries of hapū owned land, was a “prime example” of an iwi authority under section 33.³⁵³ Aside from this, there has been very little judicial comment on the definition of iwi authority.

2 *Functions, powers and duties under the RMA*

Thirdly, the functions, powers and duties (“FPDs”) under the RMA that are subject to section 33 must be considered. The RMA prescribes a number of FPDs for local authorities, including the duty to monitor both the state of the environment, and the efficiency and effectiveness of planning documents.³⁵⁴ However, the main FPDs for the present purpose are those that enable direct decision-making over resources, i.e. the promulgation of planning instruments (regional policy statements,³⁵⁵ regional plans (including coastal plans),³⁵⁶ and district plans),³⁵⁷ the

³⁵² *Whakarewarewa Village Charitable Trust v Rotorua District Council* W061/94 [1994] NZPT 189 (25 July 1994).

³⁵³ At 21.

³⁵⁴ Section 35.

³⁵⁵ Sections 59-62.

³⁵⁶ Sections 63-70.

³⁵⁷ Sections 72-77.

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consideration of resource consent applications, and the associated monitoring and enforcement processes.³⁵⁸ Through this framework the RMA enables local authorities to set the environmental objectives and rules for the region or district. They also classify the type of activities that are permitted as of right (i.e. not requiring a resource consent), those that require a resource consent (and may be subject to certain conditions), and those that are strictly prohibited.³⁵⁹ Any of the FPDs associated with this RMA framework are capable of transfer under section 33.

3 Procedural and substantive requirements

From the face of the provision it is not clear how the procedure for implementing a section 33 transfer is initiated, e.g. whether a formal written proposal or application is required by an iwi authority, and what this must contain (if it is required). This was found by Rennie et al to be a factor which disincentivises section 33's use.³⁶⁰ Once the process is in fact initiated, a number of arguably draconian measures are required to be satisfied before the proposal can be concluded. Section 33 requires the local authority to serve notice of the proposal on the Minister for the Environment, and use the special consultative procedure contained in

³⁵⁸ Also see generally sections 30 and 31.

³⁵⁹ See generally pt 6 and s 87A.

³⁶⁰ Rennie, Thomson and Tutua-Nathan, above n 351.

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section 83 of the Local Government Act 2002 (set out in the footnote).³⁶¹

This procedure is complex, usually reserved for the most important local authority decisions (e.g. adoption of bylaws and annual plans) and entails a lot of time, resources and bureaucratic navigation.³⁶²

In addition, before the local authority may complete the transfer, both parties must be satisfied that a “three step test” has been met and therefore the transfer is desirable.³⁶³ The three criteria are: (1) the transferee represents the appropriate community of interest relating to the exercise of the FPD; (2) that the transfer is “efficient”; and (3) that the transfer is desirable on the grounds of technical or special capability or expertise. Joseph and Bennion contend that the community of interest

³⁶¹ Section 33(4)(a) and (b). The special consultative procedure is summarised below. It requires the local authority to:

- prepare and adopt a statement of proposal (and a summary if the local authority reasonably believes it will be required for public understanding);
- Ensure the following are publicly available:
 - The statement of proposal;
 - A description of how interested persons can have their say;
 - A time limit for when public views may be provided to the local authority;
- Make the statement of proposal or summary as widely available “as is reasonably practicable as a basis for consultation”;
- Provide an opportunity for oral submissions; and
- Ensure anyone who wishes to make their views known is given a reasonable opportunity to do so; and is informed about how/when they may do this.

³⁶² Waitangi Tribunal, above n 224.

³⁶³ See s 33(4)(c).

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requirement suggests the transfer will need to be over a limited physical area opposed to a general blanket transfer of authority over part of a region or district.³⁶⁴ Without any previous examples of iwi transfers to consider it is difficult to know if this holds true. The efficiency and capability/expertise requirements may bring other issues for iwi seeking to adopt section 33. As Rennie et al have argued, local authorities usually interpret these requirements in terms of economic efficiency i.e. whether the transfer will result in a net financial gain for the council (and its ratepayer constituents). The difficulties with these requirements and the various interpretations will be discussed in further detail below.³⁶⁵

Once the special consultative procedure has been executed, and both parties are satisfied that the proposal is desirable on the grounds set out in section 33(4)(c), the transfer must be effected via written agreement, which may be subject to any terms and conditions that are agreed. All successful transfers to date (to non-iwi) have been made by deed, and have contained clauses regarding reporting requirements of the transferee, the amendment of the agreement, revocation, indemnities, and dispute resolution (inter

³⁶⁴ Robert Joseph and Tom Bennion “Challenges of incorporating Maori values and Tikanga under the Resource Management Act 1991 and the Local Government Bill - possible ways forward” 2003 6 Yearbook of New Zealand Jurisprudence.

³⁶⁵ Rennie, Thomson and Tutua-Nathan, above n 351.

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alia).³⁶⁶ A local authority has absolute discretion to change or revoke any transfer it makes to a public authority, “at any time,” simply by giving notice to the transferee.³⁶⁷ However, a transferee may only revoke a transfer in accordance with the terms of the empowering agreement.³⁶⁸ Local authorities have a duty to monitor the exercise of any transferred FPDs, but are no longer ultimately liable for the exercise of the FPDs.³⁶⁹

4 *References to section 33 in national and local planning instruments*

Under the original RMA framework, it was envisaged that high level strategic policy direction for environmental management would be provided to local authorities by central government.³⁷⁰ This would come in the form of national policy statements (“NPSs”) and national environmental standards (“NESs”), which would sit above regional and district planning instruments in the RMA’s hierarchy. While NPSs and NESs have been scarcely promulgated since 1991, one such example is the New Zealand Coastal Policy Statement (“NZCPS”).³⁷¹ The 1994 version of the NZCPS set out central government’s policy objectives in relation to

³⁶⁶ Section 33(6). Also see Ministry for the Environment *Section 33: transfer of functions, powers or duties - a stocktake of council practice* (Wellington, NZ, 2015).

³⁶⁷ Section 33(8).

³⁶⁸ Section 33(9).

³⁶⁹ Section 35(2)(c). Section 33(3), which has been repealed, stated that the transferor retained responsibility for the transferred FPD.

³⁷⁰ Waitangi Tribunal, above n 224.

³⁷¹ Department of Conservation *New Zealand Coastal Policy Statement* (1994).

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the country's marine and coastal area. The NZCPS contained a reference to the section 33 transfer power, directing that where characteristics of a special value to tangata whenua are identified (in the marine environment), the local authority should consider using section 33.³⁷² As Rennie et al note, this was a clear direction from the Crown that local authorities should “actively consider” transfers to iwi under section 33,³⁷³ whom must implement the NZCPS. However, the latest version of the NZCPS, which was released in 2010, does not refer to section 33 and instead opts for other language regarding the involvement of tangata whenua in managing the marine environment (e.g. policy 2(d): to “provide opportunities *in appropriate circumstances* for Māori involvement in decision making...” (emphasis added)). This is problematic for iwi authorities seeking to adopt this tool to implement self-determination and is consistent with the thesis of the Waitangi Tribunal that the Crown has dis-incentivised the use of the mechanism.³⁷⁴ The removal of section 33 from the NZCPS removes one of the only central government encouragements for local authorities to adopt it.

³⁷² At policy 2.1.3.

³⁷³ Rennie, Thomson and Tutua-Nathan, above n 351 at 18.

³⁷⁴ Waitangi Tribunal, above n 224.

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None of the other NPSs in force currently³⁷⁵ refer to section 33. The NPS for Freshwater Management contains an objective to “provide for the involvement of iwi and hapū, and to ensure that tangata whenua values and interests are identified and reflected in the management of fresh water...”.³⁷⁶ But, there is no mention of section 33. Overall, it can be surmised that there has been little direction or encouragement from central government regarding the execution of section 33 transfers, and local authorities have been afforded a wide discretion to ignore the existence of the mechanism when dealing with the iwi in their area.

With respect to local government policy and planning instruments, many local authorities’ instruments refer to the possibility of using section 33. Although, most do not openly consider the idea and qualify the proposal with words such as “where appropriate”. For example, the Southland Regional Policy Statement (RPS) states the regional council will:³⁷⁷

Provide for tangata whenua involvement in resource management, decisions and monitoring through: ... (b) where appropriate ... full

³⁷⁵ Ministry for the Environment *National Policy Statement - Urban Development Capacity* (2016); Ministry for the Environment *National Policy Statement - Freshwater Management* (2014); Ministry for the Environment *National Policy Statement - Renewable Electricity Generation* (2011); Ministry for the Environment *National Policy Statement - Electricity Transmission* (2008).

³⁷⁶ Objective D1.

³⁷⁷ Southland Regional Policy Statement 2017, method TW.4.

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or partial transfer of the Southland Regional Council’s functions, duties or powers to tangata whenua through the recognised iwi authority, in accordance with Section 33 of the Act. [Emphasis added].

The Southland RPS further states that local authorities (regional councils and territorial authorities) will be encouraged to.³⁷⁸

Consider, where appropriate, full or partial transfer of a council’s functions, duties or powers to tangata whenua through the recognised iwi authority, in accordance with Section 33 of the Act.

The Southland Coastal Plan states that the methods to give effect to the objectives and policies of the plan include the potential adoption of section 33 transfers for “the management of areas containing high cultural values to tangata whenua.”³⁷⁹ The plan states that section 33 transfers are particularly useful “where such values are important to tangata whenua or in remote areas.” It seems that while many local authority planning and policy instruments refer to the possibility of using section 33 to involve Māori in resource management, the references are generally conditional, they extend a wide discretion to the councils, and, in any case, have not resulted in any successful transfers to iwi authorities.

³⁷⁸ At Method TW.7.

³⁷⁹ At 1.6.5, method 5.

C Examples of section 33 transfers

In 2015 the Ministry for the Environment undertook a stocktake of section 33 and its adoption to date. The report noted that very few transfers had been concluded under the provision.³⁸⁰ It correctly noted that there had been no transfers to iwi authorities under section 33, but there had been some concluded between local authorities. The most common transfer identified was from regional councils to territorial authorities. Examples of this were Otago Regional Council (“ORC”), which in 1994 transferred to Queenstown Lakes District Council the function of determining consent applications for land use under section 13 (structures on river beds), as well as the administration and monitoring of such consents. Another example is the 2001 transfer by the Northland Regional Council to the Far North District Council of the function of processing, administering and monitoring consents for certain specified activities, including the discharge of contaminants (e.g. treated effluent) from dwellings. Less common were transfers from territorial authorities to regional councils, although one example of this was a transfer from Far North District Council to Northland Regional Council in 2001.³⁸¹ The general trend has been for regional councils to transfer FPDs relating to consent administration, monitoring

³⁸⁰ Ministry for the Environment, above n 366.

³⁸¹ The transferred function was the processing, administration and enforcement of consents for land use relating to earthworks for earth dams, and land use for private jetties and boat ramps.

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and enforcement, as opposed to environment policy or planning development itself. There have never been any ‘blanket’ transfers i.e. of all FPDs from one council to another.

D Analysis against Anaya’s framework

Now that the legal framework of section 33 has been mapped out above, the following section will analyse the provision against Anaya’s self-determination standards to consider whether it is capable of giving expression to the norm.

1 Constitutive self-determination

The constitutive inquiry was canvassed in the context of the two treaty settlements analysed above. The analysis of section 33 against this heading could be considered from two points of view: (1) the inclusion of section 33 in the RMA originally; and (2) the establishment of a successful section 33 transfer under the regime. This section does not propose to go into any detail regarding (1), other than to point out that section 33 has been unilaterally framed by the Crown via the legislative process. As with the treaty settlement process, given the vastly different power dynamics between the legislature and minority Māori groups that existed at the time, the inherent power imbalance operated to ensure that Māori had very little input into the processes leading to the creation of the section 33 transfer mechanism. This section instead focuses on point (2), whether the

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processes leading to the implementation of section 33 transfers operationalise Anaya’s constitutive self-determination principle.

There are various potential issues associated with section 33’s practical operation and these discourage its adoption in the first place. Natalie Coates has identified issues with the operation of section 36B joint management agreements (“JMAs”). JMAs are a “halfway house” to section 33 as they enable the joint implementation of FPDs by iwi and local authorities. The same criticisms of JMAs can be applied to section 33. Coates notes potential issues that arise based on the application of the maxim “*nemo iudex in sua causa*”, which translates to “no one should be a judge in his/her own cause”. Iwi authorities exercising FPDs under section 33 expose themselves to judicial review claims for apparent bias, as, in their application of the FPDs, they will likely hear and adjudicate claims in which they have a conflicting interest.³⁸² Rennie et al demonstrate this issue: “...how could iwi authorities possibly act unbiasedly when this is their ancestral mountain and Mr Smith wants to quarry at the base of it.”³⁸³ This litigation risk is an undesirable aspect of the mechanism that discourages its adoption by iwi authorities. Although, local authorities frequently face similar conflict of interest situations and

³⁸² Coates, above n 240.

³⁸³ Rennie, Thomson and Tutua-Nathan, above n 351 at 43.

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are able to develop practical solutions to resolve the issue. For example, in applications for resource consent for council sewerage or water reticulation developments. In these cases, the council is both the regulator as well as the adjudicator. In such cases the risk of actual conflict (or the perception of conflict) is mitigated through the adoption of transparent decision-making mechanisms, for example, the incorporation of independent hearing commissioners.³⁸⁴ Iwi authorities could adopt similar decision-making mechanisms to ensure the risk of actual or perceived conflict does not hinder the application of a section 33 transfer.

The notable lack of adoption of section 33 must also be considered here. There is nothing in the legislation which compels local authorities to adopt the mechanism, or to even consider it seriously (beyond the ambiguous and non-committal references in local planning instruments). Accordingly, iwi interested in exploring this mechanism as a way to implement their self-determination face significant hurdles from the outset. This lack of compulsion is currently met with a lack of political willingness amongst local authorities to implement a transfer to iwi authorities. This can be attributed to a number of factors, including: it may be seen as a politically risky move by elected officials wishing to please their majority constituents; the procedure is cumbersome and costly (the special

³⁸⁴ Rennie et al, above n 351.

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consultative measures must be adopted, which are reserved for the most important council decisions); the three-stage test must be met; questions around financing must be resolved and the agreement itself must be negotiated.³⁸⁵

This issue is not isolated to section 33 specifically and is related to a more inherent problem of a general lack of willingness to involve Māori in resource management decision-making at all levels. Early Waitangi Tribunal reports criticised the RMA framework for preventing iwi/hapū from controlling or managing their taonga or natural resources.³⁸⁶ Despite minor amendments to the Māori participation aspects of the RMA framework (e.g. JMAs), this criticism remains extant. The Wai 262 report notes that while the RMA was supposed to deliver a high level of Māori involvement in resource management decision-making, “Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise.”³⁸⁷ As one prominent Whanganui iwi member has said:³⁸⁸

³⁸⁵ Rennie et al, above n 351.

³⁸⁶ Deputy Chief Judge Caren Fox and Chris Bretton “Māori Participation, Rights and Interests” (paper presented to RMLA 2014, September 2016); Waitangi Tribunal *Ngawha Geothermal Resource Report* (Wai 204, 1993).

³⁸⁷ Waitangi Tribunal, above n 227 at 284.

³⁸⁸ Linda Te Aho, above n 260.

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The Resource Management Act has always provided the opportunity for Māori to participate at planning level, but it never happens because there is *no willingness*, we have no political weight. So we are shut out, and we become one voice amongst many other constituencies.

This general comment on the efficacy of the RMA's processes for realising Māori self-determination is strongly reflected in the operation of section 33 in particular (or lack thereof).

Accordingly, there exist many deficiencies in the constitutive processes of section 33 which discourage its adoption by both local authorities and Māori (iwi authorities). Various practical issues with the mechanism discourage its adoption by iwi authorities (i.e. the potential for judicial review), and the 'tyranny of the majority' operates to discourage local authorities from adopting any measure that would displease their non-Māori majority constituents.³⁸⁹ Accordingly, due to the deficiencies in the establishment of section 33 transfers, this mechanism fails to adequately comply with Anaya's constitutive self-determination principle. The processes leading to the establishment of section 33 transfers cannot be seen as incorporating the will of the people, or as reflective of indigenous participation and consent.

³⁸⁹ John Stuart Mill *On Liberty* (London, 1859).

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2 *Ongoing self-determination: subsidiarity*

The starting point for the subsidiarity aspect of Anaya’s ongoing self-determination is the fact that section 33, if applied, would allow iwi Māori to assume responsibility for FPDs under the RMA. As discussed above, this potentially applies to a wide range of FPDs, among the most significant are: the power to promulgate planning documents (RPS, regional and district plans),³⁹⁰ the power to adjudicate resource consent applications, the power to monitor compliance with consent conditions, and the power to generally enforce the RMA’s regulatory framework. Compared to the Whanganui River example above, section 33 has the potential to deliver to iwi authorities a higher level of autonomous decision-making power over resources (subject, of course, to central government oversight). In comparison, the ability of the Whanganui iwi to influence resource decision-making under their settlement is limited to the interpretation of statutory directives for ultimate (i.e. non-iwi) decision-makers to variously “recognise and provide for” or “have regard to” iwi interests or specified Māori customary concepts of management (or other relevant considerations). The iwi is not the ultimate decision-maker under the Whanganui example for any context – ultimate decision-making for the awa and its catchment is in the hands of non-iwi, majoritarian institutions.

³⁹⁰ Under the original formation of s 33, this power was unable to be transferred (subs (3)). This restriction has now been repealed.

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Under section 33, the iwi authority itself is capable of being the ultimate decision-maker with respect to resource decision-making through RMA FPDs (although, remain subject to central government oversight). This is the most significant feature of the mechanism when viewed against Anaya’s subsidiarity requirements. The Waitangi Tribunal itself has recognised the potential for this mechanism to deliver “kaitiaki control” over their taonga, in such cases where it is considered desirable for the kaitiaki interests to take priority over other third-party interests (after a balancing test is executed).³⁹¹

3 Ongoing self-determination: cultural pluralism

This section assesses the extent at which section 33 transfers are capable of embodying the distinct cultural preferences and concepts of Te Ao Māori to give effect to Māori self-determination. This is both a requirement of Anaya’s conception of ongoing self-determination and a clear aspiration of Māori seeking to implement their self-determination over natural resources or taonga. Janet Stephenson, in reviewing the Māori submissions to the proposed Far North District Plan, notes:³⁹²

It was clear that submitters wanted not only a higher level of involvement in management, but also the ability to base

³⁹¹ Waitangi Tribunal, above n 224.

³⁹² Janet Stephenson “Recognising Rangatiratanga in Resource Management for Maori Land: A Need for a New Set of Arrangements?” 2001 5 New Zealand Journal of Environmental Law.

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management practices on Māori cultural and spiritual values and customary practices rather than western-centred concepts.

There is an avenue for Māori concepts of resource management to be expressed within section 33 transfers, namely through the terms and conditions of the transfer agreement,³⁹³ where the management of the resource could be framed around the operation of Māori tikanga and kawa. This might then enable iwi authorities to draft and implement policy and planning documents, or otherwise exercise RMA FPDs, based on their own tikanga and kawa. However, given the lack of Māori representation on local authorities generally, the fact that Māori are a population minority, and the power imbalance inherent in the constitution of section 33 transfers, it is unlikely that iwi authorities will be able to frame the nature of the transfer in their favour (or flavour) to any substantial extent.

Further, as noted above, the parameters of decision-making under a section 33 transfer have been set by central government in drafting the legislation. Under a transfer arrangement an iwi would not be able to make resource decisions solely on the basis of their tikanga/kawa – decision-making must comply with the RMA framework as well as any terms and

³⁹³ Section 33(6).

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conditions contained in the transfer documents. As Joseph and Bennion say, an iwi authority:³⁹⁴

... will have to act judicially – that is, fairly and impartially and in accordance with the RMA and relevant plans – when it considers any applications relating to that resource. For example, it will have to weigh Māori concerns in balance with other matters of national importance. It will also be bound by decisions of the Environment Court and other courts on the way in which Māori interests are to be considered under the RMA, even if it disagrees with the approach and result of those decisions.

This is contrasted with both the Whanganui River and Te Urewera examples outlined above, which expressly enable decision-making to be made on the basis of Māori notions of resource management. As Rachael Harris says, section 33: “[does] not allow iwi to fully invest in resource management in a method compatible with tikanga Māori.”³⁹⁵ Accordingly, section 33 does not comply with the cultural pluralism aspects of the self-determination norm. This renders this mechanism non-compliant on the basis of both aspects of Anaya’s framework.

³⁹⁴ Joseph and Bennion, above n 364.

³⁹⁵ Harris, above n 231 at 57.

VII Chapter Conclusion

It has been demonstrated that none of the current partnership (Whanganui River) or control models (Te Urewera and section 33) studied comply with Anaya's principles of indigenous self-determination (constitutive or ongoing). With that said, the two Treaty settlement models are insightful for their adherence to the cultural pluralism principle (discussed below).

Under the constitutive self-determination heading it was noted that Aotearoa's treaty settlement process perpetuates the inherent power imbalance experienced by iwi Māori vis a vis the Crown in Aotearoa. As there is no legal mechanism for Māori to invoke and have their rights to self-determination (and Treaty of Waitangi rights) recognised, Māori are forced to participate in a political process to this end i.e. the negotiation of Treaty settlements. Given the inherent power imbalance extant in the Treaty settlement process, and the Crown's inherent desire to appease its majority, non-Māori constituents, it is difficult to see how Anaya's constitutive self-determination would find expression in this process. As such, the requirements of participation and consent embodied by this principle are absent in the Treaty settlement process (and therefore the Whanganui River and Te Urewera examples). As an ancillary point, this speaks to a wider need to move the processes of adjudication of indigenous

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rights from the political realm to the legal realm. This could be achieved by providing the Waitangi Tribunal with greater ‘teeth’ by widening its ability to provide for ‘binding recommendations’.³⁹⁶

The chapter made similar findings regarding the section 33 model’s adherence to the constitutive self-determination principle (or lack thereof). Ultimately, the conclusion of a section 33 transfer agreement is dependent upon the local authority exercising its discretion, and this is unlikely to occur unless the local authority considers it will obtain further ‘political capital’ in the process. Furthermore, various inconsistencies in the drafting of the legislative provisions act to disincentivise the adoption of the mechanism by both iwi and local authorities. The section 33 model does not give expression to the constitutive self-determination principle.

While it was noted that partnership (or power-sharing) models can be an effective mode for implementing indigenous self-determination in some cases, the existing prescriptions of partnership fail to reach the standards required by Anaya’s framework. For example, the extent that Whanganui iwi members can practically influence the outcome of resource decisions depends upon how the third party statutory decision-maker

³⁹⁶ It is the author’s view that this should be coupled with the entrenchment of the legislation constituting the Waitangi Tribunal to ensure its tenure remains in perpetuity.

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interprets and applies the statutory directions on a case by case basis (i.e. the direction to ‘recognise and provide for’ or ‘have particular regard to’ Māori legal tradition).³⁹⁷ Under this model the overall decision power is exercised by non-iwi bodies, and very little practical authority is devolved to the relevant iwi. This framework is more accurately described as an influence model, which (as discussed) do not generally enable the expression of genuine self-determination. Accordingly, the Whanganui framework fails to adhere to Anaya’s subsidiarity principle.

The two-purported control (or autonomous governance) models studied are also non-compliant when they are viewed against Anaya’s subsidiarity principle. The Te Urewera framework ultimately fails due to the iwi’s lack of ability to prevent mining in their ancestral homeland. This is one of the most invasive activities possible and the argument that Tūhoe are self-determining cannot be sustained if they have no real influence over the regulation of this activity. This speaks to a wider lack of provision of real decision-making power over Te Urewera to the iwi. Similarly, several aspects of section 33 of the RMA are problematic. The overall ability of iwi authorities to influence environmental decision-making under section 33 depends upon the efficacy of the functions, powers and duties of the RMA itself (since section 33 enables the transfer of these to iwi

³⁹⁷ Sections 15, 12 and 14, Te Awa Tupua Act.

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authorities). Section 33 might theoretically enable an iwi authority to assume responsibility for consenting or planning/policy development. But the ability to provide for their own iwi's interests through these mechanisms is constrained as they must act within the parameters of the RMA framework and the principles of natural justice as defined by Aotearoa common law. There is little room for Māori tikanga or kawa to apply to decision-making under this tool. Even if it was effective, a lack of political willingness for local authorities to execute section 33, and a number of procedural disincentives continue to prevent the tool from being used.

Bearing these considerations in mind, it cannot be argued that the three models studied provide for both the subsidiarity principles of Anaya's framework. By extension, they fail to enable Māori to develop and make meaningful choices about their economic, social and cultural development. The first question of this chapter³⁹⁸ is therefore answered in the negative: Aotearoa is failing to give expression to Anaya's conception of the self-determination norm, and legislative reform will be needed to introduce models that are norm-compliant.³⁹⁹

³⁹⁸ See the introduction to this chapter.

³⁹⁹ The thesis will attempt this exercise in chapter 4.

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The second focus of this chapter asks whether, even if the current legal framework is failing to give effect to the norm, any insights can be adopted and adapted from the Aotearoa case studies to assist the formulation of a norm-compliant model. It was argued that the Whanganui and Te Urewera models are worthy of celebration for their implementation of the cultural pluralism aspects of the norm (i.e. through their ability to defer to Māori legal traditions in resource decision-making (Tupua te Kawa and Tūhoetana) and the embodiment of personified view of natural resources). These insights are positive and might enable a self-determination compliant mechanism to be developed, provided they are matched with a genuine ability to influence environmental decision-making (i.e. if the framework equally embodies the subsidiarity principle to an equally material extent), and the appropriate processes and procedures required by the constitutive aspect.

Chapter 6 will adapt the cultural pluralism insights explored in this chapter and, along with the comparative insights analysed in chapter 4, will propose a model for the future of indigenous self-determination in Aotearoa based on the recommendations of the Waitangi Tribunal in the *Ko Aotearoa Tenei* (Wai 262 report), which is explored in chapter 5.⁴⁰⁰

⁴⁰⁰ The Wai 262 tribunal's recommendations will be discussed in further detail in chapter 5.

Chapter 4: Foreign Models of Indigenous Self-Determination – Insights for Aotearoa?

I Chapter Introduction

The previous chapter concluded that the current resource management and environmental laws in Aotearoa are failing to give adequate expression to the international obligations of indigenous self-determination, when viewed through the lens of Anaya's framework. It did, however, note that certain aspects of the existing legal mechanisms could be adapted and developed further to assist the development of a framework that *is* norm-compliant. In other words, some parts of the existing framework go some way toward the expression of the requirements of the international norm (such as the legal personality approach of Te Awa Tupua and Te Urewera), but, as a whole, they are non-compliant when analysed against Anaya's schema.

This chapter undertakes a similar analysis of various foreign environmental law frameworks. It has two purposes: (1) to evaluate the mechanisms against Anaya's self-determination framework and consider whether they are giving adequate expression to the norm;⁴⁰¹ and (2) to

⁴⁰¹ To achieve this, the chapter considers the extent at which both the processes leading to the arrangement, and form and functioning of the autonomy arrangement itself, enables the indigenous people to freely pursue their economic, social and cultural development, and to "make meaningful choices in matters touching upon all spheres of

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ascertain how certain insightful concepts underpinning these models can inform the implementation of self-determination in Aotearoa.⁴⁰²

First, the Sami people from northern Scandinavia and the Kola Peninsula, and various frameworks applying to them, are considered.⁴⁰³ Then, frameworks applying to the Aboriginal peoples of Canada are considered. There are many other indigenous peoples that could have been considered but it is not possible to cover them all in any sufficient detail. The chapter focuses exclusively on indigenous models because the thesis concerns the implementation of self-determination for the indigenous people of Aotearoa (Māori). Historically, many different indigenous peoples have experienced a similar context of colonisation, assimilation, integration, intergenerational protest and, to some extent, rights recognition. While there are significant differences between these peoples and their legal, political and historical contexts, it is helpful to assess case studies which involve similar conditions to obtain a more nuanced

life on a continuous basis.” See Anaya, above n 45 at 106. This enables a normative evaluation of the autonomy mechanisms to be undertaken, which can inform the implementation of self-determination in Aotearoa.

⁴⁰² For example, further below the Draft Nordic Sami Convention is analysed, in particular, the ‘sliding scale’ or relativistic approach to self-determination that it embodies. Again, a normative assessment of the foreign tools based on Anaya’s framework can inform these observations.

⁴⁰³ A limitation of the Sami research is that the author was only able to consider materials written in English in formulating this section. There were many publications that the author was unable to consider as he does not read or speak any of the Scandinavian languages.

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understanding of how self-determination can be implemented in Aotearoa law. With that said, the importance of context is recognised given there are many distinctions between the various case studies and Māori in Aotearoa, including: constitutional system (unitary or federal), system of law (common, civil, customary or a mixed system), the degree of integration between the indigenous and non-indigenous peoples, and the degree of population concentration within defined traditional territorial areas. The underlying context will be borne in mind for any understandings obtained from the case studies.⁴⁰⁴

⁴⁰⁴ The thesis generally adopts the comparative legal method to carry out the analysis between different jurisdictions. See, for example, Montesquieu “The Spirit of the Laws” 1748, and Mary-Rose Russell and others *Legal research in New Zealand* (LexisNexis NZ Limited, Wellington, 2016).

II Scandinavia's Sami Law

A Introduction

The Sami (also referred to as Saami or Sámi) are the native peoples of Northern Scandinavia and Russia's Kola Peninsula. Historically a semi-nomadic people, the Sami have traditionally hunted, fished, gathered and trapped food in Europe's Arctic region where they developed, over many centuries, their own distinct legal, social, cultural and economic institutions and social governance systems. The various Sami sub-groupings are united by common cultural values, languages and, as a collective, are often associated with reindeer husbandry. Like many other indigenous peoples throughout the world, the Sami have experienced land dispossession, the denial of basic human rights (including rights to land and waters), colonisation and government sanctioned assimilation.⁴⁰⁵ Today, jurisdiction over the traditional Sami homeland, known as Sápmi, is divided between the modern states of Finland, Norway, Russia⁴⁰⁶ and Sweden. While there are no reliable statistics, there are between 50,000

⁴⁰⁵ James Anaya "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. 'The situation of the Sami people in the Sapmi region of Norway, Sweden and Finland'" 2011; Mattias Åhren "The Saami Convention" 2007(3) *Galdu Cala Journal of Indigenous Peoples Rights*.

⁴⁰⁶ The Russian government has made little effort to recognise the rights of its Sami citizens or to participate in international processes in this respect. As the Russian Sami exercise little autonomy, they will not be considered in any detail in this thesis.

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and 100,000 Sami people, with over half of the population residing in Norway.⁴⁰⁷

The Sami people were selected as a case study in this thesis because the discourse of self-determination implementation is enriched by analysing a wide range of perspectives (i.e. both territorial and non-territorial models). The Sami are also selected as, like Māori in Aotearoa, the Sami have an affinity for traditional food gathering and these rights have been the subject of state regulation and legal commentary.⁴⁰⁸ Additionally, most Sami do not seek secession as a remedy for their self-determination claims.⁴⁰⁹

This section first discusses the background to the development of the Nordic Sami parliaments (also known as ‘Samediggi’ and ‘Sameting’ in Norwegian) and the role they play in Sami self-determination. Finland, Norway and Sweden all have their own distinct Sami parliament established under their domestic law. Generally, the Sami parliaments are

⁴⁰⁷ Torvald Falch, Per Selle and Kristin Strømsnes “The Sámi: 25 Years of Indigenous Authority in Norway” 2016 15(1) *Ethnopolitics*.

⁴⁰⁸ The implementation of indigenous self-determination in Aotearoa in relation to a specific traditional Māori food gathering area will be discussed below in chapter 6.

⁴⁰⁹ Margret Carstens “Sami land rights: the Anaya Report and the Nordic Sami Convention” 2016 15(1) *Journal on Ethnopolitics and Minority Issues in Europe*; John Henriksen “Sami Self-Determination: Scope and Implementation” 2008(2) *Galdu Cala - Journal of Indigenous Peoples Rights*.

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popularly elected institutions designed to represent the collective interests of the Sami. While each one is similar, they differ in many respects, such as legal basis, mandate and the degree of independence from the state institutions.⁴¹⁰ First, an overview of the development of the three Sami parliaments will be given, followed by an analysis of certain autonomous tools of the Norwegian example. Later, a novel approach to exercising self-determination, promoted by the 2005 version of the draft Nordic Sami Convention is analysed and considered for the insights it might provide for the future implementation of self-determination in Aotearoa.

B Sami self-determination: background

To analyse the formal mechanisms giving effect to Sami self-determination in the Nordic states we must first look at the background which led to their development, and the legal context which they operate within. The establishment of the Sami Delegation in Finland in 1973, the first official representative Sami organisation, had a profound impact on the recognition of Sami rights in the other Nordic states.⁴¹¹ The Norwegian Samediggi can be traced to a protest movement over the proposed damming of the Alta/Kautokeino River in the 1970s. The development would have resulted in the flooding of traditional Sami villages and sites

⁴¹⁰ Eva Josefsen, Ulf Morkenstam and Ragnhild Nilsson “The Nordic Samediggis and the Limits of Indigenous Self-Determination” 2016(1) Galdu Cala - Journal of Indigenous Peoples Rights.

⁴¹¹ Josefsen et al., above n 410.

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of importance, as well as a disruption to reindeer herding and other traditional livelihoods. The political resistance of the Sami people to the dam development gained international and national news media attention, leading to an increased dialogue between the government and Sami people, and eventually the establishment of the Norwegian Samediggi.⁴¹²

The Nordic states have been (relatively) active in the international indigenous rights arena. The Nordic states are signatories to the major UN human rights conventions, including the ICCPR and ICESCR, and all three states voted in favour of adopting the UNDRIP at the UN General Assembly. Norway is the only Nordic state to have ratified the International Labour Organization’s Convention No. 169 (“ILO 169”).⁴¹³

The three codified constitutions of Norway, Sweden and Finland recognise the Nordic countries as unitary states with all sovereign authority vested in the central government. Consistent with this approach, regional government enjoys no constitutional protection and its ongoing existence is subject to the legislative discretion of the central government.⁴¹⁴ It has been argued that Sami self-determination is limited by this context as

⁴¹² Josefsen et al., above n 410.

⁴¹³ It was, in fact, the first state in the world to ratify ILO 169.

⁴¹⁴ Broderstod, above n 166. An indigenous autonomy model within the context of a federal state will be discussed further below in the Canadian section.

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unitary states are generally less comfortable with accommodating sub-groups in the constitutional order through a tiered government system.⁴¹⁵ There exists no constitutional guarantee of Sami territorial autonomy as a distinct order of government. In contrast, Canada has a federal system where the provinces enjoy a higher level of authority and protection in the constitutional structure. It is perhaps the federal nature of the Canadian system has made indigenous territorial autonomy more palatable there (discussed further below). Although, this may be a convenient argument for the governments of unitary states, as these institutions generally seek to retain a ‘monopoly’ on constitutional authority or the notional ‘sovereignty’.

Under this unitary system, the extent of Sami rights recognition in the various Nordic constitutional arrangements has varied. The Swedish constitution makes some provision for the Sami, recognising them as the indigenous people of Sweden and noting that opportunities for them to develop and preserve their cultural and social life should be promoted.⁴¹⁶ Comparatively, the Finnish constitution appears to contain the strongest provisions recognising the Sami people and their rights. First, it recognises

⁴¹⁵ Timo Koivurova “The Draft for a Nordic Saami Convention” 2006 6 *European Yearbook of Minority Issues*.

⁴¹⁶ Instrument of Government (Sweden), art 2.

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the Sami as an ‘indigenous people,’⁴¹⁷ and secondly, it recognises that in their home region they have “linguistic and cultural self-government,”⁴¹⁸ i.e., non-territorial autonomy which provides decision-making powers over linguistic and cultural development. Norway’s constitution incorporates a positive obligation for the state to protect Sami language, culture and ways of life.⁴¹⁹ Although, the extent at which this is upheld in reality is questionable (discussed later with specific reference to the Planning and Building Act and the Finnmark Estate).

The extent at which the constitutional references to Sami rights have been translated into further legislation has also varied. In all cases the constitutional references are accompanied by legislation creating a representative Sami parliament. The constitutional position, function and mandate of these institutions varies. The Swedish Samediggi has an unusual position in the constituting legislation which describes it as a “special government agency,”⁴²⁰ with its main function being to “...monitor issues concerning Sami culture in Sweden.”⁴²¹ The Samediggi is therefore an advisory to the Swedish government on cultural Sami

⁴¹⁷ Section 17.

⁴¹⁸ Section 121.

⁴¹⁹ Norwegian Constitution as laid down on 17 May 1814 (May 2016 version), art 108.

⁴²⁰ Sami Parliament Act 1992 (Sweden), chapter 1, s 1.

⁴²¹ Chapter 1, s 1.

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matters, and an administrative body tasked with delivering the government's Sami policy.⁴²² As a state organ, it would be difficult for this institution to express any meaningful level of self-determination. 'Cultural self-government' in Finland is almost exclusively consultative in nature. State authorities must 'negotiate' (i.e. consult) with the Samediggi when considering matters which may directly affect the Sami.⁴²³ However, state authorities are under no obligation to defer to the Samediggi when considering matters of importance to them and ultimately it has very limited authority of its own.⁴²⁴ The same could be said of the Norwegian Sami parliament, which has secured a consultation agreement based on the consultation provisions of the International Labour Organization's Convention 169. The agreement provides the Sami with an opportunity to influence national policy and law making by providing their views on proposed law or policy changes. However, there is no requirement for the state authorities to commit to Sami views (they are one of many considerations for the ultimate decision-maker to consider). The agreement does not provide the Sami parliament with autonomous powers of decision.

⁴²² Henriksen, above n 409.

⁴²³ This section applies to matters such as community planning/zoning, changes in state land use, applications for mining and mineral extraction (inter alia).

⁴²⁴ Laila Vars "Political Aspects of the Sami's Right to Self-Determination" 2008(2) *Galdu Cala - Journal of Indigenous Peoples Rights*.

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The Norwegian case study warrants further analysis. As discussed, Norway contains the greatest number of Sami by population, and is the only state to have ratified the ILO 169 Convention. The section will focus on the Finnmark Estate legislation and (briefly on) the Planning and Building Act, both of which contain mechanisms to involve Sami in resource decision-making. The degree of self-determination provided to the Sami parliament through these tools will be assessed against Anaya's ongoing self-determination standard. It will be further demonstrated that the Sami model in Norway is largely consistent with 'relational' notions of self-determination, discussed above in chapter 1.

C Norway and Sami self-determination

1 Finnmark legislation and Sami parliament

The Norwegian Sami have assumed some ability to influence public decision-making regarding resource use in the Finnmark County through the Finnmark Estate legislation. The Finnmark Act 2005⁴²⁵ was adopted as a response to years of Sami protests to have their rights to lands and resources in Finnmark County recognised by the state, triggered by the conflict regarding the establishment of the Alta-Kautokeino hydro-electric development.⁴²⁶ The ratification of ILO 169 by the Norwegian state in

⁴²⁵ Finnmark Act 2005 (Norway) [**"Finnmark Act"**].

⁴²⁶ Josefsen, Morkenstam and Nilsson, above n 410; Eva Josefsen "Norwegian Legislation and Administration - Saami Land Rights" 2007 1 Galdu Cala - Journal of Indigenous Peoples Rights.

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1990 also created obligations for the government to identify and recognise in law indigenous peoples' traditional lands.⁴²⁷ Finnmark County itself is situated in northern Norway, the heart of the Sami homeland. The Act transferred ownership of about 95% of the area of Finnmark County (48,649 kilometres) to a new agency, the Finnmark Estate, to be held and managed by that agency on behalf of county residents. It applies to real property, as well as mineral and other natural resources. Prior to this, the land was owned and managed by a state-owned company (Statskog SF). The purpose of the Act is to:⁴²⁸

... facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life.

The board of Finnmark Estate is effectively co-managed and comprised of six representatives, three appointed by the Samediggi and three appointed by the Finnmark County Council.⁴²⁹ The Finnmark Estate board is mandated to act in a similar manner to other private landholding organisations with some additional executive powers of public decision-making. For example, it is responsible for the authorisation of hunting,

⁴²⁷ ILO 169, art 14.

⁴²⁸ Section 1.

⁴²⁹ Section 7.

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fishing and trapping permits in the area.⁴³⁰ A related organisation, the Finnmark Commission, was established simultaneously to investigate and officially recognise individual Sami and non-Sami rights to land and resource ownership (or so-called ‘usufructory’ rights).⁴³¹

The Sami parliament interacts with the Finnmark Estate through certain prescribed decision-making processes. For example, the Sami parliament’s influence over proposals for the use or development of ‘uncultivated lands’⁴³² in Finnmark County is notable. Pursuant to section 4, the Sami parliament is empowered to issue ‘guidelines’ directing how a proposal for change in uncultivated land use (i.e. similar to a ‘zoning’ change in Aotearoa law) is to be assessed by both the Finnmark Estate and public authorities for its impact on Sami culture, reindeer husbandry, the use of uncultivated areas and commercial activity. This mechanism would apply to, for example, applications to build housing or roading infrastructure, to carry out extractive activities or to establish wind power developments on previously uncultivated lands within the Finnmark Estate.⁴³³ The guidelines must be approved by central government

⁴³⁰ Sections 1 and 6.

⁴³¹ Section 29. The legislation recognises that the Sami have individually and collectively acquired rights to land and resources through prolonged use since time immemorial (s 5).

⁴³² I.e. unfenced, open country that is not cultivated.

⁴³³ Ministry of Justice and the Police and Ministry of Local Government and Regional Development "*The Finnmark Act - A Guide*" (2005).

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authorities, whom must consider whether the guidelines are consistent with section 4 of the Finnmark Act. Central government, county and municipal authorities must follow the guidelines in assessing the impact of such proposals on Sami culture and reindeer husbandry (inter alia).⁴³⁴ For example, a municipality must follow the Sami parliament's guidelines upon receipt of a proposal to rezone uncultivated Finnmark land for some other purpose where that land previously supported Sami reindeer husbandry (e.g. to allow for mineral exploration). Furthermore, section 10 of the Act provides that the Finnmark Estate board itself must follow the guidelines of the Sami parliament in assessing proposals for their impact on Sami interests and reindeer herding etc., before they make their final decision on the proposed land-use change.

Decisions of the Finnmark Estate board itself relating to uncultivated land-use changes are also subject to special voting procedures. The board has a standard quorum requirement of five members before decision can be made, and the board's composition is six representatives. The Act provides that decisions relating to uncultivated land-use changes require the support of a majority of at least four board members (i.e. a 'super majority').⁴³⁵ If the proposal is only supported by four members (i.e. there

⁴³⁴ Sections 4 and 10.

⁴³⁵ Section 10. For other decisions, a simple majority will suffice (which can be three board members given the quorum requirement is five board members). See s 9.

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is not a full consensus of six, or at least five members in favour) the minority voters can require that the matter be referred to the Sami parliament for their decision. If the Sami parliament declines to approve the proposal (i.e. it does not ratify the decision of the majority), or if it fails to make a decision within a reasonable time frame, the majority voters can refer the matter to central government for a final decision.⁴³⁶ Central government is under no obligation to uphold the decision of the Sami parliament, or the board dissenters.

The passage of the Finnmark Act also occasioned amendments to the Mining Act 1972,⁴³⁷ providing the Sami with an increased role in decision-making regarding the permitting of mineral prospecting or extraction in the Finnmark Estate area. The amendments provided that both the Sami parliament and the Finnmark Estate board must be given written notice in advance if persons wish to undertake preliminary examinations for minerals within Finnmark. Furthermore, when public mining authorities are considering whether to grant applications for mineral extraction, the Sami parliament (along with county and municipal authorities) shall have a right to express their views regarding such applications. If either the Sami parliament or Finnmark Estate oppose the granting of the application, the

⁴³⁶ Section 10.

⁴³⁷ Mining Act 1972 (Norway).

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matter shall be decided by the Ministry of Trade and Industry.⁴³⁸ These amendments are reflected in section 17 of the new Minerals Act 2009. The Act is to be administered so that, amongst other interests, the foundations for Sami culture, commercial activity and social life are safeguarded.⁴³⁹

Another mechanism that provides the Sami parliament with influence over resource decisions is the Planning and Building legislation, which is now considered. Both frameworks are then analysed against Anaya's framework.

2 Planning and building legislation and Sami parliament

Another example of a legal framework providing for Sami participation in resource decision-making is the Norwegian Planning and Building Act 2008,⁴⁴⁰ which sets out the framework for land use and community planning at the differing tiers of government (municipal, county and central), as well as the administration of a building permitting system. It is the most important piece of legislation governing land-use in municipalities, performing a role similar to the New Zealand Resource

⁴³⁸ Finnmark Act, Section 50; Malgosia Fitzmaurice "The UN Declaration on the Rights of Indigenous Peoples: Recent Developments regarding the Saami People of the North" in Steve Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford (UK); Portland, Oregon (USA), 2011).

⁴³⁹ Section 2.

⁴⁴⁰ Planning and Building Act 2008 (Norway).

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Management Act 1991. Under the Act, municipal councils may adopt overarching land use plans, as well as more detailed zoning plans setting the framework for activities permitted within certain spatial areas. It allows conditions to be attached to permitted activities, such as compliance with air quality standards in industrial zones. The Act provides that all plans created pursuant to the Act must “protect the natural basis for Sami culture, economic activity and social life.”⁴⁴¹ Significantly, the planning legislation allows the Sami parliament to raise formal objections to proposals regarding “the land-use element of the municipal master plan and the zoning plan” where there are “issues that are of significant importance to Sami culture or the conduct of commercial activities.”⁴⁴² If the Sami parliament raises a planning objection, the municipality must consider whether to uphold the substance of the objection (or whether it should be disregarded). If the municipality disagrees with the objection, the matter is referred to mediation, and the mediator is to be chosen by the central government. If mediation is unsuccessful (i.e. no agreement is reached between the Sami parliament and the municipality regarding the objection), the matter, along with the mediator’s recommendation, is

⁴⁴¹ Section 3-1(c).

⁴⁴² Section 5-4.

forwarded to central government for final decision on whether the plan requires amendment.⁴⁴³

3 Analysis against Anaya's framework

This section will now analyse, against the framework developed in chapter 1, the Norwegian Sami parliament and its interaction with both the Finnmark Act and the Planning and Building.

Constitutive self-determination

As discussed, the constitutive aspect of self-determination considers the efficacy of the processes leading to the establishment of the institutional order, and whether these processes have adequately incorporated the consent or participation of the indigenous people. This section therefore analyses the processes leading to the establishment of the Norwegian Finnmark Act and the Planning and Building Act.

While they were initially flawed, the processes leading to the passage of the Finnmark Act ultimately gave effect to the requirements of constitutive self-determination. Else Broderstad notes that the first draft of the Finnmark bill, which was finalised in 2003 (based on a 1997 Report

⁴⁴³ Sections 5-5 and 5-6.

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from the Sami Rights Commission), was strongly criticised by the Sami parliament as it did not contain a process for the proper identification and recognition of Sami rights.⁴⁴⁴ The Sami parliament also criticised the lack of consultation on the bill generally prior to that point, as required under the provisions of the ILO 169 Convention (ratified by Norway). In response to these criticisms, the Norwegian parliament asked the Finnmark County Council and the Sami parliament to participate in a consultation process in relation to the bill, a mechanism that was not contemplated by the formal parliamentary procedures at the time.⁴⁴⁵ After this, the parties met four times leading to substantial changes to the first draft of the bill, including the adoption of a formal process to identify rights to land and resources (was sought by the Sami parliament to ensure the recognition of outstanding Sami rights claims). The Finnmark Act ultimately passed with the support of the Sami parliament, which indicates that the law creation processes embodied the necessary principles of indigenous participation and the resulting legislation can be said to reflect the will of the people.

The lead up to the Finnmark Act was a catalyst for the negotiation of the formal ‘consultation agreement’ between the Sami parliament and central government in 2005, as noted above. This agreement regulates the

⁴⁴⁴ Else Broderstad “Consultations as a tool. The Finnmark Act - an example to follow?” 2006.

⁴⁴⁵ Broderstad, above n 166.

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incorporation of Sami views into proposals for central government law or policy changes where these may directly affect the Sami (giving expression to article 6 of ILO 169). The consultation agreement was tested with the proposed passage of the Planning and Building Act. According to then Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, the consultation procedures adopted by the Ministry of the Environment regarding this legislation were “good examples of consultation with full information at all stages and a willingness on both sides to achieve agreement.”⁴⁴⁶ Essentially, the consultation agreement ensured that the Sami had “a substantial influence” on the drafting of the Planning and Building Act.⁴⁴⁷ As with the Finnmark Act, it can be said that both the processes leading to the adoption of this legislation, and the act itself, reflected the will of the people. It can be further surmised that the adoption of ILO 169 by Norway has substantially contributed to adoption of norm compliant consultation mechanisms. However, it remains to be seen whether the substance of these mechanisms, their ongoing form and functioning, meets the requirements of Anaya’s framework (in terms of subsidiarity and cultural pluralism).

⁴⁴⁶ James Anaya “Sami Parliament in Norway: Conference with the UN Special Rapporteur Professor James Anaya in Rovaniemi” 2010 at 3.

⁴⁴⁷ Christina Allard “The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts” 2018 9 Arctic Review on Law and Politics at 29.

Ongoing self-determination: subsidiarity

The level of authority afforded to the Sami in ‘non-cultural’ or non-linguistic matters, is very limited, particularly over Sami lands and natural resources (the primary inquiry of this thesis). Under the Finnmark Act, in Finnmark County the Sami parliament can (through its promulgated guidelines) influence proposals for changes in land-use in respect of uncultivated land, based on Sami cultural and economic considerations (e.g. reindeer herding). The special voting procedures that apply to such applications also incorporate the Sami parliament into the decision-making structure: if a minority of the board opposes the change in land-use, it can require that the decision be referred to the Sami parliament for decision. The Sami parliament can also raise objections to community planning proposals under the Planning and Building Act (such as zoning designations) where there are concerns for their effects on Sami cultural and economic matters. If an objection is raised, municipal authorities must then consider whether to uphold the objection, or whether to refer the matter to mediation. These tools, along with the operation consultation agreement procedures, ensure that the Sami have a voice in natural resource decision-making.

Although, under these mechanisms, the Sami are notably absent from the decision-making table itself. While the Finnmark legislation advances Sami self-determination through *some* participation in resource

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management, the board is perhaps best seen as a form of ‘co-determination’ or ‘co-management’, or as a partnership model under the schema developed in chapter 3, and the other mechanisms as mere ‘influence’ tools. As the Canadian Royal Commission on Aboriginal Peoples stated, “[s]imply put, the Sami Parliaments lack clout.”⁴⁴⁸ The Sameting’s ability to influence land use and resource management decision-making is constrained by the requirement for joint management of the Finnmark Estate board in partnership with the county council. While Sami interests are considered in changes of use of uncultivated land (i.e. through the requirement for the Finnmark Estate board and public authorities to apply the Sami parliament’s guidelines), Sami interests ultimately have the same weight as non-Sami interests in the application. The Sami parliament’s guidelines are incapable of compelling public authorities to give more weight to Sami interests over other interests (e.g. commercial), therefore they are one of a number of factors that the decision-maker must consider. This mechanism therefore can only provide the Sami with a limited influence over such decisions. Sami influence is further hindered by the fact that the locus of decision-making for resource proposals generally sits with external, majoritarian, public decision authorities. While the Finnmark Estate board must sign off a change in

⁴⁴⁸ Royal Commission on Aboriginal Peoples *Report of the Royal Commission on Aboriginal Peoples* (1996) at 378.

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uncultivated land use, ultimately, the Sami have limited ability to prevent such a proposal, even where it will have detrimental effects on Sami cultural or economic activities. For example, where the board is divided on the matter, applications for change in uncultivated land-use can be referred to the Sami parliament for decision by a board minority. If the Sami parliament does not ratify the proposal, the majority of the board can overpower this mechanism by referring the matter to central government for final decision. Therefore, in spite of outside appearances, the ultimate locus of decision-making on such proposals sits outside of Sami hands.

The ability for the Sami parliament to raise objections to community planning proposals under the Planning and Building Act is ostensibly a promising form of Sami self-determination. Although, upon closer inspection, Sami objections are always subject to central government's final decision power. If the relevant municipality disagrees with the substance of the Sami objections to the planning proposal, the matter is referred to mediation. If mediation fails, and the parties cannot agree on a way forward, the matter is referred to central government for ultimate decision. An example is the proposal for Norwegian investment company, Nussir ASA, to develop a copper mine within the Kvalsund municipality. Evidence existed that the mine would disrupt traditional Sami fishing, hunting and reindeer herding livelihoods, and that this would have damaging flow on effects for the erosion of Sami culture. Despite protest,

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the municipality granted the required zone change, prompting an objection from the Sami parliament under the above power. The matter was eventually referred to central government for decision. After consideration by four government ministries, the zone change was confirmed in 2014 by the Ministry of Local Government and Modernization, effectively ignoring the Sami objections.⁴⁴⁹ Koivurova points out the key deficiency of this mechanism as follows: “The Norwegian State can still decide that the national interests of the mining industry are more important than the interests of traditional Sami livelihoods.”⁴⁵⁰

Overall, the institutional frameworks embodied in both the Finnmark Act and the Planning and Building Act are ultimately consultative in nature and fail to provide any real decision-making autonomy over resource management proposals. This is a low level of respect for the principle of indigenous subsidiarity.

Ongoing self-determination: cultural pluralism

The substance of both institutional orders produced by the Finnmark Act and the Planning and Building Act have little to offer under the cultural

⁴⁴⁹ Timo Koivurova and others “Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States” 2015 6(1) Arctic Review on Law and Politics.

⁴⁵⁰ At 34.

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pluralism aspect of Anaya’s ongoing self-determination framework. This aspect provides that culturally bespoke accommodations should be made within the institutional framework. In other words, Sami laws and/or legal traditions should be valued and practically adopted under the model. While the Finnmark Act incorporates an approach to recognising traditional Sami landowners/‘usufructory’ rights holders, and the Sami parliament can raise planning objections under the Planning and Building Act where a planning proposal does not “protect the natural basis for Sami culture, economic activity and social life”,⁴⁵¹ both structures are wholly framed through the lens of non-Sami (i.e. European) concepts of the law. That is, traditional Sami understandings of law or legal tradition do not, and are not able to, form the basis of decision-making under any of these mechanisms.

On the above bases, it cannot be said that the Norwegian Sami parliament enables Sami individuals and groups to continuously develop freely in all spheres of life on an ongoing basis. The institutional structures examined fail to adequately adhere to Anaya’s self-determination principles, and the mechanisms discussed therefore offer little insights to the implementation of Māori self-determination in Aotearoa.

⁴⁵¹ Section 3-1.

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The section will now consider a developing matter of international law, the draft Nordic Sami convention, which has the potential to increase the level of influence that the Sami have over decisions affecting their interests. The concepts discussed below have the potential to inform the way self-determination is implemented in Aotearoa.

D Proposed Nordic Sami convention

1 Background

In 2002 an Expert Group comprised of representatives of the Nordic states (Norway, Finland and Sweden) and the three Sami parliaments began preparing an international convention based on existing positive and customary international law standards. The convention was intended to clarify how the international norms pertaining to indigenous peoples materialise for the Sami in the three Nordic states. A proposed convention text and a commentary was completed by the Expert Group in 2005.⁴⁵² The 2005 text is enlightening for its articulation of the operational aspects of the right to self-determination, including, the right to free, prior and informed consent ('FPIC'), and the inclusion of a process to balance all Sami and non-Sami interests. While the 2005 version has undergone a redrafting process, culminating in a new version released in 2016 and the amendment of a number of provisions (including substantial changes to the provision on FPIC),⁴⁵³ it is nonetheless useful to consider the 2005 text for

⁴⁵² Henriksen, above n 409.

⁴⁵³ The 2016 version is, at the time of writing, only available in the various Scandinavian languages. An English translation is yet to be officially approved. The Sami parliaments have since officially requested further amendments to the 2016 version, and this will not be finally approved by the states until the Sami parliaments formally approve the text. Department of Sami and Minority Affairs (Norway) to the author Email from Bjørn Olav Megard (Director General) 2018). See also Atle Staalesen "Historic Sami agreement starts long way towards ratification" (2017) <https://thebarentsobserver.com/en/2017/01/historic-sami-agreement-starts-long-way-towards-ratification> <<https://thebarentsobserver.com/en/2017/01/historic-sami-agreement-starts-long-way-towards-ratification>>.

the normative value it provides to the discourse of self-determination implementation, particularly as a case study of how the indigenous self-determination right can materialise operationally outside of the Sami context.

2 Provisions relating to self-determination

The right to self-determination is a central provision of the draft convention, and its text is similar to the self-determination clause contained in the ICCPR, ICESCR and the UNDRIP.⁴⁵⁴ For present purposes the most instructive provisions are those that elaborate the scope and content of the right to self-determination (Chapter II).

Chapter II embodies what Mattias Åhren terms a ‘sliding scale’ or ‘relativistic’ approach to the implementation of self-determination.⁴⁵⁵ It is ‘relative’ in the sense that the level of influence or involvement afforded in decision-making processes varies relative to the importance of the decision for the relevant indigenous agents. Under this approach, when a

⁴⁵⁴ Article 3 of the draft convention states: “As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.” While the statement referring to the right to “freely determine its political status” is not included in the draft, Vars argues this does not curtail the Sami’s right to self-determination in any way (as the Sami are owed the same right to self-determination as all ‘peoples’, regardless of the wording). See Henriksen, above n 409.

⁴⁵⁵ Mattias Åhren a Sami legal expert, is a member of the ‘Expert Group’ appointed to draft the Nordic Sami Convention. See Henriksen at above n 409.

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public authority (central or local government) is considering a proposal that will affect the Sami (e.g. culturally, economically or socially), the more important the decision is for the Sami the more influence they are afforded over that decision process. The importance of the proposal for the Sami is determined by considering the extent at which it will impact the fundamental underpinnings of Sami culture, Sami economies and Sami social patterns. Heinämäki contends that this was a guiding principle for the drafters of the convention, and accordingly this theory underpins certain provisions in the 2005 text.⁴⁵⁶ The sliding scale in this context means that the level of influence or involvement of the Sami can range from:⁴⁵⁷

...a complete and exclusive decision right where no consideration has to be made to the non-Sami peoples [i.e. FPIC] to a right merely to be informed and briefed about a decision-making process by the non-Sami decision making bodies.

In practice, this provision would find expression as a spectrum of Sami influence over decision-making procedures – at the lower end of the spectrum are rights to be informed of matters concerning Sami interests, to

⁴⁵⁶ Heinämäki, above n 56.

⁴⁵⁷ Mattias Åhren “International Conference on Sami Self-Determination: Scope and Implementation - Culture and Natural Resources” 2008(2) *Galdu Cala - Journal of Indigenous Peoples Rights* at 88; John Henriksen “Sami Self-Determination: Autonomy and Self-Government: Education, Research and Culture” 2009(2) *Galdu Cala - Journal of Indigenous Peoples Rights*; John Henriksen “Sami Self-Determination: Land, Resources and Traditional Livelihoods - Self-Determination and the Media” 2011(1) *Galdu Cala - Journal of Indigenous Peoples Rights*.

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be represented on public decision-making authorities, and to submit their views toward such processes (i.e. influence or consultative mechanisms), where the decision will have a negligible impact on the Sami. At the upper end a right of full free, prior and informed consent, i.e. a right to withhold consent to proposals that will have a substantially adverse impact on Sami culture, economies and society. The spectrum (or sliding scale, as Åhren terms it) can be found in articles 17, 16 and 36.

Article 17, the lower end of the scale, provides certain procedural safeguards where matters are being considered by public authorities which concern Sami interests. This provision generally applies to matters of a ‘less serious’ nature when the potential effects of the proposal on the Sami are considered.⁴⁵⁸ When this provision applies, the Sami parliaments have rights to: representation on public decision-making authorities considering such matters; to receive notice of the matters concerning Sami interests; and to submit their views on the decision, at a sufficiently early stage so that their views are able to influence the outcome.⁴⁵⁹

⁴⁵⁸ Compared to “matters of major importance to the Saami,” which is covered by art 16 and discussed below.

⁴⁵⁹ These are ‘influence’ mechanisms in terms of the Waitangi Tribunal’s Wai 262 schema discussed above in chapter 3.

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Toward the middle of the scale, article 16(1) provides a more substantial right for the Sami parliaments to consultation, which applies to “matters of major importance” to the Sami. This entitles the Sami parliaments to participate in ‘negotiations’ with the public authorities before the decision is made, and in any case, this must be carried out sufficiently early to enable the Sami parliaments to have a real influence over the decision. A similar provision is contained in article 36(2), which states that similar negotiations shall be held with the Sami parliaments before a public authority grants prospecting or extraction permits for natural resources, or otherwise makes decisions regarding the utilisation of lands/resources owned/used by the Sami. This influence mechanism places a positive obligation on the public authority to enter into formal consultation (‘negotiation’) procedures with the Sami, a greater requirement than article 17.

Importantly, and at the top end of Åhren’s sliding scale, article 16(2) provides a right for the Sami parliaments to withhold consent for certain projects when public authorities are considering proposals which may have a ‘significantly damage’ the Sami (culturally, economically or socially).⁴⁶⁰ In other words, in such cases, public authorities are unable to sanction

⁴⁶⁰ Martin Scheinin “Sami Self-Determination - A Nordic Perspective of Indigenous Peoples' Right to Self-Government” 2008(2) Galdu Cala - Journal of Indigenous Peoples Rights.

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certain activities if the consent of the Sami parliaments (or the ‘affected Sami’ under article 36(3)) is not forthcoming. It is linked to article 16(1), which applies to matters of ‘major importance’ to the Sami. Article 16(2) states:

The states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned.
[emphasis added]

Article 36(3) also provides the Sami with the power to withhold their consent to, and prevent the granting of, proposed resource extraction and/or exploration permits in similar situations:

Permits for prospecting or extraction of natural resources shall not be granted if the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami parliament and the affected Saami.
[emphasis added]

Under the foregoing articles of the convention’s 2005 text, where proposals are being considered by public authorities that will have a ‘substantial’ or ‘significant’ effect on the Sami (i.e. their culture, society or livelihoods), and the Sami interest that is impacted is of major importance to the Sami, the prior approval of the Sami must be obtained before the proposal is approved or officially sanctioned by the public

3 *Analysis against Anaya's framework*

This section will now analyse the draft Nordic Sami convention (2005 text) against the principles of Anaya's self-determination framework. It considers whether the convention can be used as a source of inspiration for the future operationalisation of self-determination in Aotearoa.

Constitutive self-determination

The section will first analyse the processes and procedures that led to the drafting (and potential future adoption) of the draft convention and consider whether these processes adequately embodied the constitutive requirements of Sami participation and consent.

The expert group constituted to draft the proposed convention was comprised of six members, one appointed by each Sami parliament and one appointed by each Nordic state government. During its tenure the expert group convened 15 times to deliberate on the drafting of the convention.⁴⁶³ By contributing to this drafting forum the Sami were effectively able to participate and incorporate their views in the initial processes leading to the draft convention. This is a far cry from the

⁴⁶³ Timo Koivurova "The Draft Nordic Saami Convention: Nations Working Together" 2008 10(3) International Community Law Review.

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unilateral imposition of legislation or policy that the Sami and other indigenous peoples have experienced historically.

With that said, the procedures underpinning the draft convention are not panaceaic: they are not the model representation of Anaya's constitutive self-determination. A major criticism of the draft convention is that the Sami or the Sami parliaments will not be parties to the final draft convention: only the three Nordic states are signatories. This is somewhat alleviated by the fact that the ratification of the convention is conditional upon the approval of the Sami parliaments.⁴⁶⁴ However, the Nordic states are the ultimate signatories of the convention, and the governments' resource base and constitutional authority perpetuates an inherent power imbalance that disadvantages the Sami in negotiations (as discussed above under the Te Awa Tupua settlement). Ultimately, the states will only adopt a convention that appeases the majority of their political constituents, rendering the processes leading to the adoption of the draft convention highly subject to majoritarian political forces, instead of legal process. Further, once the document is ratified by all three states, the Sami will have limited ability to influence how it is given effect in domestic legislation.

⁴⁶⁴ Articles 48 and 49.

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Overall, the processes underlying the drafting of the draft Nordic Sami convention are not without issue. However, these processes represent a significant improvement in the level of participation afforded to the Sami (compared with the historical imposition of law and policy experienced by many indigenous peoples historically). This embodies a greater adherence to Anaya’s constitutive self-determination principle than any other models discussed in this thesis (e.g. the Aotearoa examples in chapters 2 and 3 or the Canadian examples below).

The thesis will now consider the form and functioning of the draft Nordic Sami convention itself, namely, the ‘sliding scale’ provisions.

Ongoing self-determination: subsidiarity

In considering the draft convention against Anaya’s subsidiarity precepts, it is prudent to consider the textual flaws of articles 16(2) and 36(3), the provisions of the draft that provide the right to withhold consent.⁴⁶⁵ Heinämäki notes that “the content and scope of the draft’s negotiation requirements are formulated in a loose and unclear manner which could prove to be problematic.”⁴⁶⁶ As discussed, under article 16(2),

⁴⁶⁵ It must be borne in mind that the author analyses an English translation of the draft Nordic Sami Convention, instead of the various Scandinavian versions. Thus, there are likely to be some minor differences in the precise textual meanings. Nonetheless, the issues discussed here are not simply minor translational matters, but relate to substantive gaps in the document itself.

⁴⁶⁶ Heinämäki, above n 456 at 137.

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it is not known what types of measures would be considered to be of ‘major importance to the Sami’ or to ‘significantly damage’ Sami culture, livelihoods or society. Or, under article 36(3), what proposals would make it impossible or substantially more difficult for the Sami to continue to utilize the areas concerned (provided the utilization is essential to the Sami culture)?⁴⁶⁷ There are likely to be differences of opinion regarding the standard of proof that would apply for such decisions (with the Sami likely to promote a low threshold and the state vice-versa). A key point is the question of *who* decides whether a proposal is serious enough to warrant the right to withhold consent, i.e. whether this is a unilateral decision of the Sami parliament or a central government body. It is also unclear as to what criteria will be applied in making this decision, i.e. whether it is an objective or subjective test (or mixed). It is not explicit as to who may provide the consent on behalf of “affected Saami” under article 36(3). Nor is clear what decision-making body would adjudicate disputes arising out of these matters.

These are crucial uncertainties, particularly when considering the mechanism against Anaya’s subsidiarity requirements. If these decisions are able to be adjudicated by the Sami then the relativistic model of the draft convention enables the expression of indigenous subsidiarity to a high

⁴⁶⁷ However, consultation rights in such cases will likely crystallise (discussed below).

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degree in cases involving a ‘major’ adverse impact on Sami interests of high importance. As Åhren points out, the approach affords the Sami a greater level of agency in environmental decision-making relative to the impact that the decision will have on them and their ways of life. For highly invasive proposals, this approach encourages decision-making at a very local level. If, however, the decisions are to be made by public authorities, however, then the sliding scale mechanism is less noteworthy for its adherence to indigenous subsidiarity precepts. Further, proposals which affect the Sami less, or relate to a Sami interest of lesser importance, will attract a lower level of participation in the ultimate decision (i.e. a right to receive notice of such proposals, a right to be represented on the decision-making board, or a right to provide their views to the decision-making panel). Subsidiarity principles are applied to a lesser extent in situations where the proposal will have less impact on the Sami. In such cases, the Sami will have little influence over the outcome.

Ongoing self-determination: cultural pluralism

The relativistic approach of the draft Nordic Sami convention can also be considered against the cultural pluralism heading. Where proposals will have a highly adverse effect on highly important Sami interests, the convention promotes an approach that values and provides for the protection of Sami ways of life, Sami culture, Sami economies and Sami

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social considerations. However, as discussed, under the wording of the 2005 draft it is not known who or what institution decides whether a matter is of high importance for the Sami, or whether a development proposal will have a high impact on the Sami (culturally, economically or socially). This further means that it is not known what considerations the decision-maker is able to take into account in making these decisions (i.e. whether Scandinavian civil law (i.e. ‘positive’ law promulgated by the legislature) take precedence or whether Sami law can be considered). The principle of cultural pluralism would be upheld if the decision-maker is able to apply wholly Sami derived conceptions of the law. Although, this seems unlikely as the draft convention will ultimately be interpreted and applied by the governments of the Nordic states. Accordingly, it is unlikely that the application of the Nordic Sami convention will reflect the unique cultural characteristics or preferences of the Sami people, as required by Anaya’s ongoing self-determination framework.

In summary, this section has demonstrated that the processes leading to the draft Nordic Sami convention are insightful for their relative adherence to the constitutive self-determination norm (when compared against other models analysed in this thesis), as the Sami were highly involved in the drafting of the draft convention. Further, the sliding scale approach ensures that the Sami assume a high level of decision-making where decisions will have a major impact on them. This is insightful for

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the implementation of the subsidiarity principle in other contexts. The draft convention is less noteworthy for its application of the cultural pluralism aspect of Anaya's framework.

The chapter will now consider various models that apply to the Aboriginal peoples of Canada.

III Canada's Aboriginal Law

A Introduction

This section analyses aspects of the legal framework of Aboriginal⁴⁶⁸ self-determination in Canada. First, the historical development of the contemporary self-government arrangements is discussed. While there are multiple models of indigenous self-determination applied in Canada, this section focuses on First Nations band governments constituted under the Indian Act 1876⁴⁶⁹ for an analysis of a practical structure of indigenous autonomy (i.e. a control model). It then considers the more abstract concept of the common law duty to consult and accommodate. The section ultimately concludes that while both mechanisms are poor examples of indigenous self-determination for various reasons, the duty to consult and accommodate offers some insights around how both indigenous and non-indigenous interests can be balanced to give expression to indigenous self-determination.

B Canada's aboriginal peoples

Unlike Scandinavia and Aotearoa, Canada has many different indigenous groups which comprise the catch-all term 'Aboriginal'. For administrative purposes these groups are divided into three sub-groups:

⁴⁶⁸ For consistency with the Canadian scholarship, the thesis uses the term 'Aboriginal' when broadly referring to the collective Indigenous Peoples of Canada.

⁴⁶⁹ Indian Act 1876 (Canada) [**Indian Act**].

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‘Indians’ (or First Nations), Inuit and Metis. Within each grouping there exists many distinct linguistic, ethnic and cultural groups, such as “Mi’kmaw, Innu, Inuit, Cree, Lakota, Dene, Haida, and many others who were established societies when Europeans arrived about 500 years ago.”⁴⁷⁰ There are approximately ten linguistic families and over fifty distinct languages amongst the Aboriginal population.⁴⁷¹ When settlers arrived Aboriginal groups lived in organised societies with sophisticated legal, political and economic systems, and various governance systems which reflected their diverse cultures and spiritual beliefs.⁴⁷²

Beyond the initial contact period and as European colonisation became systematic Aboriginal peoples endured a similar fate to other Indigenous Peoples globally, involving land loss, displacement, cultural genocide, the erosion of traditional institutions, assimilation and ‘civilisation’. Today, unfortunately, the statistics regarding Aboriginals make for poor reading: “no matter how statistics are evaluated or assessed, Aboriginal peoples as a group remain at the bottom of the socio-economic

⁴⁷⁰ Frances Abele and Michael J. Prince “Four Pathways to Aboriginal Self-Government in Canada” 2006 36(4) *American Review of Canadian Studies*.

⁴⁷¹ Bradford Morse “Common roots but modern divergences: aboriginal policies in Canada and the United States (Indigenous Renaissance: Law, Culture & Society in the 21st Century)” 1997 10(1) *St. Thomas Law Review*.

⁴⁷² See, for example, the Canadian Supreme Court’s overview of this history in *Calder v British Columbia (AG)* [1973] SCR 313; Morse n 471.

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heap.”⁴⁷³ As of 2016 approximately 5% of the Canadian population identifies as Aboriginal (1,673,000), 58.4% of which is First Nations, 35.1% is Metis and 3.9% are Inuit.⁴⁷⁴

Aboriginal Canadian models of self-determination are assessed because of the wide array of arrangements that exist and the territorial delineation of the jurisdiction. Aboriginal self-determination has been shaped by the British colonial experience in a similar way to Aotearoa. Unlike Aotearoa and the Nordic states, however, Canada is a federal state. Federalism was adopted due to political and cultural realities in 1867 (i.e. strong British and French communities).⁴⁷⁵ Furthermore, Aboriginal and treaty rights are protected under Canada’s constitution (unlike Māori rights in Aotearoa). This section examines these ideas further, but first, the historical development of the current Aboriginal self-government arrangements is explored.

⁴⁷³ Comparative to other sections of the population, Aboriginals face high unemployment, low life expectancy, high suicide rates, high welfare and infant mortality rates, high teenage pregnancy rates, a high rate of alcohol-related deaths, high rates of domestic abuse, and high incarceration rates etc. See Roger Maaka and Augie Fleras *The politics of indigeneity: challenging the state in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, N.Z., 2005) at 165. Also see John H. Hylton *Aboriginal self-government in Canada: current trends and issues* (Purich Pub, Saskatoon, 1994).

⁴⁷⁴ Statistics Canada “Focus on Geography, 2016 Census” (2016) <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-eng.cfm?Lang=Eng&GK=CAN&GC=01&TOPIC=9> <<https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-eng.cfm?Lang=Eng&GK=CAN&GC=01&TOPIC=9>>.

⁴⁷⁵ Reference re Secession of Quebec, above n 49.

C Aboriginal self-determination: background

Prior to European contact, Canadian Aboriginal peoples lived under their own systems of government and legal traditions/customs. In the initial period of European contact, Aboriginal self-determination was respected by the newcomers whom mostly lived symbiotically with the Aboriginal residents, and often forming military alliances (particularly as the British and French sought to establish their dominance in the continent). Commentators argue that the Royal Proclamation 1763 exemplifies this approach by dealing with the Aboriginal peoples on a sovereign nation-to-nation basis and providing that pre-existing Aboriginal sovereignty and rights ought to be respected. Interpreted in accordance with Aboriginal custom, various commentators argue the Proclamation set out an agreement respecting the self-governing nature (or ‘sovereignty’) of Aboriginal communities.⁴⁷⁶ At the same time, a number of treaties were drafted and signed between the British and Aboriginal communities (before and after confederation in 1867). These generally provided for the cession of Aboriginal land in return for reserve lands, rights to hunt and fish and various other inducements.⁴⁷⁷

⁴⁷⁶ See John Borrows “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, Vancouver, Canada, 2002); Peter Russell “Indigenous Self-Determination: Is Canada as Good as it Gets?” in Barbara A. Hocking (ed) *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, Canberra, Australia, 2005); Morse, above n 471; Maaka and Fleras, above n 473.

⁴⁷⁷ Maaka and Fleras, above n 473.

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Respect for Aboriginal self-determination soon dissipated as the balance of power shifted in favour of the settlers, exemplified by a steady increase in population and military capacity.⁴⁷⁸ Europeans steadily began to extend their influence over the internal affairs of Aboriginal society and their traditional lands and resources. At this time, the settler government's laws and policies reflected the dominant social theories which classed Aboriginals as uncivilised savages in need of guidance from 'higher civilisations.'⁴⁷⁹ Such views pervaded Aboriginal law and policy for many years, leading to an erosion of Aboriginal self-determination (and by extension, Aboriginal cultures, societies and economies) and an imposition of foreign governance and legal institutions. This is exemplified by the Indian Act 1876, which has been described as a means to eliminate the political structures of Indian peoples.⁴⁸⁰ The Indian Act, which consolidated the existing laws relating to 'Indians,' was passed pursuant to the federal government's exclusive jurisdiction over Aboriginal peoples provided under the Constitution Act 1867.⁴⁸¹ According to Maaka and

⁴⁷⁸ Russell, above n 476.

⁴⁷⁹ Ian Ward and Peter Ward *Introduction to critical legal theory* (2nd ed, Taylor & Francis Group, London; Portland, 2004).

⁴⁸⁰ Russell, above n 476. The Indian Act does not apply to the Inuit or Metis.

⁴⁸¹ Section 91(24), Constitution Act 1867 (Canada). Then known as the "British North America Act of 1876". This statute also established the Canadian federation. Pursuant to s 91(24) provincial governments have no jurisdiction over Indians.

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Fleras, the Indian Act had three key functions: (1) to ‘civilise’ Indians;⁴⁸² (2) to better manage Indian individuals, their lands and their resources; and (3) to define which Indians were entitled to federal resources.⁴⁸³ It achieved this by usurping Aboriginal authority and replacing it with federal jurisdiction, governing “almost all aspects of Aboriginal life on Canadian Indian reserves.”⁴⁸⁴ The initial version of the Indian Act brought major changes to First Nation societies, which were previously governed by the pre-contact Aboriginal institutions, legal traditions and value systems. It addressed governance structures (by introducing the band system), rules for on reserve taxation, the creation of reserve bylaws, band membership (a legal definition of ‘Indian’ was imposed based on blood quantum), and the creation of a Lockean system of property rights.⁴⁸⁵ Under the legislation, band governments faced a high level of federal oversight in their management of reserve lands and resources. While elected band councils were delegated some autonomous powers over reserves, federal authorisation was (and still is) required in many circumstances of on-reserve resource use (e.g. leasing, timber development, agricultural

⁴⁸² For example, through the infamous ‘residential school’ system, which was designed to remove Aboriginal children from the cultural influences of their communities in order to assimilate them into Euro-Canadian society.

⁴⁸³ Maaka and Fleras, above n 473.

⁴⁸⁴ Christopher Alcantara “To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada” 2008 38(2) *Publius* at 363.

⁴⁸⁵ At 363; Thomas Flanagan, André Le Dressay and Christopher Alcantara *Beyond the Indian Act: Restoring Aboriginal Property Rights* (McGill-Queen's University Press, Montréal, 2010).

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production).⁴⁸⁶ In spite of many amendments, the Indian Act is still in force today and many of the issues caused by its paternal nature remain extant.⁴⁸⁷

The assimilationist paradigm of Aboriginal law and policy, demonstrated by the Indian Act, began to shift in the mid-twentieth century with the conclusion of two world wars and a global push for the universal application of the principles of freedom, equality and human rights. Liberal Prime Minister Pierre Trudeau was elected in 1968 on a policy platform of Aboriginal ‘desegregation’ and absolute equality before the law.⁴⁸⁸ In 1969 his now infamous ‘White Paper’ was released proposing to repeal the Indian Act, eliminate Indian status, divide up reserves, terminate treaties and dismantle the Department of Indian Affairs. The regressive proposals were met with strong opposition by the Aboriginal sectors of society and sparked nationwide Aboriginal mobilisation and unification. Somewhat paradoxically, the White Paper influenced a further paradigm change in Aboriginal law and policy in the 1970s toward the recognition of the Aboriginal right to self-government.⁴⁸⁹ In 1973, the Supreme Court

⁴⁸⁶ Alcantara, above n 484.

⁴⁸⁷ Modern day legislative initiatives which allow First Nations to ‘opt-out’ of portions of the Indian Act will be discussed further below.

⁴⁸⁸ Maaka and Fleras, above n 473.

⁴⁸⁹ Russell, above n 476; Mark Bennett “Indigenous Autonomy and Justice in North America” 2004 2(2) *New Zealand Journal of Public and International Law*.

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delivered its judgment in *Calder v British Columbia*,⁴⁹⁰ recognising in Canadian law the common law doctrine of Aboriginal rights, and opening the door for the recognition of an inherent Aboriginal right to self-government.⁴⁹¹ At the same time, momentum was building for a significant constitutional adjustment, which was eventually provided for in the new Constitution Act 1982.⁴⁹² The 1982 Act became supreme law and set out the machinery of government in Canada. Significantly, section 35(1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” While the provision does not define the content of those Aboriginal rights, the 1983 ‘Penner Report’ concluded that it must encompass a right to self-government.⁴⁹³ A referendum to have this recognised and entrenched in the constitution failed, but in 1995 the federal government released a policy framework regarding the implementation of the inherent right to self-government.⁴⁹⁴ In spite of the introduction of the self-government policy framework, the Indian Act remains in force and sets out the governing framework for the

⁴⁹⁰ *Calder v British Columbia (AG)*, above n 472.

⁴⁹¹ Jill Wherrett *Aboriginal Self-Government* (Library of Parliament, Parliamentary Research Branch, Ottawa, 17 June 1999).

⁴⁹² Constitution Act 1982 (Canada).

⁴⁹³ Canada House of Commons *Report of the Special Committee on Indian Self-Government* (Ottawa, 1983).

⁴⁹⁴ Department of Indian Affairs and Northern Development Canada *Aboriginal Self-Government: Federal Policy Guide: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Minister of Public Works and Government Services Canada, Ottawa, 1995).

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majority of First Nations communities. That is, unless and until they opt-out of parts of the legislation, or they negotiate comprehensive self-government (e.g. Nisga'a) or public government arrangements (e.g. Nunavut), as discussed below.

Today, therefore, three general categories of Aboriginal self-determination (over land and resources) can be identified in Canada: (1) modern self-government treaties,⁴⁹⁵ based on an inherent Aboriginal right to self-government;⁴⁹⁶ (2) public government;⁴⁹⁷ and (3) arrangements

⁴⁹⁵ Negotiated arrangements based on the 1995 federal government's self-government policy framework, which derives from a loose acknowledgment by the federal government of an inherent Aboriginal right to self-government. The policy enables, through negotiation, the creation of exclusive domains of Aboriginal jurisdiction over matters which concern their collective survival as a people. The policy cannot be unilaterally invoked or enforced by First Nations through the courts. The Nisga'a Final Agreement (1998) is one of few arrangements concluded under this policy. Under the agreement, the Nisga'a people obtain the right to legislate and control certain matters within their reserve lands (e.g. culture, language, membership and property). Although, the power is not comprehensive and exclusive federal jurisdiction remains in place for matters such as crime, health, education and child welfare. Such arrangements are not constitutionally protected and could easily be revoked by the executive/legislature if the political will existed.

⁴⁹⁶ See *R v Pamajewon* [1996] 2 SCR 821, where an inherent Aboriginal right to self-government was pleaded (encompassing a right to regulate high stakes gambling on reserve). The Supreme Court of Canada applied the *Van der Peet* test for recognition of Aboriginal rights (the claimed right must be integral and central to the Aboriginal people's distinct culture): *R v van der Peet* [1996] 2 SCR 507. The case failed as the claim was couched too broadly.

⁴⁹⁷ Arrangements where Aboriginal groups obtain expression of their inherent right to self-government through accommodations within the existing constitutional and local government structures. One example is the creation of the Nunavut Territory for the Inuit people under the Nunavut Land Claims Agreement (1993). This agreement led to the partition of the Northwest Territories in order to create a territory where the majority population would be Inuit. The territorial government has the same powers of local government afforded to other territories. The vast territory has a population of 37,000, and some 30,000 residents claimed Inuit ancestry in the 2016 census (Statistics Canada "Census Profile, 2016 census" (2017) <http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> <[213](http://www12.statcan.gc.ca/census-recensement/2016/dp-</p></div><div data-bbox=)

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under the Indian Act. It is not possible to analyse all three categories in any detail given the word restrictions of this project. Instead, the section focuses on the operation of the Indian Act and its ability to give expression to the self-determination of First Nations peoples. The section concludes that the Indian Act framework itself is, in many ways, problematic and antithetical to the realisation of Aboriginal self-determination.

D Indian Act: enabler of self-determination?

The Indian Act and the system of governance and control it imposed on ‘Indians’, their way of life and their lands/resources, was introduced above. This section explores the framework further and considers the extent at which it provides for indigenous self-determination (if at all), and whether any insights can be obtained for future Aotearoa models. First, a brief overview of the general features of the legislation is required.

1 Background

While the Indian Act does not apply to Metis or Inuit peoples, the Indian Act has had a significant bearing on the lives of First Nation peoples whom belong to one of more than 600 federally recognised bands, or whom reside on one of the 2,800 reserves (comprising approximately 0.5%

pd/prof/index.cfm?Lang=E>). The Inuit people are able to use their power as a majority to influence the development of law and policy by the territorial government. Like modern treaties, the Inuit public government model is not constitutionally protected and could be easily disestablished. See André Légaré “Canada’s Experiment with Aboriginal Self-Determination in Nunavut: From Vision to Illusion” 2008 15(2-3) *International Journal on Minority and Group Rights*.

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of Canada’s territory).⁴⁹⁸ The Indian Act imposed the band as the mode of reserve governance, which, together with the minister⁴⁹⁹ and the Governor-in-Council, acts as a system of local government, without the need for a municipality. The band council comprises democratically elected representatives and a chief. Through the Indian Act the federal government also imposed a statutory definition for ‘Indian’, thereby preventing First Nations communities from determining their own membership criteria in accordance with their own legal traditions. The Indian Act and the framework it creates is not constitutionally protected.

The underlying governance scheme of the Indian Act can be seen through several of its sections, particularly those that relate to land/resource use on reserve. It is immediately demonstrable that the federal government has a lot of authority and oversight over the management of reserve resources. First Nation bands are at the mercy of the federal government in most instances of on-reserve resource development. First, the Minister⁵⁰⁰ can direct that certain reserve lands be

⁴⁹⁸ Morse, above n 471.

⁴⁹⁹ Today the legislation is administered by Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC), which were both created out of the dissolution of Indigenous and Northern Affairs Canada (INAC). Before that, the legislation was under the guise of the Department of Indian Affairs (DIA). Indigenous Services Canada “Home page” (2018) <https://www.canada.ca/en/indigenous-services-canada.html> <<https://www.canada.ca/en/indigenous-services-canada.html>>.

⁵⁰⁰ The Minister of Crown-Indigenous Relations and Northern Affairs.

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used for schools, administration, burial grounds, health projects etc.⁵⁰¹ The Minister can also determine the general plan and layout of the reserve by planning, subdividing and determining the location of roads.⁵⁰² Under section 60 the Minister may, at the band's request, grant the band a right to control and manage the reserve, but this right may be withdrawn at any time. Under section 71 the Minister can operate farms without the consent of the band. Any transactions of agricultural goods from Indians to non-Indians are void unless written approval is given by INAC.⁵⁰³ The removal of minerals, stone, sand, gravel, clay, soil, trees, timber, cordwood or hay from reserves is prohibited without ministerial approval.⁵⁰⁴ INAC controls the regulation of both timber cutting licences⁵⁰⁵ and oil and gas resources.⁵⁰⁶ As Sanderson says, "Indians can sell neither the produce of their farms, nor the naturally occurring wealth of their reserve lands without ministerial approval."⁵⁰⁷

⁵⁰¹ Section 18.

⁵⁰² Section 19.

⁵⁰³ Section 32(1).

⁵⁰⁴ Section 93.

⁵⁰⁵ Section 57.

⁵⁰⁶ Indian Oil and Gas Act 1985 (Canada).

⁵⁰⁷ Douglas Sanderson "Overlapping consensus, legislative reform and the Indian Act" 2014 39(2) Queen's Law Journal at 535.

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While the federal government is heavily involved in the regulation of land use, resource management and economic development on reserves, First Nation governments are, under the Indian Act, given some limited powers to create laws governing these matters. The powers conferred on bands are similar to those provided to municipal governments. Bands may promulgate bylaws over certain on-reserve matters such as: health, traffic, law and order, trespass, animal control, public works and infrastructure, land allotment, zoning and building regulation, agriculture, wildlife management and commercial activities (inter alia).⁵⁰⁸ Bands may also make bylaws in respect of on-reserve taxation.⁵⁰⁹ The powers closely resemble those given to municipal governments under provincial legislation, but ultimately bands operate with less independence and power than municipalities due to the high level of federal oversight.⁵¹⁰ Again, the authority to make bylaws is not constitutionally protected: it is delegated by legislation and exercised under close supervision of the federal government. Until 2014 the Minister had the power to veto all bylaws made by band governments under section 81.⁵¹¹ The following section critiques the Indian Act against Anaya's self-determination framework.

⁵⁰⁸ Section 81.

⁵⁰⁹ Section 83.

⁵¹⁰ Abele and Prince, above n 470. See also Jack Woodward *Native Law* (Carswell, Toronto, 1989).

⁵¹¹ The right to establish bylaws relating to taxation remains subject to ministerial approval.

2 *Analysis against Anaya's framework*

Constitutive and ongoing self-determination (subsidiarity and cultural pluralism)

The 141-year-old legal framework governing First Nation reserves is a poor example of indigenous rights by any measure. It would be difficult to conclude that the Indian Act positively contributes to the realisation of First Nations' self-determination, particularly when viewed against Anaya's constitutive and ongoing self-determination. As Metallic says:⁵¹²

Certainly, both the dark history of the Indian Act as a tool for assimilation and the status of by-laws as a form of 'delegated' governance powers make the prospect of using the Indian Act to advance self-government somewhat unpalatable.

The Indian Act is very much a creature of its time, reflecting many of the paternal and assimilationist leanings of 1876 Anglo-European colonial thought. As discussed, the Indian Act imposed a Western designed scheme of governance on First Nation peoples, which was designed to remove and replace the pre-contact traditional institutions of indigenous governance. First Nations groups were not involved in the development of the law, an archetypal breach of the constitutive self-determination frame. As a tool of assimilation, the legislation directly promoted the erosion of

⁵¹² Naomi Metallic "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control Over Local Matters Now and Not Later" 2016(67) UNBLJ at 212.

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traditional indigenous notions of resource management, which has strongly prevented First Nation peoples from pursuing their cultural development. This is the antithesis of the cultural pluralism principle.

Until very recently almost every aspect of Indian life on reserve was regulated by the federal government. This included many decisions relating to land use, resource management, primary industry development, and many other matters relating to the governance of lands, resources and ‘status-Indians’ themselves. Under the Indian Act, federal approval is required for many decisions relating to the use of reserve lands and resources (for example, leasing; trading agricultural goods with non-Indians; logging). The high level of oversight creates inefficiencies in reserve economies by increasing compliance requirements and transaction costs. Many commentators have argued that the status quo therefore prevents the economic development of First Nations peoples: in spite of a desire to improve the lives of their nation members, they are hamstrung by a legal framework which inhibits their ability to be competitive participants in the market economy.⁵¹³ In some ways First Nation governments are afforded similar powers to those of municipalities under provincial

⁵¹³ See Flanagan, Dressay and Alcantara, above n 485; Christopher Alcantara “Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nations Land Management Act and Economic Development on Canadian Indian Reserves” 2007 132(3/4) Public Choice.

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legislation: they are empowered to create local bylaws relating to taxation, zoning, building regulation, and traffic management etc. However, these powers are subject to a high level of scrutiny and oversight by the federal government, which retained the power to veto First Nation bylaws until 2014.⁵¹⁴ While the scheme ensures *some* autonomy over administrative matters, ultimately it constrains the development of First Nations (culturally, economically, socially). In many ways, the system embodies the antithesis of indigenous subsidiarity and cultural pluralism, and therefore, Aotearoa has very little to learn and gain from the Indian Act framework regarding the implementing indigenous self-determination. To conclude this point, the Indian Act does not enable Aboriginal Canadians subject to its provisions to develop and make meaningful choices about their economic, social and cultural development.

Mohawk scholar Taiaiake Alfred sums up this point accurately in the author's view:⁵¹⁵

In terms of solving the problems, it is not so much the types of rules that govern the band council that are the problem; it is the whole band council system itself. What it does is serve as the main obstacle to the recovery of our power, which is born out of the unity of our people and is most accurately expressed in our traditional forms of government.

⁵¹⁴ The federal government retains the power to veto Indian Act First Nation bylaws relating to taxation.

⁵¹⁵ Cited in Abele and Prince, above n 470 at 581.

E Duty to Consult and Accommodate Aboriginal Interests

While the Indian Act system offers very little assistance to the operationalisation of indigenous self-determination in Aotearoa, Canada's common law 'duty to consult and, where appropriate, accommodate,' ('duty to consult') does have the potential to offer insights for this task. As noted, the thesis contends that a number of principles need to be satisfied to ensure a proposed self-determination model is both compliant with the international norm and sustainable. The model must: (1) be formed through processes embodying indigenous participation (constitutive self-determination); and (2) embody the concepts of indigenous subsidiarity and cultural pluralism (ongoing self-determination).⁵¹⁶ A further theme that emerges from the comparative analysis is that, to be sustainable, the model needs to adequately balance and give expression to indigenous and non-indigenous interests. In other words, given the large population of non-indigenous people and interests in modern liberal states, how can the various interests (indigenous and non-indigenous) be balanced in a way that enables the meaningful and lasting expression of indigenous interests (to the extent that the two conflict)?⁵¹⁷ This section will analyse the duty to consult generally and then consider whether this Canadian doctrine

⁵¹⁶ Anaya, above n 45.

⁵¹⁷ See the analysis of the proposed Nordic Sami Convention in the first part of this chapter.

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offers some conceptual insights to this issue for future self-determination models in Aotearoa.

1 Background

The duty to consult is a common law doctrine developed by the Canadian judiciary and is most clearly articulated in two seminal Canadian Supreme Court cases: *Haida Nation*⁵¹⁸ and *Taku River Tlingit*.⁵¹⁹ The duty to consult is grounded in the principle of the ‘honour of the Crown’, recognised by the courts as developing out of the need to reconcile the British assertion of sovereignty with the interests of pre-existing aboriginal societies.⁵²⁰ Pursuant to the honour of the Crown doctrine, the Crown must be ‘honourable’ in all of its dealings with aboriginal peoples (including the assertion of sovereignty, the negotiation of modern land claim treaties and the recognition of aboriginal rights and interests); ‘sharp dealing’ is prohibited. The rationale for the honour of the Crown is to achieve reconciliation, which triggers differing duties in different circumstances.⁵²¹ For example, where the Crown voluntarily assumes discretionary control over specific aboriginal interests, fiduciary duties arise, and the Crown must act in the best interests of the aboriginal people in exercising that

⁵¹⁸ *Haida Nation v British Columbia (Minister of Forests)*, above n [Haida Nation].

⁵¹⁹ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550 [Taku River Tlingit].

⁵²⁰ *Taku River Tlingit*.

⁵²¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 186 [Delgamuukw].

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discretion. Whereas, where an aboriginal right or title claim has been asserted, but not yet recognised, no fiduciary duty arises (i.e. where a first nation claims aboriginal title over land that is presently owned in fee simply by the provincial government, but this claim has not yet been finalised or upheld). In such cases, the duty to consult can be invoked to protect the subject of the claim from irreversible exploitation (for example, a large stockpile of virgin timber).⁵²² As the Supreme Court said in *Haida Nation*:⁵²³

It is a corollary of s. 35 that the Crown act honourably in defining rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

Accordingly, the duty to consult, which applies to both federal and provincial governments, arises when the Crown has knowledge of the existence of an aboriginal right or title and proposes conduct/actions that may adversely affect that right or title (i.e. the granting of forestry licences).⁵²⁴ In such cases, as the Supreme Court states: "... the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting those interests are being seriously pursued in the process of treaty negotiation and proof."⁵²⁵

⁵²² *Haida Nation*, above n 518.

⁵²³ At 3.

⁵²⁴ At para 35.

⁵²⁵ At 3.

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Importantly for this thesis, precisely what the duty to consult requires the Crown to do (i.e. the scope and content of the duty) varies with the circumstances, namely, the strength of the claim to the asserted aboriginal interest, and the extent that the interests will be adversely impacted by the proposed action or activity.⁵²⁶ This results in what can be described as a spectrum of consultation where if an aboriginal group has a strong prima facie case to the asserted right, and the proposed activity will have a large impact on that right, a higher level of consultation is likely to be required. This could entail “deep consultation, aimed at finding a satisfactory interim solution,” i.e.:⁵²⁷

... the opportunity to make submissions for consideration, formal participation in the decision-making process and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decisions.

Whereas, at the other end of the spectrum, where the claim to the right is perceived as ‘weak’ and/or the potential infringement on that right is minor, a lower level of consultation will be warranted. In those cases, “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.”⁵²⁸ The overall

⁵²⁶ Haida Nation; Taku River Tlingit.

⁵²⁷ *Haida Nation*, at para 44.

⁵²⁸ At para 43.

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question in all cases will be whether the Crown’s honour is maintained and whether the process gives expression to the reconciliation envisaged by section 35 of the Constitution Act 1982. Upholding the honour of the Crown may require the accommodation of aboriginal interests in certain cases, bearing in mind the various indigenous and non-indigenous interests that exist.

Furthermore, the Supreme Court in *Delgamuukw* argued that the duty to consult could, in some cases, “require the full consent of an aboriginal nation...”.⁵²⁹ However, *Haida Nation* clarified that this does not entail a general veto right over what can be done on the land subject to an aboriginal rights claim pending formal recognition of that right. Aboriginal consent may only be required where aboriginal title or rights have been formally recognised: “Rather, what is required is a process of balancing interests, of give and take.”⁵³⁰

2 *Analysis against Anaya’s framework*

Overall, the duty to consult is an ‘influence mechanism’ in terms of the conceptual schema adopted by the Waitangi Tribunal in its *Ko Aotearoa Tenei* report, as it does not allow for unilateral or joint decision making by aboriginal peoples over resources, but it does allow for some

⁵²⁹ *Delgamuukw*, above n 521 at para 168.

⁵³⁰ *Haida Nation*, above n 518 at para 13.

influence over decisions relating to resources that are subject to outstanding aboriginal rights claims.⁵³¹

Constitutive self-determination

In terms of Anaya's constitutive self-determination, the duty to consult is a common law doctrine that is interpreted and applied by the judicial and executive wings of government. Of relevance here is the ability for aboriginal peoples to invoke the mechanism and to have it upheld by the third-party decision-maker (in respect of asserted aboriginal title/rights). Aboriginal groups are effectively at the mercy of executive and judicial bodies whom they must first satisfy that the relevant legal test has been met. When the claim is made through litigation, aboriginal groups must provide adequate evidence of their pre-existing aboriginal rights and meet the relevant evidential thresholds to convince the court that the Crown should be held to the duty to consult. Accordingly, it is difficult for Aboriginal peoples to receive the benefit of this mechanism as its interpretation, application and the parameters of the scope/content are all decided by third party, non-indigenous groups, and aboriginal peoples must expend a lot of time and resources in the pursuit of such claims. For these reasons, the invocation of the duty to consult at the level of individual

⁵³¹ See chapter 3 for a breakdown of this scheme.

cases is unlikely to comply with Anaya's constitutive self-determination principle.

Ongoing self-determination: subsidiarity

In terms of Anaya's ongoing self-determination, the duty to consult offers some noteworthy insights. The duty to consult is similar to the draft Nordic Sami Convention (discussed at the beginning of this chapter) in that it embodies a 'relativistic' or 'sliding scale' approach to managing resources by balancing the various interests that are associated with particular resources. For example, the level of consultation required under the duty is dependent upon an assessment of the strength of the underlying aboriginal claim, the importance of the subject matter to the aboriginal group, and the extent at which the right will be adversely affected by the proposed activity. Beyond this, the question as to whether aboriginal interests should be accommodated requires the Crown to balance all relevant indigenous and non-indigenous interests. As the Supreme Court stated in the *Haida Nation* case:⁵³²

Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

⁵³² *Haida Nation*, above n 518 at p. 3.

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This approach recognises that while underlying aboriginal interests should be given expression in certain resource management decisions, there are non-indigenous interests that, in some cases, might legitimately require expression in the decision-making process as well. To extrapolate, the approach is insightful for the implementation of self-determination as it recognises that the long-term sustainability of a notional self-determination model is dependent upon the consideration of, and provision for, all relevant interests (indigenous and non-indigenous). To use Anaya's terms, if the institutional framework encompassing the self-determination model is not sustainable then it cannot empower individuals and groups to develop and make meaningful choices in all spheres of life (the core rationale for the ongoing self-determination principle). These conceptual underpinnings of the duty to consult will be considered in further detail in chapter 6 where a framework for implementing self-determination in Aotearoa in future is discussed.

Aside from these considerations, the duty to consult enables some indigenous agency in environmental decision-making, by providing that a high level of consultation should be undertaken by the Crown when there is a strong case for the underlying aboriginal right/title, and where the proposed activity will have a high impact on that underlying interest. The case law has deliberately not defined the boundaries of these concepts (i.e. what is a 'strong case' and what is a 'high impact'). However, in cases

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where aboriginal groups are unable to satisfy the executive or judicial decision-maker that they have a strong case for the underlying interests, a much weaker form of consultation will be allowable. This is problematic and a clear limitation regarding the utility of the duty to consult for the expression of indigenous self-determination.

Ongoing self-determination: cultural pluralism

The duty to consult has little to offer under the cultural pluralism heading of Anaya's ongoing self-determination framework. While it is related to the common law doctrine of aboriginal title/rights (which enables recognition of underlying aboriginal interests that existed prior to the assertion of European sovereignty), that doctrine itself is derived from non-indigenous, liberal conceptions of the law. Indigenous understandings or systems of law are not given expression under this framework as the executive or judicial body that is applying the duty to consult does not consider the matter through the lens of pre-European aboriginal conceptions of law.

IV Chapter Conclusion

This chapter has two key foci: (1) to consider various foreign legal frameworks against Anaya's framework to determine whether they are complying with the self-determination norm; and (2) to consider whether any insights can be obtained from these examples to inform the way that indigenous self-determination can be operationalised in Aotearoa in future. The chapter explored two case studies: the Sami in Scandinavia and the Aboriginal peoples of Canada. These examples were selected to enable a wide range of perspectives to be considered, given the varied and rich contexts associated with each. Within each case study, various historical institutional structures, and more recent legal developments, were analysed against Anaya's framework (developed in chapter 1).

An analysis based on comparative law methodologies is useful as it considers whether any legal insights can be obtained from external jurisdictions to assist with answering the research questions of the thesis. In this case, the thesis considers how indigenous self-determination might be operationalised in Aotearoa in the future. As such, this chapter considered the extent that selected jurisdictions are currently giving expression to the indigenous self-determination norm. To the extent that the jurisdictions are giving adequate expression to the norm, the normative assessments can be adapted to enrich the current understandings about how

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the right is, or might in future be, implemented in Aotearoa. Similarly, Aotearoa can learn from the aspects of the studied models that are archetypal breaches of self-determination.

The chapter considered the Norwegian Sami parliament and its interactions with the institutions of the Finnmark Act and the Planning and Building Act. It was positively noted that a high level of consultation was undertaken in the lead up to the passage of both pieces of legislation. The ‘consultation agreement’ between Sami and the Norwegian state was also produced from these processes. Aotearoa has a lot to learn from Norway’s adherence to the constitutive self-determination principle. Although, this course of action was highly influenced by Norway’s ratification of the ILO’ Convention 169, which entails binding legal requirements in respect of indigenous consultation where policy and law development will affect indigenous interests. Aotearoa should ratify this convention and reconsider the way that Māori are consulted in the legislative/policy drafting processes.

Under the ongoing self-determination frame, it was demonstrated that the Norwegian Sami parliament is able to incorporate the views of its people and matters of cultural/economic importance into various decision-making fora through mechanisms such as the guidelines for changes in uncultivated land use in Finnmark, and objections to community planning

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proposals. While this form of participation is positive, it falls short of affording the Sami any meaningful level of autonomy over land use or resource management decisions. The locus of decision-making in these contexts ultimately lies with the non-Sami public authorities and these are merely ‘influence’ models (in terms of the Wai 262 schema). Any objections lodged by the Sami under these processes are ultimately subject to the state’s final decision power. Further, these Norwegian frameworks fail to adhere to Anaya’s cultural pluralism requirements.

This chapter demonstrated that the Indian Act framework was the archetypal breach of both Anaya’s constitutive and ongoing self-determination. The Indian Act revolutionised the way that First Nations people and their lands were governed by imposing the reserve and band council systems, thereby removing Aboriginal systems of law and governance. Today, the 1876 legislation retains the majority of its original assimilationist and paternal leanings. The majority of decisions regarding life on reserve and the use of lands and resources attract at least some form of oversight from the federal government. As Sanderson notes, “Indians can sell neither the produce of their farms, nor the naturally occurring wealth of their reserve lands without ministerial approval.”⁵³³ As such, indigenous subsidiarity and agency is almost non-existent under the band

⁵³³ Sanderson, above n 507.

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system. The power to make bylaws under sections 81 and 83 does not render this diagnosis any more favourable – the power is narrowly prescribed by the federal government (instead of a recognition of inherent authority), and until 2014, the federal government retained the power to veto any bylaws promulgated under section 81.⁵³⁴ Ultimately, the Indian Act framework embodies the antithesis of indigenous subsidiarity and cultural pluralism, and, when viewed against Anaya’s framework, it fails to register as a meaningful form of self-determination. Hence, it offers minimal insights for the implementation of self-determination in Aotearoa.

In addition to the above institutional structures the chapter analysed various recent legal developments for each case study: the relativistic approach embodied in the draft Nordic Sami Convention and Canada’s common law duty to consult and accommodate.

The processes leading to the drafting of the draft Nordic Sami convention are strongly reflective of Anaya’s constitutive self-determination. As discussed, the Sami comprised 50% of the drafting panel, and the convention provides that its ratification is conditional upon Sami assent. The Scandinavian states have come a long way from the historical approach of Western governments i.e. the unilateral imposition

⁵³⁴ The federal veto power remains for taxation bylaws made under s 83.

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of law and policy on indigenous peoples without extending any agency to those peoples in the process. Aotearoa has much to learn from these inclusive approaches.

The chapter also demonstrated that the form and functioning of the draft Nordic Sami convention is strongly insightful for its adherence to the subsidiarity principle. While there are some uncertainties that arise from the ambiguous wording of some provisions (i.e. when a proposal will ‘significantly damage’ Sami culture, triggering the right to withhold consent), if these matters are ultimately interpreted in favour of the Sami then this mechanism will provide a level of influence over environmental decision-making relative to the level of impact on their interests (e.g. highly impactful projects will trigger a high level of Sami influence). This relativistic approach operationalises the right to free, prior and informed consent, giving effect to the ratio of the *Poma Poma* and *Saramaka* cases (discussed in chapter 1) i.e. that consent is required for ‘major impact’ proposals. The draft convention will enable the expression of Anaya’s understandings of subsidiarity, and, as Åhren maintains:⁵³⁵

The [draft convention] is a unique project and instrument, also worthy of study beyond the Nordic context. It can serve as a model

⁵³⁵ Mattias Åhren “Nigel Bankes and Timo Koivurova (eds.), review of *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*” 2014 32(3) *Nordic Journal of Human Rights* at 283.

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for contemporary, constructive arrangements between indigenous peoples and states around the world.

Canada's common law duty to consult, and, where appropriate, accommodate Aboriginal interests, is also insightful for a similar relativistic approach that it promotes. As with the draft Nordic convention, where a case involves strongly arguable indigenous interests the duty to consult requires a stronger level of protection of those interests (and vice versa). Such an approach recognises that the balancing of all extant interests is required in formulating a harmonious and lasting self-determination model. In other words, indigenous peoples are not able to develop and make meaningful choices in all spheres of life (the key rationale for Anaya's ongoing self-determination) unless the self-determination model is sustainable, and sustainability is dependent upon a pragmatic approach that appropriately weighs all extant issues.

Chapter 5: Waitangi Tribunal and Ko Aotearoa Tenei: Potential Insights?

I Chapter Introduction

This chapter returns to the Aotearoa context and analyses a conceptual framework posited by the Waitangi Tribunal in its Wai 262 report, known as *Ko Aotearoa Tenei*.⁵³⁶ The Wai 262 inquiry produced a ‘whole of government’ report, the result of a comprehensive inquiry into “the place of Māori culture, identity and traditional knowledge in Aotearoa’s laws, and in government policies and practices.”⁵³⁷ A key focus of the tribunal in Wai 262 was an analysis of the environmental law framework against the requirements of the Treaty of Waitangi and its principles. To this end, the tribunal determined what it perceived to be the fundamental features of a Treaty of Waitangi compliant environmental law framework, one that adequately protects the interests of Māori kaitiaki.⁵³⁸

⁵³⁶ Waitangi Tribunal, above n 227.

⁵³⁷ Waitangi Tribunal “Ko Aotearoa Tenei: Report on the Wai 262 Claim Released” (2011) <https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/> <<https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>>.

⁵³⁸ The tribunal defines ‘*kaitiakitanga*’ as “the obligation, arising from the kin relationship, to nurture or care for a person or thing . it has a spiritual aspect, encompassing not only an obligation to care for and nurture not only physical well-being but also mauri.”

It continues in relation to ‘*kaitiaki*’: Kaitiaki can be spiritual guardians existing in non-human form . They can include particular species that are said to care for a place or a community, warn of impending dangers and so on . every forest and swamp, every bay and reef, every tribe and village – indeed, everything of any importance at all in te ao Māori – has these spiritual kaitiaki . But people can (indeed, must) also be kaitiaki . in the human realm, those who have mana (or, to use treaty terminology, rangatiratanga)

The conceptual framework developed by the tribunal, which prioritises the identification and balancing of all legitimate vested interests, is the focus of this chapter. As will be demonstrated below, the tribunal's underlying approach is insightful when viewed against Anaya's principles of indigenous self-determination, and should be adopted to assist the operationalisation of the norm in future.

II Waitangi Tribunal, Environmental Law and Te Tiriti

A 'Balancing test' – overview

As noted above, one key focus of the compendious *Ko Aotearoa Tenei* report was whether Aotearoa's environmental management framework was compliant with the Treaty of Waitangi and its principles, namely, the requirement for the Crown to actively protect the relationship of kaitiaki over their taonga.⁵³⁹ In this portion of the claim inquiry, the claimants sought "Māori control of taonga Māori,"⁵⁴⁰ i.e. the ability to exercise authority over matters or resources of importance to them. Whereas, Crown counsel argued that the Crown/local authorities should

must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure."

Waitangi Tribunal, above n 227 at 17.

⁵³⁹ The tribunal defines 'taonga' as follows: "Finally, where kaitiaki obligations exist, they do so in relation to taonga – that is, to anything that is treasured . taonga include tangible things such as land, waters, plants, wildlife, and cultural works ; and intangible things such as language, identity, and culture, including mātauranga Māori itself." Waitangi Tribunal, above n 227 at 17.

⁵⁴⁰ Waitangi Tribunal, above n 224 at 112.

retain control of all decision-making affecting taonga, to the exclusion of Māori. The tribunal was tasked with reconciling these submissions and developing a workable framework to enable this to occur.

The tribunal first considered that a clear understanding of the fundamentals of the pre-European Māori resource management system, was required: “we must first understand the deep values that impel the Māori voice.”⁵⁴¹ The tribunal noted that prior to European contact the principle of kaitiakitaka governed all resource management, and that this was based on a principle of whanaukataka.⁵⁴²

Whanaungatanga is the basis on which the world is ordered, the organising principle of mātauranga Māori, the source of whakapapa, and the origin of all rights and obligations – including kaitiakitanga over the environment.

These two fundamental concepts (kaitiakitaka and whanaukataka) interact in Māori environmental management “not necessarily by forbidding [resource] use, but by using them in ways that enhance rather than damage kin relationships.”⁵⁴³ Instead of the transactional and Lockean property rights focus of ‘western’ environmental management, kaitiakitaka

⁵⁴¹ At 105.

⁵⁴² Waitangi Tribunal, above n 227 at 267-269. The tribunal defines ‘whanaungatanga’ as a defining principle of kinship. It notes: “In te ao Māori, all of the myriad elements of creation – the living and the dead, the animate and inanimate – are seen as alive and inter-related. All are infused with mauri (that is, a living essence or spirit) and all are related through whakapapa.” At 17.

⁵⁴³ At 269.

is more akin to a familial relationship, that is “permanent and mandatory, binding both individuals and communities over generations and enduring as long as the community endures.”⁵⁴⁴

This idea of a kinship relationship between humans and the natural world (or between kaitiaki and their taonga) was fundamental to the Māori system of resource management (as discussed in chapter 3). For the modern resource management system to be compliant with the requirements of Te Tiriti, this fundamental principle, the tribunal opined, had to be embodied in the framework. In other words, and using the language of the existing treaty principles,⁵⁴⁵ the tribunal determined that article two of Te Tiriti, the right to tino rangatiratanga, requires the Crown to “actively protect” the ability of kaitiaki to control and regulate their relationship with the environment in accordance with their tikanga and mātauraka.⁵⁴⁶ In other words, the Crown must enable kaitiaki to maintain their position of authority with respect to natural resources, in accordance with their own cultural understandings of this kinship relationship.

⁵⁴⁴ At 269.

⁵⁴⁵ I.e. those derived from the *SOE case*, above n 191.

⁵⁴⁶ Waitangi Tribunal, above n 227 at 269. The tribunal defines ‘Mātauranga’ as: “the way of perceiving and understanding the world, and the values or systems of thought that underpin those perceptions. ‘Mātauranga Māori’ therefore refers not only to Māori knowledge, but also to the Māori way of knowing.” At 16.

But how would the tribunal determine if the current legal framework was complying with the relevant treaty requirements? To answer this the tribunal articulated what is essentially an analytical framework for measuring the current environmental law system against the requirements of the principles rights and interests sourced from Te Tiriti.⁵⁴⁷ If the legal framework failed to reflect and give expression to the fundamental principles articulated in the tribunal's analytical schema, the legal framework would not be compliant with Te Tiriti. The essence of the analytical framework is captured as follows:⁵⁴⁸

In the end, it is the degree of control exercised by Māori and their influence in decision-making that needs to be resolved in a principled way by using the concept of kaitiakitanga. The exact degree of control accorded to Māori as kaitiaki will differ widely in different circumstances and cannot be determined in a generic way. Finding the appropriate degree of control will depend on several factors. ... [These] include the importance of the taonga in question to the iwi or hapū, the health of that taonga, and any competing interests in it.

To this end, the tribunal concluded that a Treaty compliant framework would enable Māori to exercise one of three decreasing levels of influence over decision-making (control, partnership or influence), depending on the circumstances. The tribunal contended that all extant and

⁵⁴⁷ At 269-273.

⁵⁴⁸ At 270.

legitimate interests associated with the resource would first need to be identified and balanced against each other before an appropriate outcome could be selected. As the tribunal states:⁵⁴⁹

what is needed here is a system that allows all legitimate interests (including the interests of the environment itself) to be considered against an agreed set of principles, and balanced case by case.

This ‘balancing test’ will now be elaborated in further detail.

B ‘Balancing test’ – in more detail

As touched on above, the tribunal’s view was that a treaty-compliant environmental law framework would embody two essential elements:⁵⁵⁰

- (1) identification and balancing of all legitimate interests (kaitiaki and non-kaitiaki):
 - i. kaitiaki relationship?
 - ii. Legitimate third-party interests?
- (2) identification of an appropriate level of authority to give expression to the interests of kaitiaki (to the extent that they should be paramount):
 - i. control;
 - ii. partnership; and
 - iii. influence.

1 Identifying legitimate interests

The first limb of a treaty-compliant framework is the identification of all ‘legitimate interests’ associated with the taonga, an assessment of the relative importance of the subject taonga for each ‘interested party’, and a determination regarding the extent at which the kaitiaki interest should

⁵⁴⁹ Waitangi Tribunal, above n 224 at 112.

⁵⁵⁰ Waitangi Tribunal, above n 278.

prevail over other interests in the management regime. The first part of this step involves the identification of whether a kaitiaki relationship exists with the taonga, and this can be achieved by identifying whether a body of mātauraka Māori (i.e. traditional Māori knowledge) exists in relation to the taonga. The tribunal notes that that the environment in its entirety is not capable of being deemed a taonga in this context: a taonga will have identifiable ‘korero tuku iho’ (a body of inherited knowledge) associated with it, or a whakapapa that can be recited regarding it. The tribunal argues that the existence and credibility of the asserted kaitiaki relationship can be tested.⁵⁵¹

A treaty-compliant framework would also require consideration of whether any legitimate third-party interests exist, in other words, any non-kaitiaki parties whom hold a legitimate interest in respect of the taonga or resource. Such interests necessarily include ‘the environment’ itself (in the widest sense of the term), those interested in the development, active use or exploitation of the environment (e.g. primary industries, farmers, fishermen, miners, or hydroelectricity operators etc.), and other interests (such as tourism operators, local authorities, homeowners and other

⁵⁵¹ At 269.

property owners).⁵⁵² There will be many other legitimate interests that cut across these interests, and it is not possible to exhaustively list them all.

Once all interests are identified, a treaty-compliant framework requires value judgements to be made regarding the level of priority that should be attributed to the respective interests (both iwi and non-iwi).⁵⁵³ For example, the tribunal notes that the RMA is an example of a legal framework that allows interests to be considered against one another (i.e. demonstrated through the RMA's statutory purpose and operationally through the resource consent process). Given the extensive range and complexity of interests that exist, "there can be no one-size-fits-all approach" to balancing interests in environmental management: there are situations where control by the kaitiaki or by the local authorities/Crown would be inappropriate (and vice versa).⁵⁵⁴ As the tribunal notes, policies or standards could be set by central government as to how interests should be balanced, "but ultimately every decision about use or development of a resource will be centred around its own particular set of circumstances and interests, and will therefore be unique."⁵⁵⁵ In some cases there will be no conflict between various interests which will be easily reconcilable. Where

⁵⁵² At 270.

⁵⁵³ At 227.

⁵⁵⁴ At 272.

⁵⁵⁵ At 272.

there is conflict, “some interests will be entitled to greater protection than others.”⁵⁵⁶ The tribunal also notes that some taonga will be more important to hapū or iwi identity than others (as evidenced by the relevant body of mātauranga), and therefore some will be more deserving of protection than others.⁵⁵⁷ The health of the taonga itself should also be a key balancing consideration.

2 Appropriate level of authority

Once all legitimate interests (kaitiaki and non-kaitiaki) have been identified and balanced, a treaty-compliant framework would enable the kaitiaki to exercise an appropriate level of authority in respect of the taonga, relative to the outcome of the balancing test. The tribunal theorises three levels of authority that will be appropriate in differing circumstances: ‘control’, ‘partnership’ and ‘influence’.

A ‘control’ model will be appropriate where the balancing test identifies that the kaitiaki interest should be paramount in environmental management, over all other interests. The tribunal contends that the more important the taonga is for the iwi, the greater the need for a control model. An example given of a control model in Aotearoa’s environmental

⁵⁵⁶ At 272.

⁵⁵⁷ At 272.

management is section 33 of the RMA (discussed in detail in chapter 3), although the tribunal notes section 33 has some serious shortcomings.

‘Partnership’ models should be opted for when the balancing test determines that both kaitiaki and non-kaitiaki interests shall be heard in the management framework. An example of a partnership model is joint management agreements under section 36B of the RMA (discussed in chapter 3), which allow specified RMA functions, powers and/or duties to be jointly exercised by an iwi authority and a local authority (although, the tribunal outlines how this mechanism fails to reach the requisite standard).

At the bottom of the tier, the ‘influence’ model will be appropriate where, after undertaking the balancing of interests, the circumstances do not justify either a control or partnership model. In such cases, the Waitangi Tribunal contends there is still a strong case for kaitiaki to be able to influence environmental management within their takiwā in accordance with kaitiakitanga principles (albeit in a less formal manner than the control/partnership models). The treaty principle of active protection requires this. An example of an influence model is Part II of the RMA, which relates to the consideration of the Māori voice in resource management decision-making (albeit, inadequately as discussed by the tribunal and in chapter 3 above).

Overall, the tribunal argued that:⁵⁵⁸

... these are the key requirements of an environmental management regime that is Treaty compliant and provides adequately for the kaitiaki interest: it must deliver kaitiaki control, partnership, and influence, whichever of those outcomes is appropriate.

C Nexus between Wai 262 and indigenous self-determination

Although the Wai 262 model's genesis is within Aotearoa's Treaty jurisprudence, analogies can be made between the nature of the model (i.e. ensuring domestic environmental law gives expression to Treaty rights and interests), and the operationalisation of the international law right to indigenous self-determination (ensuring domestic law gives expression to the self-determination norm). The implementation of rights and interests derived from Te Tiriti o Waitangi is, at essence, an exercise in international law. This view is consistent with the ratio of *Hoani Te Heuheu Tukino*, i.e. that Te Tiriti, as a treaty of cession under international law, is legally unenforceable except to the extent that it is incorporated into municipal law.⁵⁵⁹ As discussed, the balancing test articulated by the tribunal in *Ko Aotearoa Tenei* was designed to test whether Aotearoa's environmental law framework gives adequate expression to the rights and interests

⁵⁵⁸ At 227 at 272.

⁵⁵⁹ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

articulated in Te Tiriti. Analogies can be drawn between this task, and the operationalisation of the international law norm of indigenous self-determination (they both involve the implementation of international law standards relating to indigenous peoples). Given the fundamental similarities between the two rights, their international law source, and their underlying objectives, it is appropriate for Wai 262's conceptual model to act as a source of inspiration for the operationalisation of indigenous self-determination.

D Analysis against Anaya's framework

The conceptual model articulated by the Waitangi Tribunal in *Ko Aotearoa Tenei* will now be considered against Anaya's principles of self-determination. As with the previous chapters, this assessment will determine its normative value as a model for implementing indigenous self-determination in Aotearoa using Anaya's framework explored in chapter 1.

1 Constitutive self-determination

As discussed in the preceding chapters, the constitutive self-determination principle considers the processes leading to the development of the model (and whether these adequately embody indigenous participation and consent). The Wai 262 model discussed above is unique compared the previous models analysed in this thesis in that it is not an existing, positive, legal framework – it is merely a theoretical model

adopted by the Waitangi Tribunal as a means to consider whether the Crown is adequately implementing the Treaty of Waitangi. Notwithstanding this difference, the Wai 262 model can still be considered against this principle. The indigenous subjects of the model had adequate opportunities to participate in the development of this model. The Wai 262 inquiry was lodged in October 1991 and, after nearly 20 years of hearings the tribunal's report was released in 2011. Throughout this period, the six initial claimants and their whānau members participated in two rounds of hearings, the first in 1995 and the second in 2005.⁵⁶⁰ These processes of the tribunal allowed the claimants to pursue their claims with evidence, and to shape the overall outcome of the report. In following the principles of natural justice, the formation of this model was consistent with the precepts of Anaya's constitutive self-determination.

2 Ongoing self-determination: subsidiarity

This heading assesses the 'form and functioning' of the model itself. As discussed above, the balancing test is an abstract means to determine whether the current environmental law framework is complying with the rights and interests derived from Te Tiriti, and, as such, it is not a 'black letter' legal framework. The tribunal notes that a treaty-compliant

⁵⁶⁰ Haana Murray (Ngāti Kurī), Hema Nui a Tawhaki Witana (Te Rarawa), Te Witi McMath (Ngāti Wai), Tama Poata (Ngāti Porou), Kataraina Rimene (Ngāti Kahungunu) and John Hippolite (Ngāti Koata).

framework would: (1) identify and balance all interests associated with a taonga (kaitiaki and non-kaitiaki); and (2) enable the expression of a level of kaitiaki authority relative to the circumstances. The analysis is then applied to existing legal frameworks to determine whether they are treaty-compliant (where they are not, the tribunal recommends reforms to the relevant legislation or policy).

Throughout this process, where the balancing test determines that the kaitiaki interest should be paramount to all other interests, a control model will be appropriate. Control models theoretically provide iwi with responsibility for exclusive regulatory control over taonga, providing for the management of the resource at the most local level. As discussed above, the control model essentially resembles a model of autonomous governance (chapter 3). The tribunal argues that a Treaty compliant environmental management framework must allow for the expression of control models when they are deemed appropriate by the balancing test.⁵⁶¹ Accordingly, the model encourages the Crown to create space for iwi decision-making authority in environmental management in certain

⁵⁶¹ The tribunal concludes that the current framework is not capable of delivering the control model: “In particular, the [RMA] has failed to deliver any iwi control of iconic taonga within their environment, despite the existence of the section 33 transfer power...” This provides strong support for the contention of this chapter that section 33 of the RMA does not enable the expression of indigenous self-determination. Waitangi Tribunal, above n 224 at 116.

situations. By extension, this promotes adherence to the indigenous subsidiarity principle (albeit, in cases where this is deemed appropriate).

The tribunal holds that partnership models are appropriate when legitimate third-party interests exist which should be provided for in the regulatory framework alongside legitimate kaitiaki relationships. As discussed in chapter 3, partnership models are essentially power-sharing or co-management arrangements, entailing the sharing of decision-making power and influence between public authorities and local communities (in this case, iwi, hapū or whānau). Partnership models rank lower against Anaya's framework than control models (particularly with regard to subsidiarity considerations) because they provide Māori with less ability to directly influence environmental decision-making (less subsidiarity). Nonetheless, the partnership model still enables Māori to exercise authority over their taonga (albeit in conjunction with the Crown). The tribunal contends: "Partnerships can themselves be seen as a form of tino rangatiratanga in some circumstances."⁵⁶² It is contended that the same applies to partnership models and the right to self-determination. The Wai 262 model, through its promotion of partnership models, encourages the operational expression of indigenous subsidiarity in tandem with the Crown.

⁵⁶² At 24.

One of the insightful aspects of the Wai 262 model is that it encourages the pragmatic implementation of Māori authority (article 2) by considering all interests (Māori and non-Māori) and reconciling these to find a workable balance in the ensuing institutional framework. The tribunal characterises this as “perfecting the treaty partnership”⁵⁶³ that exists between the two founding cultures: “Kupe’s people” and “Cook’s people”.⁵⁶⁴ The tribunal determines that the Treaty and its principles (e.g. partnership and tino rangatiratanga) requires this balancing approach. Justice Joe Williams captures the essence of the approach in the cover letter to Wai 262: “...Aotearoa and New Zealand must be able to co-exist in the same place.”⁵⁶⁵

David Williams’ view is that in fact, the Waitangi Tribunal was “too intent on being pragmatic”, compared to the more radical tribunal reports that preceded Wai 262.⁵⁶⁶ Williams contends that the tribunal has historically articulated the “high ground” of treaty guarantees, and the Crown, based on the tribunal’s position, tends to “find a negotiated middle

⁵⁶³ Waitangi Tribunal, above n 227 at 714.

⁵⁶⁴ Waitangi Tribunal, above n 224 at xxiii.

⁵⁶⁵ Waitangi Tribunal, above n 227 at xxiii.

⁵⁶⁶ David V. Williams “Ko Aotearoa Tenei: Law and Policy Affecting Maori Culture and Identity” 2013 20(3) International Journal of Cultural Property at 322.

ground to resolve a political impasse.”⁵⁶⁷ In Wai 262, however, Williams argues the tribunal opts directly for the middle ground. This author has some sympathy for this view, noting the tribunal’s premise that “it is no longer possible to deliver tino rangatiratanga as full autonomy in all cases in which taonga Māori are ‘in play’, as it were.”⁵⁶⁸ It seems contrary to the pursuit of indigenous rights to begin with such a concession.

Notwithstanding this, in the author’s view there is a legitimate place for the pragmatic approach of the tribunal in Wai 262. As discussed above in chapter 4,⁵⁶⁹ approaches that balance all extant interests are insightful as they promote the *sustainable* operationalisation of indigenous rights. To use Anaya’s terms, if the institutional framework established pursuant to the Wai 262 model is not sustainable (i.e. capable of acceptance by a broad majority of society) then they cannot empower individuals and groups to develop and make meaningful choices in all spheres of life (the core rationale for the ongoing self-determination principle). But, in terms of Anaya’s framework, the necessity for pragmatism to ensure sustainability must not override adequate provision for the principle of subsidiarity.

⁵⁶⁷ At 323.

⁵⁶⁸ Waitangi Tribunal, above n 224 at 24.

⁵⁶⁹ In the context of the Canadian duty to consult and Anaya’s framework.

3 *Ongoing self-determination: cultural pluralism*

Aside from subsidiarity considerations, the theory underpinning the model itself is highly reflective of Māori cultural concepts. As discussed, a treaty-compliant framework would first consider the existence of a kaitiaki relationship in order to determine the importance of the taonga or resource for the kaitiaki. This would be achieved by considering the existence of a body of mātauraka Māori relating to the resource. This is indicative of a Māori approach to the implementation of treaty rights. The approach gives expression to Jeff Corntassel's argument that the operational expressions of self-determination should be inextricably linked to indigenous ways of seeing the world (for example, that environmental management should be seen through the lens of relationships, rather than rights-based discourses which are ultimately crafted by 'the state' itself).⁵⁷⁰ In terms of Anaya's scholarship, this model goes a long way toward promoting the reflection of the groups character and cultural preferences in environmental management.

⁵⁷⁰ Corntassel, above n 158. See chapter 1.

III Chapter Conclusion

Wai 262 sets out an approach to measuring whether Aotearoa's environmental law framework complies with Te Tiriti. This 'balancing model' is pragmatic in the sense that it requires the legal framework to consider all legitimate and extant interests (kaitiaki and non-kaitiaki), and to provide an appropriate level of authority for the kaitiaki (depending on the outcome of the balancing test). The conceptual framework recognises that the kaitiaki voice is important, but in some circumstances, compromise will be required to accommodate other vested interests. The chapter contends that this form of pragmatism is required to ensure longevity in operational expressions of indigenous rights. The approach in *Ko Aotearoa Tenei* appreciates the fundamental kinship relationships between people and the natural environment inherent to pre-European Māori environmental management, and promotes the recognition of these kaitiaki relationships. The tribunal's approach is therefore highly framed by Māori cultural concepts, a key requirement of the cultural pluralism aspect of Anaya's framework. Overall, the conceptual framework ranks favourably against Anaya's principles and is a strong source of inspiration for the operationalisation of the international norm of indigenous self-determination.

Chapter 6: Future of Indigenous Self-Determination in Aotearoa?

I Chapter Introduction

The thesis has demonstrated a widespread lack of adherence to the international norm of indigenous self-determination in nearly all of the examined contexts, by applying Anaya's framework of indigenous self-determination. Chapter 2 concluded that Aotearoa's historical legal developments failed to embody Anaya's principles. In fact, in some cases these models embodied an archetypal breach of the constitutive self-determination principle (i.e. the unilateral imposition of law or policy on indigenous peoples without consent or participation in its development). Similarly, for the reasons outlined in chapter 3, it was demonstrated that the current environment and resource management law framework in Aotearoa is failing to give expression to Anaya's principles of indigenous self-determination. Accordingly, law reform is needed to fill the void of norm compliant mechanisms in Aotearoa law.

The potential nature of this law reform is the subject of the second major inquiry of the thesis. This aspect of the thesis concluded that while the various analysed models fail to adhere to Anaya's principles as a whole, there are severable aspects of the selected models that are compliant with parts of Anaya's analytical framework, and these parts therefore offer

valuable insights into how indigenous self-determination could be operationalised in Aotearoa in future.⁵⁷¹

For example, While the current Aotearoa frameworks were held to be non-compliant when viewed as a whole, it was noted that severable portions of the studied frameworks are insightful for their adherence to the cultural pluralism aspects of Anaya's ongoing self-determination. The Aotearoa models that embody Stone's legal personality concept (Whanganui and Te Urewera) were found to be highly favourable against Anaya's cultural pluralism aspect of the norm.⁵⁷² These frameworks are also insightful for their prioritisation of tikanga Māori in the decision-making framework itself.

Furthermore, chapter 4 analysed two overseas contexts (Canada and Scandinavia). The aim was to consider whether any insights could be obtained from these foreign models to inform the future implementation of indigenous self-determination in Aotearoa. The most celebrated aspects of the foreign frameworks for the purposes of this thesis, i.e. the concepts that were notable for their adherence to Anaya's principles, are those relating

⁵⁷¹ Irrespective of the findings that the models studied *as a whole* are non-compliant with Anaya's principles.

⁵⁷² See chapter 3 for an analysis of the Te Awa Tupua (Whanganui River) and Te Urewera settlements. Stone, above n 242.

to the ‘pragmatic balancing of interests’ (both indigenous and non-indigenous) and the allocation of decision-making authority based on an analysis of interests and their legitimacy. This was observed in the ‘sliding scale’ or ‘relativistic’ approach embodied in the draft Nordic Sami Convention, and, to an extent, in Canada’s common law duty to consult and accommodate Aboriginal interests. A similar approach was also observed in the context of the Waitangi Tribunal’s *Ko Aotearoa Tenei* report in chapter 5, which noted the normative value of this model against Anaya’s self-determination framework.

In light of these analyses, it is necessary to consider how the various insights might contribute to the operational expression of indigenous self-determination in Aotearoa. With this in mind, the present chapter looks to chart a possible path for the future of indigenous self-determination in Aotearoa. It does this by elucidating the fundamental principles that are required of a self-determination compliant domestic legal framework (balancing of interests, decision-making authority, adequacy of influence and the application of indigenous laws), and then by ‘populating’ these principles into the Wai 262 balancing framework.⁵⁷³ The suggested

⁵⁷³ As will be outlined below, this thesis takes a similar approach to that of the Waitangi Tribunal in Wai 262, which formulated an analytical framework for determining whether Aotearoa’s environmental and resource management was giving expression to article two of Te Tiriti.

Chapter 6: Future of Indigenous Self-Determination in Aotearoa?

framework is then applied to a case study: the Rakiura Tītī (or muttonbird) Islands.

II Background

As this thesis demonstrated in chapter 1, the operationalisation of indigenous self-determination cannot be achieved by one specific type of institutional framework (i.e. by copying an autonomous framework from an existing external jurisdiction, for example). Such a view not only promotes an ‘essentialist’ approach to indigenous self-determination, but also unduly focuses on the remedial aspects of the norm.⁵⁷⁴ That is, it focuses on the design of the institutions that might be required to remedy a substantive breach of self-determination, without considering the substance of the norm itself.⁵⁷⁵ This thesis has not promoted such an approach to operationalising indigenous self-determination.

Instead, as outlined in chapter 1, the thesis has adopted Anaya’s holistic approach to self-determination which: (1) considers whether a substantive breach of self-determination has occurred (by measuring the framework against the constitutive and ongoing self-determination principles); and (2) once a substantive breach has been observed, considers the ‘shape’ of the framework required to remedy that breach of self-determination (remedial self-determination).⁵⁷⁶

⁵⁷⁴ Gunn, above n 138.

⁵⁷⁵ Anaya, above n 45.

⁵⁷⁶ See chapter 1 for a discussion regarding Anaya’s framework. Anaya, above n 45.

This chapter considers the second part of Anaya's framework: the realm of remedial self-determination. It posits that there are identifiable fundamental principles that underpin the remedial operationalisation of the international norm of indigenous self-determination. This chapter draws on the analysis of the previous chapters and concludes that a norm-compliant (i.e. remedial) legal framework would give expression to the following principles: the balancing of interests; locus of decision-making; indigenous influence over decision-making; and pluralism. The chapter adopts a similar conceptual approach to the Wai 262 report, which articulated the fundamental characteristics of a Treaty of Waitangi-compliant environmental law framework.⁵⁷⁷ For example, a remedial framework that gives full expression to these principles will likely be in compliance with the norm, and have remedied the underlying substantive breach. The remedial principles will now be explored in more detail.

⁵⁷⁷ Waitangi Tribunal, above n 227.

III Principles of a Norm-Compliant Model

A Balancing interests

The first principle, and a significant theme of this thesis, provides that a self-determination norm-compliant legal framework must identify and pragmatically balance all interests (both indigenous and non-indigenous) before allocating to the indigenous actors an appropriate level of decision-making authority.⁵⁷⁸

Both the draft Nordic Sami convention and the Canadian duty to consult promote the balancing of various interests.⁵⁷⁹ However, the most useful articulation of such an approach is contained in Wai 262's *Ko Aotearoa Tenei* report, which was explored in chapter 5.⁵⁸⁰ To recap, in Wai 262 the Waitangi Tribunal developed an analytical framework for determining whether the environmental law framework was compliant with article 2 rights of Te Tiriti (tino rangatiratanga). A compliant legal framework, the tribunal held, would do two things: (1) identify and balance all legitimate interests (kaitiaki and non-kaitiaki); and (2) the identify an appropriate level of authority to give expression to the interests of kaitiaki

⁵⁷⁸ An idea that is adopted from the Wai 262 inquiry, but is echoed in many other contexts, such as the draft Nordic Sami Convention and the Canadian duty to consult and accommodate.

⁵⁷⁹ See chapter 4. Draft Nordic Sami Convention. *Haida Nation*.

⁵⁸⁰ Waitangi Tribunal, above n 227.

(to the extent that they should be paramount, based on the balancing test: i.e. control, partnership or influence models).⁵⁸¹

As discussed in chapter 5, analogies can be made between the rationale of the model developed in Wai 262 (i.e. ensuring domestic environmental law gives expression to Treaty rights and interests), and the operationalisation of the international law right to indigenous self-determination (ensuring domestic law gives expression to the self-determination norm). Furthermore, the implementation of rights and interests derived from Te Tiriti o Waitangi is, at essence, an exercise in international law. Both article 2 of Te Tiriti and the self-determination norm seek to achieve similar outcomes, and although self-determination is “philosophically distinct from tino rangatiratanga... the right of self-determination will support and complement Māori claims to self-determination.”⁵⁸² Therefore, it is appropriate for the Wai 262 balancing test to assist the conceptual development of self-determination operationalisation as the exercises are conceptually similar.

As touched on above, a similar pragmatic approach to operationalising self-determination can be found in the draft Nordic Sami

⁵⁸¹ These models are outlined in greater detail in chapter 5. Waitangi Tribunal, above n 227.

⁵⁸² Toki, above n 31 at 143-144.

convention (discussed in chapter 4), which adopts a comparable approach by considering the importance of the underlying resource to various stakeholders. The draft Nordic Sami convention holds that the greater the importance of the resource to the Sami, the greater the level of authority the Sami should hold. The draft convention was intended to be a reflection of existing international norms applying to the Sami, including the right to self-determination.

A similar approach was also found in the Canadian common law duty to consult and accommodate Aboriginal interests, whereby the level of consultation required in any given case is dependent upon the strength of the underlying Aboriginal claim, the importance of the subject matter to the aboriginal group, and the extent at which the right will be adversely affected by the proposed activity.⁵⁸³ The question as to whether Aboriginal interests should be accommodated requires the Crown to balance all relevant indigenous and non-indigenous interests.⁵⁸⁴

A principle requiring the legal framework to balance all interests (indigenous and non-indigenous) is pragmatic in the sense that it is more likely to produce a sustainable model of self-determination than one that

⁵⁸³ *Haida Nation*; see chapter 3.

⁵⁸⁴ *Haida Nation*.

does not.⁵⁸⁵ This accords with Åhren's view that the pragmatic approach adopted in the draft Nordic Sami convention offers a 'blueprint' for implementing self-determination when there is a high level of 'mixing' of indigenous and non-indigenous peoples on the lands once occupied only by the former, as it recognises and attempts to reconcile the interests of both parties.⁵⁸⁶

B Subsidiarity: decision-making 'locus'

It was identified in chapter 1 that indigenous self-determination in this context can manifest itself as 'autonomy' and/or free, prior and informed consent, and the scope and content of these rights was explored in that chapter.⁵⁸⁷ Based on these aspects of the norm, a further principle of norm-compliant legal frameworks is the idea that indigenous peoples should not only be participants in decision making processes, but should, in certain situations, be afforded full agency to be the ultimate decision-maker itself.⁵⁸⁸ This thesis suggests that full decision-making authority will be appropriate where, once all indigenous and non-indigenous interests are balanced (on the basis of the balancing test discussed above), the

⁵⁸⁵ As discussed in chapter 4 in relation to the Canadian duty to consult.

⁵⁸⁶ Åhren, above n 457.

⁵⁸⁷ Articles 4, 10, 19, 29 and 32, UNDRIP.

⁵⁸⁸ It was noted in chapter 4 that none of the existing mechanisms in Norway's Sami legal framework enable Sami to make decisions regarding their resources, all decisions are made by public authorities. The same applies to the Whanganui River settlement, where all decision-making regarding land use in the catchment is regulated by the relevant local authorities pursuant to the RMA. See chapter 3.

indigenous interest is deemed to require priority. In other words, in terms of the Wai 262 model, the control model.⁵⁸⁹

The locus principle can be identified within the international jurisprudence of indigenous peoples. At essence, the devolution aspect of the right to autonomy under the UNDRIP (and ‘internal self-determination’) contemplates the transfer of a decision-making locus from the state/local authorities to the indigenous people.⁵⁹⁰ Under the FPIC aspect of self-determination, indigenous peoples should be afforded the ability to withhold consent for proposals where the proposed activity will have a ‘major impact’ on the indigenous peoples’ interests.⁵⁹¹ The key theme of these aspects of the norm is that the ‘locus’ of decision-making is with the indigenous people, within certain prescribed parameters. As the scope of indigenous self-determination is limited to the “internal and local affairs” of the indigenous people,⁵⁹² any decision-making powers afforded to indigenous peoples must be exercised within the context of the state’s overarching sovereignty.⁵⁹³ In other words, as discussed in chapter 1, there

⁵⁸⁹ Waitangi Tribunal, n 227.

⁵⁹⁰ Article 4, UNDRIP. See the discussion regarding territorial and non-territorial autonomy (and other forms of autonomy) in chapter 1.

⁵⁹¹ Although, this aspect of the norm is still developing. See *Poma Poma v Peru* and *Saramaka*, discussed in chapter 1. Also see the discussion regarding FPIC in chapter 4, which considered the draft Nordic Sami convention’s operationalisation of the FPIC right.

⁵⁹² Article 4, UNDRIP.

⁵⁹³ Articles 46, UNDRIP.

is no ability to use the international norm to secede from the state, and that is not what the locus principle espouses.

It was demonstrated that the legal mechanisms analysed in this thesis are inadequately providing for the norm, but, there are some promising aspects of the models (when viewed against the subsidiarity aspects of Anaya's framework). For example, section 33 of the RMA enables 'iwi authorities' to assume authority over functions, powers or duties under the RMA (e.g. planning, policy setting or adjudicating resource consents), a clear transfer of autonomous decision-making authority from local authorities to an indigenous people, and this is perhaps the Aotearoa mechanism that is the closest to expressing the locus principle. Although, as noted in chapter 3, there are several issues inherent in section 33 that render the mechanism ultimately non-compliant with the norm (i.e. the unwillingness of local authorities to adopt the mechanism and the lack of ability to compel).⁵⁹⁴

Further, under the Te Urewera settlement, the governance board is able to promulgate bylaws, and authorise concessions or activity permits over a range of matters within Te Urewera, effectively taking the place of

⁵⁹⁴ Further issues regarding the ability of iwi authorities to actually influence environmental decision-making under section 33 are discussed below.

the Department of Conservation in making these executive decisions. This is a transfer of certain autonomous powers from the central government to the Te Urewera board. Although, as discussed in chapter 3, the ability of the Tūhoe people to make decisions regarding their whenua is carefully prescribed by the Crown in the Tūhoe settlement documents, and the board has no power to prevent mining or resource extraction, some of the most invasive activities possible in their whenua. Thus, while this framework provides positive adherence to the locus principle, it comes short of satisfying the influence principle to any material extent (discussed below).

In comparison, the Norwegian Sami parliament has very little power of decision with respect to resources of importance to their people. It was demonstrated that the legal frameworks related to the Planning and Building Act provide the Sami parliament with the ability to raise objections to planning proposals where they raise issues that are of “significant importance to Sami culture or the conduct of commercial activities.”⁵⁹⁵ Similarly, the Sami parliament can promulgate ‘guidelines’ directing how a proposal for change in uncultivated land-use is to be assessed by both the Finnmark Estate and public authorities for its impact on Sami interests.⁵⁹⁶ While both mechanisms are positive, they fail to

⁵⁹⁵ Planning and Building Act 2008 (Norway), s 3-2.

⁵⁹⁶ Finnmark Act 2005 (Norway).

provide any real decision-making power to the Sami – the locus remains with central and local government. These mechanisms are more akin to ‘influence’ mechanisms referred to in the Wai 262 model.

Nor does Te Pou Tupua, the ‘human face’ of the Whanganui River assume any direct decision-making power over the Whanganui awa or its catchment. All decision-making in respect of these matters remains with the pre-existing decision-maker (for example, the regional and district councils).⁵⁹⁷

Overall, a norm compliant framework would, when it is deemed appropriate after all interests are identified and balanced, require indigenous peoples to assume responsibility for environmental decision-making.

C Subsidiarity: influence over outcomes

Related to the above principle is the principle that not only should indigenous peoples have the opportunity to be the ultimate decision-maker (in some situations), but their interests must be able to be both influential and upheld in the outcome of the decision-making process, where this is

⁵⁹⁷ See chapter 3 and Te Awa Tupua Act.

deemed to be appropriate in the balancing test.⁵⁹⁸ That is, any devolved decision-making power must actually be effective at providing for indigenous interests for it to give effect to Anaya's principle of subsidiarity. As Åhren contends, "the core element of the internal aspect of the right to self-determination is not a right to participate in decision-making processes, but to effectively determine the material outcome of such."⁵⁹⁹

This 'influence' principle can be drawn from the international jurisprudence applying to indigenous peoples, for example, the right of indigenous peoples to autonomy (article 4 of the UNDRIP)⁶⁰⁰ and the various rights to free, prior and informed consent outlined in the UNDRIP.⁶⁰¹ For the purposes of this thesis, the influence principle interrelates to the balancing principle (discussed above) in that the level of indigenous influence required in any given circumstance will be dependent upon the identification and balancing of all extant indigenous and non-indigenous interests in the underlying subject matter.⁶⁰²

⁵⁹⁸ This principle therefore requires a differing level of influence depending upon the outcome of the balancing test.

⁵⁹⁹ Åhren, above n 79 at 138.

⁶⁰⁰ Discussed in chapter 1.

⁶⁰¹ Also discussed in chapter 1.

⁶⁰² See the discussion regarding the Wai 262 balancing test above and in chapter 5.

The content of the right to FPIC is an example of the higher levels of influence that the self-determination norm will require in some circumstances. While the precise content of FPIC remains somewhat unsettled at international law, it is arguable that the norm provides indigenous peoples with a right to withhold their consent to substantial development proposals where such projects will have a substantial impact on them culturally, socially, or economically.⁶⁰³ This part of the influence principle was demonstrated in chapter 4 with reference to the draft Nordic Sami convention, which attempted to operationalise a right to FPIC along these lines.⁶⁰⁴ For this thesis, these ideas are linked to the Wai 262 model. A high level of influence is likely to be warranted where the balancing test identifies that Māori interests should be paramount and where there are little (if any) legitimate third party interests. These are conceptualised in Wai 262 as ‘control models’.

However, the thesis accepts that such a high level of influence (i.e. full FPIC entailing the right to withhold consent) is unlikely to be practicable in all cases, particularly where many legitimate third party interests are identified and deemed worthy of recognition in the balancing

⁶⁰³ *Poma Poma v Peru*, above n 132; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, above n 128. See also chapter 1 for a discussion regarding the parametres of the FPIC aspect of self-determination.

⁶⁰⁴ Articles 16 and 36. See also Åhren, above n 79.

test outlined above.⁶⁰⁵ Therefore, some compliant schemes of self-determination will give effect to something less than fully autonomous power sharing, and may be closer to the traditional notions of collaborative management (otherwise referred to as ‘co-management’). Chapter 3 provided that co-management can be used to operationalise indigenous self-determination in certain cases,⁶⁰⁶ provided that Anaya’s principles of subsidiarity and cultural pluralism are given expression to a material extent. In terms of the Wai 262 model, therefore, there are times when the influence principle will necessitate the implementation of a partnership model, opposed to a control model.⁶⁰⁷

For example, the parameters of the thesis’ influence principle are demonstrated in the draft Nordic Sami convention which, in some cases, gives the Sami a right of withhold their consent to invasive projects, but in other cases, where the subject matter is of less importance, a lesser right of influence applies (e.g. a right to be consulted, heard, and to appear on decision-making panels).⁶⁰⁸

⁶⁰⁵ In accordance with the balancing test outlined in Wai 262. See chapter 5.

⁶⁰⁶ See chapter 5 below for a discussion on the balancing test suggested by the Waitangi Tribunal in Wai 262. The tribunal’s conceptual model suggests that partnership models may be appropriate when there are many third parties interested in the resource, as well as iwi. Waitangi Tribunal, above n 224.

⁶⁰⁷ Waitangi Tribunal, above n 224.

⁶⁰⁸ See chapter 4.

Further, a relatively low level of influence is afforded to the Whanganui iwi in the Te Awa Tupua framework, as the effective influence they have over decision-making is dependent upon the ultimate (non-iwi) decision-maker's interpretation and application of statutory directives to 'recognise and provide for' and 'have particular regard to' iwi interests.⁶⁰⁹ The iwi can only indirectly influence environmental decision-making through the development of Te Heke Ngāhuru, the awa strategy which specified decision-makers must "have particular regard to". This framework, it was demonstrated in chapter 3, does not provide the Whanganui iwi with a high level of influence over environmental decision-making.

Another example analysed was section 33 of the RMA. While section 33 can enable the transfer of the decision-making locus to an iwi authority, the level of actual influence afforded under the mechanism is highly dependent upon the efficacy of the functions, powers and duties contained within the RMA,⁶¹⁰ and their (in)ability to prioritise iwi interests.⁶¹¹ In other words, while section 33 potential provides iwi with a power of decision, the legal framework it is tied to is deficient as it

⁶⁰⁹ See chapter 3; Te Awa Tupua Act, s 15.

⁶¹⁰ As those are the powers transferred to iwi under the RMA.

⁶¹¹ See chapter 3; RMA, s 33.

inadequately provides for the expression of Māori interests by default.⁶¹² As such, the section 33 mechanism is narrowly prescribed and lacks ‘teeth’, a poor example of the influence principle.

Overall, the key rationale for this principle is that holding a power of decision (the locus principle) serves little purpose if that power is unable to be wielded to give priority to indigenous interests where appropriate. Operationalising the self-determination norm, the author argues, requires both.

D Cultural pluralism: indigenous laws and epistemologies

Another key principle of the norm is the requirement for indigenous institutions, structures, legal traditions, customs and/or value systems to be embodied in the form and functioning of the governing institutional order instead of, or in addition to, non-indigenous paradigms (pluralism). In other words, self-determination requires that a governing institutional order is framed by indigenous epistemologies and is empowered to apply indigenous legal traditions in the regulation of their ‘internal and local affairs’.⁶¹³ Indigenous ideas and value systems should no longer be relegated and seen as inferior to western liberal conceptions of law and

⁶¹² See analysis on this point in chapter 3.

⁶¹³ In other words, in applying their autonomous governance rights under article 4 of the UNDRIP.

society. As Anaya notes, Western societies, until relatively recently, did not value indigenous cultures and, in fact, “promoted their demise through programs of assimilation. Even as such policies have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a non-dominant position in the larger societies in which they live.”⁶¹⁴

This is a key aspect of the indigenous right to self-determination and is referred to in articles 5, 20, 25, 26, 27, 31, 33 and 34 of the UNDRIP. For example, article 34 provides:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

This is also the essence of Anaya’s ongoing requirement for cultural pluralism.

Several examples of this cultural pluralism principle have been examined in this thesis. For example, while they were in some ways problematic, the early Aotearoa ‘experiments in Māori autonomy’

⁶¹⁴ Anaya, above n 45 at 138-139.

exhibited some of the hallmarks of cultural pluralism. Under the Native Exemption Ordinance, Māori could regulate criminal justice within their own villages in accordance with tikanga Māori.⁶¹⁵ Similarly, section 71 of the Constitution Act, the Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 all enabled the creation of autonomous ‘native districts’ which could be regulated by tikanga Māori.⁶¹⁶ Even though the frameworks were designed to further the Crown’s own objectives (and amounted to breaches of Anaya’s constitutive and subsidiarity considerations), they were nonetheless early expressions of the cultural pluralism principle in Aotearoa.

Aotearoa’s use of in recent Treaty settlements provides an example of how this requirement can be operationalised in modern day. For example the Te Urewera board, in managing the whenua, is empowered to make management decisions on the basis of Tūhoetana i.e. Tūhoe legal tradition.⁶¹⁷ Similarly, although to a lesser extent, statutory decision-makers regarding the Whanganui River are directed to at least consider the legal traditions of the manawhenua (the statutorily identified Tupua te

⁶¹⁵ Native Exemption Ordinance 1844. See chapter 2.

⁶¹⁶ Although, as discussed in chapter 2, these measures were ultimately designed to further the Crown’s objectives.

⁶¹⁷ Te Urewera Act, s 18. See also chapter 3.

Kawa).⁶¹⁸ Furthermore, in both examples indigenous epistemologies are given expression through the recognition of the underlying resource as an ancestor of the mana whenua and the attribution of a legal personality to the ancestor.⁶¹⁹ These phenomena give expression to the whakapapa-based worldview of pre-European Māori.⁶²⁰

A norm-compliant legal framework would therefore embody the requirements of cultural pluralism by, for example, allowing tikanga Māori to form the basis of final decision-making, and by incorporating fundamental Māori concepts into the institutional framework (such as whakapapa relationships with te ao tūroa and the legal personality concept).

⁶¹⁸ Te Awa Tupua Act, s 15. See also chapter 3.

⁶¹⁹ Stone, above n 242.

⁶²⁰ Te Urewera Act, s 11; Te Awa Tupua Act, s 14.

IV Operationalising the 'Remedial Principles' of Indigenous Self-Determination

A Overview

As discussed above, the remedial principles of indigenous self-determination have been identified, which are the features of a norm-compliant self-determination framework. It is necessary to consider how, in any given case, these might be translated from the theoretical and into the operational or practical realm. The remainder of this chapter considers a means to achieve this by invoking aspects of the Wai 262 model and applying the remedial principles to a case study: the Tītī Islands. Accordingly, the balance of this chapter explores a practical process that could be used to determine an appropriate operational remedial framework where it is held that substantive self-determination has been breached. This involves:

- (1) The identification and balancing of all interests, indigenous and non-indigenous; and
- (2) identification of an appropriate level of authority to give expression to the indigenous interests (to the extent that they should be paramount).

B Step 1: Balancing interests

As noted above, and in detail in chapter 5, step 1 involves the identification and balancing of the various interests (indigenous and non-indigenous) which relate to the subject of the self-determination claim.⁶²¹ This serves to identify the extent of the indigenous interests in the subject matter, or, in terms of te ao Māori, to identify the existence and extent of the kaitiaki relationship with the taonga. It also aims to determine the existence and legitimacy of competing, non-indigenous claims and interests.

1 Kaitiaki interests

First, the importance of the taonga (or the subject) to the kaitiaki must be established. According to mātauraka Māori precepts (as discussed in chapter 3), the environment is the manifestation of various atua (e.g. Rakinui, Papa-tū-ā-nuku, Tāne-mahuta and Haumia-tiketike), and these atua have dominion over particular taonga.⁶²² The taonga can be iconic mountains or rivers or specific genera of flora or fauna. The importance of the taonga and the existence of a kaitiaki relationship will be evident if a significant body of mātauraka Māori exists relating to the taonga: e.g. “kōrero telling its stories, describing its qualities and characteristics, explaining its importance to iwi identity, and describing how the kaitiaki

⁶²¹ Waitangi Tribunal, above n 224.

⁶²² Waitangi Tribunal, above n 224.

relationship should be conducted.”⁶²³ Other indicators could include waiata, karakia, rāhui practices, tauparapara, whakapapa, whakataukī, whakatauākī, pepeha, kōrero – anything describing the nature of the taonga, the nature of the kaitiaki relationship and the importance of the taonga to the peoples’ identity. The stronger the evidence of the taonga’s importance to the kaitiaki, the greater the need to consider a kaitiaki control model.

2 Legitimate third-party interests

Secondly, once the importance of the taonga for the kaitiaki is established, the third-party interests must then be considered. As the tribunal notes, in any given taonga the interests “are many, varied, and complex,”⁶²⁴ and can include the environment itself, the kaitiaki themselves, commercial operators, energy generators, non-commercial interests, recreational interests, infrastructure providers, the community itself, individuals, homeowners and even future generations (inter alia). Property rights holders cut across all of these interests, and the tribunal argues that “where the interests of property owners or resource users will be affected by restrictions proposed by the kaitiaki, an exclusive control model may well be inappropriate.”⁶²⁵ Once identified, the legitimate third-

⁶²³ Waitangi Tribunal, above n 227 at 275.

⁶²⁴ Waitangi Tribunal, above n 227 at 271.

⁶²⁵ Waitangi Tribunal, above n 227 at 275.

party interests should then be balanced and attributed an appropriate weighting. It is possible that some cases will involve very few legitimate third-party interests, particularly in situations such as the Tītī Islands, demonstrated below.

3 Rationale

The rationale behind undertaking this exercise is to recognise that a level of pragmatism is required when operationalising the right to self-determination, and that this can be achieved by adhering to the remedial balancing principle. In other words, the importance of the subject matter to the claimant vis-a-vis other parties should inform the resulting level of influence embodied in the institutional structure. If there are no other legitimate interests in the subject matter, there is less of a reason to deny the claimant a comprehensive power of decision.

Hence, this step considers how the implementation of a scheme of self-determination will affect all legitimate interests related to the subject-matter. This accords with Åhren's argument that self-determination implementation (at least in the Sami context) must account for the right owed to both the indigenous and non-indigenous population. Åhren argues that the 2005 text of the draft Nordic Sami convention embodies such an approach by considering the relative interests of all legitimate parties: "given that a substantial part of the Sami people's traditional territory

today have a mixed population” ... “The Convention hence recognizes that it is not possible for two people sharing the same territory to exercise a complete right to self-determination.”⁶²⁶ It is arguable that in some ways Aotearoa shares a similar context with the Sami in that a large part of traditional Māori territories are now shared with Pākehā or other non-Māori.⁶²⁷ The draft Nordic Sami convention gives expression to the balancing principle by providing that the more important an issue is for the Sami, the more influence they should have over the decision, ranging from a right to withhold consent (FPIC) down to a right to simply be briefed or informed about a decision process. Adopting this approach, Åhren notes that there will be cases where the indigenous people and the majority people will disagree and the indigenous peoples’ will should prevail.⁶²⁸

C Step 2: Level of influence and operational aspects

This section considers the second stage of the remedial model, the selection of an appropriate level of influence based on the outcomes of the balancing test. As with step 1, this section borrows the conceptual framework offered by the Waitangi Tribunal in *Ko Aotearoa Tēnei*, and applies it in the international law context.⁶²⁹ In Wai 262, the tribunal mused

⁶²⁶ Åhren, above n 457 at 88.

⁶²⁷ Noting that this reality was caused by historical Crown breaches of self-determination through raupatu (confiscations) under the New Zealand Settlements Act 1863, the introduction of the Native Land Court and by ‘questionable’ land sales.

⁶²⁸ Åhren, above n 457.

⁶²⁹ Waitangi Tribunal, above n 224.

that a Treaty-compliant system of environmental management would, once all interests are accounted for, be able to deliver to the kaitiaki one of three descending levels of authority, depending on the circumstances (models of control, partnership or influence). This step, therefore, considers the identification of an appropriate level of influence appropriate for the situation, bearing in mind the strength of the kaitiaki interest and the strength of all legitimate third parties. The section considers the operational features of each model based on the analysed case studies, incorporating the remedial principles discussed above.

1 'Control' models

Where the balancing test determines that the kaitiaki interest should be paramount, then a model affording the kaitiaki full control of the resource should be implemented, within the confines of the state's sovereignty and without impairing the territorial integrity of the state. In such cases, step 1 will have identified that the taonga and the kaitiaki relationship to it are of crucial importance to the takata whenua. There are likely to be either no legitimate third-party interests associated with the taonga, or the balancing exercise will determine that any third-party interests should not be given priority in the operational framework.⁶³⁰

⁶³⁰ See chapter 5 and above for a discussion regarding this model; also see Waitangi Tribunal, above n 223.

At essence, this model embodies similar characteristics to the traditional understandings of autonomous governance, i.e. the transfer of effective decision-making powers from central government to a sub-state autonomous entity, exercised within the framework of the state.⁶³¹ Under the control model, the decision-making locus for managing the resource is transferred to the kaitiaki (and this might encompass quasi-legislative, quasi-administrative or quasi-judicial powers).⁶³² Unlike the partnership model, under this model the locus sits fully with the indigenous entity, giving expression to the locus principle outlined above. In other words, the underlying responsibility for regulating the resource is no longer held by majoritarian central government or local authorities, although, given that the norm has to operate within the confines of the state's sovereignty, central government will always retain some form of oversight over such mechanisms.

Of all the frameworks studied, the Te Urewera settlement is the closest existing example of an operational control model. For example, the statutorily appointed board of Te Urewera is given various decision-making powers over the management of the area: e.g. the promulgation of bylaws in respect of a wide range of matters; the consideration of

⁶³¹ Weller and Wolff, above n 108.

⁶³² See chapter 1 for a discussion regarding the types of autonomy and their precise parameters.

commercial concessions and activity permits; and the policy setting role of developing the management plan for the whenua. Prior to settlement, these matters were the responsibility of the Department of Conservation.⁶³³

Decision-making competency alone is not enough to give full effect to the control model. As discussed previously in the thesis, powers of decision are only effective at enabling the expression of self-determination if the indigenous interests are able to be given sufficient priority in decision-making processes (the remedial influence principle). This point can be demonstrated by examining section 33 of the RMA. While this mechanism allows iwi authorities to receive statutory powers of decision under the RMA, iwi are limited in their ability to prioritise their own interests as they must adhere to the letter of the RMA legislation (which inherently limits the influence of Māori interests) and are bound by appellate procedures and precedents. Section 33 is ineffective under this heading because the RMA itself generally is flawed in its ability to protect Māori interests.

Under the Tūhoe settlement, the interests of the Tūhoe people are able to strongly influence the decision-making of the board (short of giving expression to a right to FPIC). Although, the board is unable to prevent

⁶³³ See chapter 3 for a discussion regarding Te Urewera. See also Te Urewera Act.

mining activities within Te Urewera, which significantly limits the efficacy of that model under this heading.

A control model in the fullest sense would give expression to the developing FPIC norm, embracing a right to withhold consent for development proposals that have the potential to substantially impact the people culturally, economically or socially (*Poma Poma; Saramaka*). This would apply to situations involving a taonga of critical importance to the kaitiaki, and possibly where little or no third-party interests arise.⁶³⁴

The pluralism principle will also need to be embodied in any remedial control model. Tikanga Māori should not only be able to govern decision-making processes, but should form the basis of the entire institutional framework. In other words, the framework should embrace and embody Māori values and epistemologies at all levels, beyond mere ‘window dressing’.

The Tūhoe settlement offers a promising example of this principle in practice: the purpose of the statute is to strengthen and maintain the connection between Tūhoe and Te Urewera;⁶³⁵ decision-makers under the

⁶³⁴ See above and chapters 1 and 4 for a discussion regarding FPIC.

⁶³⁵ Te Urewera Act 2014, s 4.

legislation must act so that as far as possible Tūhoetana is valued and respected,⁶³⁶ and the board may consider and give expression to Tūhoetana in its decision-making.⁶³⁷

2 'Partnership' models

Where the balancing test outlined in step 1 determines that both kaitiaki and third-party interests should be heard in the management of the taonga, then a partnership model will be appropriate. The balancing test will have identified that the taonga and the associated kaitiaki relationship is of importance to the tangata whenua, and that legitimate third-party interests also exist in relation to the subject matter. In such cases, adopting the approach envisaged by Wai 262, a partnership model between Māori and the Crown/local authorities should be put instituted.⁶³⁸

Unlike the control model, partnership involves the sharing of the decision-making locus between the kaitiaki and a public authority. This model, therefore, is closer to the traditional notions of collaborative management than autonomous governance. A pragmatic approach to implementing self-determination recognises that there are competing interests in modern society (both indigenous and non-indigenous) which

⁶³⁶ Section 5.

⁶³⁷ Including concepts such as mana me mauri, rāhui, tapu, tapu me noa, and tohu: s 18.

⁶³⁸ Waitangi Tribunal, above n 223.

must be accounted for in operationalising self-determination. In some cases, a partnership model may be the only means of giving expression to self-determination in contexts which involve highly contested and contrasting indigenous and non-indigenous interests.

Of the models analysed, the Whanganui River settlement provides the closest expression of the partnership model. Although the Whanganui model is not a legitimate partnership or co-management model, and better models are needed to give effect to these aspects of the norm,⁶³⁹ nonetheless, the model is useful when conceptualising the operational parameters of the proposed partnership model.

Under the settlement, Te Pou Tupua is established to be the human face of the awa's new legal personality. This entity, which entails one member appointed by the interested iwi and one by the Crown, is tasked with advocating for the health and wellbeing of the awa and administering a \$30 million clean-up fund.⁶⁴⁰ While this is positive, the major environmental decision powers are held fully by majoritarian public authorities and are not shared with the manawhenua. For this reason,

⁶³⁹ See chapter 3 for further depth to this argument.

⁶⁴⁰ Te Awa Tupua Act, Subpart 6.

chapter 3 concluded that the Whanganui settlement is an inadequate example of the partnership model.⁶⁴¹

In fact, although they were not analysed in any detail in this thesis, joint management agreements (JMAs) under section 36B of the RMA would be a closer expression of the partnership model. JMAs enable iwi authorities and local authorities to jointly perform the local authority's functions relating to natural or physical resources in the region/district. Under JMAs, the decision-making locus is shared between the parties.⁶⁴²

In addition to the joint decision-making locus, the partnership model should enable the kaitiaki interest to be elevated above other third-party interests where this is deemed appropriate (the influence principle). The partnership model must give expression to a fair balancing of both indigenous and non-indigenous interests in decision-making, but allow indigenous interests to trump in certain circumstances. The Whanganui settlement, although not a pure partnership model, grapples with this aspect of the influence principle by directing various non-iwi statutory decision-makers to either "recognise and provide for" or "have particular regard to"

⁶⁴¹ See Chapter 3; Te Awa Tupua Act.

⁶⁴² JMAs are very similar to s 33 of the RMA, except under JMAs the decision-making power is held jointly instead of solely by the iwi authority. Although, similar criticisms regarding s 33 would likely equally apply to JMAs.

the new legal personality and Tupua te Kawa (Māori legal traditions of the manawhenua), in addition to the pre-existing statutory considerations. Although, the influence of indigenous interests under this framework ultimately depends upon the willingness of public authorities to interpret and apply these provisions in favour of the iwi, this is one way to operationalise the influence principle for partnership models.

Again, in accordance with the remedial pluralism principle, tikanga Māori should not only be able to govern decision-making processes, but should form the basis of the entire institutional framework. As discussed, the Whanganui framework elevates the prominence of Māori legal tradition in statutory decision-making processes.⁶⁴³ The conclusions regarding Te Urewera and the pluralism principle (above) also apply here.

3 *'Influence' models*

In some cases, as discussed, the balancing test will conclude that neither a control nor a partnership model is appropriate in the circumstances. In such cases, a strong argument nonetheless exists for a principle of kaitiaki influence over the regime of environmental management in some form. To warrant this outcome, the balancing test

⁶⁴³ As discussed above, Tupua te Kawa must either be 'recognised and provided for' or 'had particular regard to' by third party authorities when making decisions about the river or its catchment.

will determine that the taonga is not of high importance to the kaitiaki and perhaps that the subject matter is considered external to the internal/local affairs of the people. At the same time, there are likely to be many legitimate third-party interests and good reasons will exist to elevate these in the decision structure. Nonetheless, effective influence and an appropriate priority should be given to the interests of the kaitiaki when environmental management decisions are made by others.

While the institutional framework under this model provides that the locus of decision-making sits with non-kaitiaki, majoritarian, public authorities, kaitiaki interests should still be given an appropriate level of priority in environmental decision-making, and Māori legal traditions should be incorporated in to the framework. Of the mechanisms explored in this thesis, Part II of the RMA is the closest to the influence model. This mechanism requires non-iwi RMA decision-makers to consider Māori interests when exercising functions or powers under the Act (for example, when considering resource consent applications or in planning/policy setting). For example, section 6 provides that decision-makers shall “recognise and provide for ... the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.” Where a Māori party considers that a decision-maker has not applied this section sufficiently, they are open to appeal the decision to the Environment Court.

Nonetheless, this tool is deficient in that it is reactive (iwi must respond to the priorities of public authorities) and the ability for Māori to influence outcomes depends upon the priority afforded Māori interests in sections 6, 7 and 8.⁶⁴⁴ As noted earlier in the thesis, Māori views continue to be side-lined under the RMA, in spite of this tool. Furthermore, tikanga Māori has very little to do with the operation of Part II. Instead, better models are required to give expression to the remedial influence mechanism.

4 Rationale of step 2

Step 2 gives further expression to the balancing principle and the need for pragmatism in implementing the right to self-determination in shared territories. Such an approach recognises that control of the resource by the kaitiaki is required as a matter of international law in some situations, but that this will not be appropriate in all cases (resulting in the control, partnership and influence model spectrum). This part of the proposed model embodies the relativistic approach of the draft Nordic Sami convention by providing that the indigenous people shall have a level of influence relative to their level of interest in the subject matter. In other

⁶⁴⁴ E.g., to ‘recognise and provide for’ matters of national importance (including the relationship of Māori and their culture and traditions with their ancestral lands, water ... and other taonga) (s 6); ‘have particular regard to kaitiakitanga’ (s 7), and ‘take into account’ the principles of the TOW (s 8).

words, the more important a matter is for the indigenous agents, the more influence they should be afforded over environmental decision-making. The sliding scale approach recognises that some resources, areas or matters are so important to indigenous peoples, or of very little importance to the non-indigenous, and therefore that a high level of indigenous authority is possible and appropriate in its management. Conversely, if the matter is of low significance to the indigenous people, but very high importance to “the welfare of society at large” then the indigenous people may be afforded very limited influence over the decision-making process.⁶⁴⁵

⁶⁴⁵ Åhren, above n 599 at 139.

V Case Study: Application to Tītī Islands

A Introduction

It is necessary to demonstrate how the remedial principles of indigenous self-determination can be operationalised by applying this framework to a practical example: the tītī islands. There are 36 tītī islands located around Te Ara-a-Kewa (Foveaux Strait) and Rakiura (Stewart Island).⁶⁴⁶ The largest island, Taukihepa, encompasses an area of some 910 hectares. These islands are where the tītī,⁶⁴⁷ a pelagic seabird, come to breed after completing their annual migration around Te Moana-nui-a-Kiwa (the Pacific Ocean). Studies claim it is the most abundant seabird in the southern hemisphere.⁶⁴⁸ The tītī islands will now be considered against the framework and remedial principles developed earlier in this chapter.

B Step 1: Balancing interests

1 Kaitiaki interests

It will be demonstrated below that kā manu tītī (muttonbird) and kā moutere tītī (tītī islands) were, and still are, crucially important to Kāi

⁶⁴⁶ See Figure C below for a map of the islands.

⁶⁴⁷ Also known as the muttonbird, sooty shearwater or puffinus griseus.

⁶⁴⁸ David Hawke and others “A possible early muttonbirder's fire on Poutama, a Rakiura titi island, New Zealand” 2003 33(2) Journal of the Royal Society of New Zealand.

Tahu, culturally, economically and socially.⁶⁴⁹ Both oral tradition and archaeological evidence records that Kāi Tahu have been travelling to the islands to harvest the manu since well before Europeans reached Aotearoa, and potentially as early as AD 1470.⁶⁵⁰ Traditionally, the birds were cooked in their own fat and stored in pre-made rimurapa (kelp) bags known as poha. The tītī were an important source of food for southern Kāi Tahu families, and was often used as a tradeable commodity.⁶⁵¹ As Anderson says, “Preserved muttonbirds were an important source of winter food and a major commodity in Māori exchange networks.”⁶⁵² Today, many southern Kāi Tahu whānau make the annual pilgrimage to the tītī islands to participate in te hopu tītī (the customary harvest of tītī), and many consider this to be a foundational aspect of their Māori cultural identity.⁶⁵³ To recognise its importance for the Kāi Tahu iwi, the manu itself was listed as a ‘taonga species’ under the Ngāi Tahu Claims Settlement Act 1998.

⁶⁴⁹ Stevens, above n 249. Also see Matthew Rout and others “Muttonbirding: Loss of executive authority and its impact on entrepreneurship” 2017 23(6) *Journal of Management and Organization*.

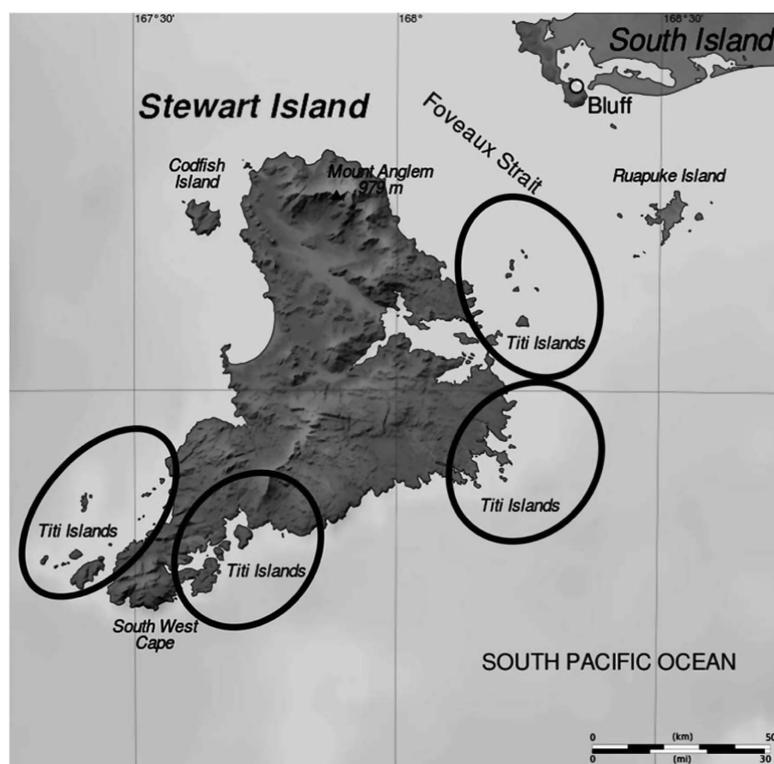
⁶⁵⁰ Hawke and others, above n 648.

⁶⁵¹ James Herries Beattie, Atholl Anderson and Museum Otago *Traditional lifeways of the Southern Maori: the Otago University Museum ethnological project, 1920* (University of Otago Press in association with Otago Museum, Dunedin [N.Z.], 1994).

⁶⁵² Atholl Anderson “Origins of Procellariidae Hunting in the Southwest Pacific” 1996 6(4) *International Journal of Osteoarchaeology* at 406.

⁶⁵³ Michael Stevens “Kai Tahu Me te Hopu Titi ki Rakiura: An Exception to the ‘Colonial Rule?’” 2006 41(3) *The Journal of Pacific History*. Also see Hana O'Regan *Ko Tahu, ko au: Kāi Tahu tribal identity* (Horomaka Publishing, Christchurch, N.Z., 2001).

Figure C. Kā Moutere Tītī Ki Rakiura⁶⁵⁴

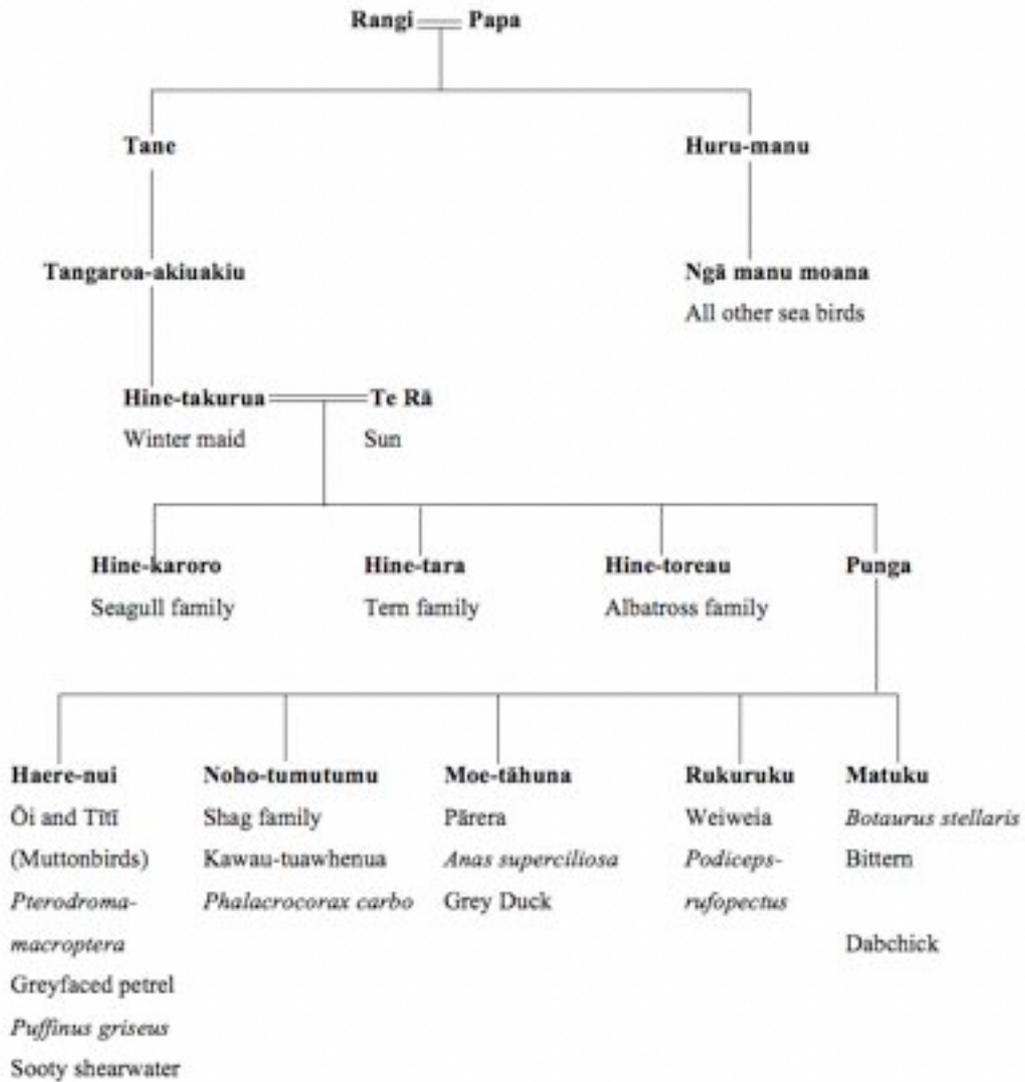


Prior to European contact, Kāi Tahu developed a unique body of mātauraka Māori relating to the management of the islands, their bounty and the human interactions with these phenomena. As noted in chapters 3 and 5, pre-European Māori perceived the world as a system of whakapapa connections. Within this taxonomy sat everything from flora/fauna, through to the weather and emotions, all arranged into interrelated genealogical groups derived from Raki and Papa. The tītī and other birds

⁶⁵⁴ Figure C was sourced from Rout and others, above n 649.

were included in these taxonomies, and, as the following whakapapa demonstrates, tītī were considered to be the progeny of Haere-nui.⁶⁵⁵

Figure D. He Whakapapa a te Tītī



⁶⁵⁵ Stevens, above n 649 at 22.

Certain sayings or whakataukī developed amongst Māori regarding the tītī's resilience and physical capabilities as a migratory seabird. These sayings complement recent findings that the tītī could travel up to 74,000 km in their annual pacific migration.⁶⁵⁶ Elsdon Best, a renowned Māori 'ethnographer' noted:⁶⁵⁷

The saying *He manawa titi* seems to refer to the powers of flight possessed by the *titi*, and so a man possessed of good staying power may be described as a *manawa titi*. Another old saying connected with this bird is: *He titi rere ao ka kitea; he titi rere po e kore e kitea* (a day-flying *titi* can be seen, a night-flying *titi* cannot be seen).

More specifically for Kāi Tahu, many legal traditions were developed regarding the tītī and the tītī Islands (many of which have been retained to this day). The islands were traditionally divided into defined areas known as 'manu' which were allocated to a family to work. Tau contends "these manu belonged to the family elder with rights..."⁶⁵⁸ As Tau notes, an elder at an 1887 Native Land Court hearing explained that Papatea Island (an island adjacent to Ruapuke) was divided into manu and

⁶⁵⁶ Scott Shaffer and others "Migratory Shearwaters Integrate Oceanic Resources across the Pacific Ocean in an Endless Summer" 2006 103(34) Proceedings of the National Academy of Sciences of the United States of America.

⁶⁵⁷ Elsdon Best *Forest lore of the Maori: with methods of snaring, trapping, and preserving birds and rats, uses of berries, roots, fern-root, and forest products, with mythological notes on origins, karakia used, etc* (Polynesian Society in collaboration with Dominion Museum, Wellington, N.Z., 1942).

⁶⁵⁸ Te Maire Tau "Property rights in Kaiapoi" 2016 47(4) Victoria University of Wellington Law Review.

each one was named after an important ancestor.⁶⁵⁹ Kāi Tahu also developed legal traditions relating to the harvest of the birds. Rāhui (prohibitions against harvesting) were, and still are, openly practiced in some spatial areas⁶⁶⁰ and outside of the tītī season (tītī may only be harvested from 15 March to the end of May).⁶⁶¹ There were also strict prohibitions against harvesting adult birds, known as kaiaka (which is still culturally prohibited and considered to be against tikanga today).⁶⁶²

When the Crown was negotiating the sale of Rakiura in 1864, southern Kāi Tahu raketira ensured that some tītī islands were retained to ensure the maintenance of their special association with the islands. Accordingly, eighteen islands were reserved out of the sale for the benefit of the named raketira and their descendants.⁶⁶³ These islands became known as the ‘beneficial tītī islands’ and are today held as Māori freehold land by the descendants of the original owners.⁶⁶⁴ The remaining islands

⁶⁵⁹ In fact, many of the Tītī Islands and their manu are adorned with names from important Kāi Tahu ancestors. Stevens, above n 649.

⁶⁶⁰ Corey Bragg and others “Variation in abundance and harvest of sooty shearwaters (*Puffinus griseus*) by Rakiura Maori on Putauhinu Island, New Zealand” 2009 36(3) *New Zealand Journal of Zoology*.

⁶⁶¹ Tītī (Muttonbird) Islands Regulations 1978 [“Tītī Regulations”] and Rakiura Tītī Islands Bylaws 2005 [“Tītī Bylaws”].

⁶⁶² Tītī Regulations, reg 4(2).

⁶⁶³ However, not all islands were reserved (another 18 went to the Crown) and nor were all people with customary interests provided for in the new regime. Stevens, above n 653.

⁶⁶⁴ Pursuant to the Māori Purposes Act 1983 and Te Ture Whenua Māori Act 1993.

became known as the ‘Crown tītī islands’, and were eventually made available to those whānau whom had an ancestral right to bird, but had been left off list of owners of the beneficial islands.⁶⁶⁵ Kāi Tahu continued to exclusively frequent both sets of islands and exercise their ancestral rights to harvest tītī in accordance with their tikanga, until this day. In 1998, under the terms of the Kāi Tahu settlement, the Crown tītī islands were vested in Te Rūnanga o Ngāi Tahu (“TRONT”), to be managed by and on behalf of those Kāi Tahu with customary interests in the tītī islands.

Overall, there is strong evidence that an extensive body of mātauraka or kōrero tuku iho exists in relation to southern Kāi Tahu and the tītī islands.

2 Third party interests

There are very little, if any, legitimate third-party interests directly concerned with the Tītī Islands. Property rights to all islands are held by the kaitiaki: the Beneficial Islands are owned by the individual successors to the original owners; the (now ex-) Crown tītī islands are owned by the collective Kāi Tahu statutory entity (TRONT). At law, title to the islands is inalienable beyond the descent group. Both sets of islands are governed by the rights holders: the Beneficial Islands by an elected committee of

⁶⁶⁵ Rout and others, above n 649.

owners (Rakiura Tītī Committee) and the ex-Crown islands by an elected administering body (Rakiura Tītī Islands Administering Body). Indeed, non-rights holders or descendants are not even permitted to enter the islands without a permit, which can only be issued under strict circumstances (e.g. to carry out maintenance, research, or transport services etc.).⁶⁶⁶ The nearest third-party interests to the islands might be commercial fisher people who operate around the tītī islands from time to time. In some cases the interests of the tītī kaitiaki are elevated above the commercial fisherman in that commercial fishing is prohibited near the whare of many tītī whānau, indicating an acceptance by central government that the interests of the kaitiaki are of high importance over non-kaitiaki interests.⁶⁶⁷ Adjacent landowners on nearby Rakiura are the Department of Conservation (Rakiura National Park) and the Rakiura Māori Lands Trust (which holds in trust the majority of Māori freehold land on Rakiura). Hydrocarbon exploration has also been carried out and further mooted for the Great South Basin, which is in the vicinity of the eastern tītī islands.⁶⁶⁸

⁶⁶⁶ Tītī Regulations, reg 3; Tītī Bylaws, cl 4.

⁶⁶⁷ Special regulatory closures prohibit commercial fishing of some species around 31 sites on the Tītī Islands. See the recent amendments to the Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Regulations 1986, which came into force on 9 July 2015.

⁶⁶⁸ Southland Energy Consortium “The Great South Basin” (2014) <http://www.oilgasmineralsnz.com/Great-South-Basin> <
<http://www.oilgasmineralsnz.com/Great-South-Basin>>.

3 *Assessment of interests*

None of these third parties can convincingly argue that they are entitled to a degree of input into the management of the tītī islands themselves as their interests specifically relate to matters beyond the islands themselves.⁶⁶⁹ On the other hand, it is clearly demonstrable that the tītī and the tītī Islands are of high importance to those Kāi Tahu people who have inherited ancestral interests to frequent the islands and harvest tītī. As the Waitangi Tribunal noted in *The Ngai Tahu Report*:⁶⁷⁰

Ngai Tahu's relationship with the Titi Islands is undoubtedly very important... Mutton birding has always been an integral part of Ngai Tahu society-an ancient tradition and mahinga kai right that is greatly valued and carefully guarded.

The tītī itself held a clear place in Māori cosmogony, and sayings evolved around their hardy characteristics, signalling their reverence within mātauraka Māori. Kāi Tahu developed strong connections with the islands surrounding Rakiura, one of the major strongholds of tītī in pre-European times, developing their own unique body of mātauraka Māori and legal traditions relating to environmental management. In spite of settler colonialism, these processes remained largely in place, and continue

⁶⁶⁹ Conversely, it is very arguable that since the core activities of these third parties have the potential to impact the Tītī Islands (e.g. commercial fishing affects the food supply of Tītī harvesters; rodents travel from Rakiura and negatively impact the biodiversity of the islands; and a potential oil spill would have detrimental impacts on the Tītī population and all other wildlife) that the kaitiaki of the Tītī Islands should be entitled to a certain degree of influence over those activities.

⁶⁷⁰ Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, 1991) at 2.12 (pdf p. 157).

to be exercised to this day.⁶⁷¹ The islands remain owned and managed by the tīti kaitiaki to the exclusion of anyone else. The lack of any legitimate third-party interests directly associated with the islands is striking and the adage of one Pākehā commentator in 1906 that the islands have always been “beyond the white man’s dominion” rings true some 112 years later.⁶⁷² Under these circumstances, the interests of the kaitiaki should be paramount in the resulting self-determination model.

C Step 2: Level of influence and operational aspects

In all of the particular circumstances, considering the critical importance of the tīti and the tīti islands to southern Kāi Tahu and the notable lack of any third-party interests associated with the islands, a control model would be an appropriate vehicle to implement remedial self-determination over the tīti islands. Such a control model, as discussed above, would transfer to the kaitiaki the locus of decision-making over environmental law and resource management, and empower them to have a real influence over the decisions made by, for example, allowing kaitiaki interests to prevail. A remedial control model for the tīti islands would also be wholly framed by tikanga Māori and kawa pertaining to the islands, to

⁶⁷¹ In fact, as Michael Stevens notes, the Tīti Harvest is quite exceptional in that it is one of the only customary harvest activities that continued relatively intact in spite of colonisation. This is an exception to the norm of Crown dominance and subjugation experienced in most areas directly affected by colonisation. Stevens, above n 653.

⁶⁷² Poverty Bay Herald, Volume XXXIII, Issue 10632, 6 April 1906.

the extent that this is possible (given the loss of mātauraka Māori due to colonisation). The legal personality concept could be applied to the tīhī islands as a step in the right direction. To give further expression to the pluralism principle, the unique Māori legal traditions of the islands and their southern Kāi Tahu occupants should form the basis of the regulatory framework applying to the islands.

VI Chapter Conclusion

This chapter circled back to Anaya's framework and considered the potential parameters of an approach based on his remedial self-determination.⁶⁷³ It articulated what the thesis calls the 'remedial principles' of indigenous self-determination: the principles that must be practically implemented to create a norm-compliant model. Drawing on the international law sources, and aspects of the analysed legal frameworks, the remedial principles are: (1) the balancing of interests; (2) the locus of decision-making; (3) influence over outcomes and (4) pluralism. A legal framework that translates these principles from the conceptual/theoretical realm into operational practice will go a long way toward self-determination compliance. It was demonstrated that the *tīhī* islands are a likely 'high water mark' for the control model. The model can be applied to other contexts to determine an appropriate operational remedial framework where it is held that substantive self-determination has been breached.

⁶⁷³ Anaya, above n 45.

Te Mutuka o Te Tuhikarua – Thesis Conclusion

While the history of indigenous peoples since colonisation has been bleak, there are exciting developments on the horizon in international law, and these will hopefully contribute to the reversal of the most insidious effects of colonisation. As the case studies have shown, law reform is needed to bring this to fruition, as well as a greater level of debate dedicated to the operationalisation of indigenous self-determination in the post-UNDRIP era. This thesis has aimed to contribute to the start of these conversations by positing a way forward for indigenous self-determination in Aotearoa. The Crown now needs to step up.

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