MĀORI AND THE BILL OF RIGHTS ACT: A CASE OF MISSED OPPORTUNITIES?

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There is a striking lacuna in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). The Bill of Rights Act purports to be a human rights instrument for all New Zealanders. But it does not refer to Māori – the Indigenous peoples of New Zealand – or to the Treaty of Waitangi. Few scholars have considered the impact of this exclusion or of the Bill of Rights Act more generally on Māori, especially in recent years. The twenty-first anniversary of New Zealand's enactment of the Bill of Rights Act is a good opportunity to reflect on the extent to which the Bill of Rights Act protects the human rights and fundamental freedoms of Māori despite these omissions. In this paper I offer my reflections on this issue I make a distinction between the Bill of Rights Act's protection of human rights generally, the benefits of which Māori enjoy alongside all other New Zealanders, and the Bill of Rights Act's protection of the rights of Māori as Indigenous peoples. I identify self-determination as the cornerstone of Māori rights as Indigenous peoples. I argue that the Bill of Rights Act offers the potential for a degree of protection of aspects of the categories of norms that elaborate the right to self-determination. I then assess the extent to which the Bill of Rights Act's potential for protecting Māori rights as Indigenous peoples has been realised in practice. I argue that, thus far, the Bill of Rights Act has not demonstrated itself as an effective tool for protecting the rights of Māori as Indigenous peoples. In the final part of the paper I consider why this is so. I argue that a combination of factors is at play focusing, in particular, on the Bill of Rights Act's silence regarding Māori.

I INTRODUCTION

There is a striking lacuna in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). The Bill of Rights Act purports to be a human rights instrument for all New Zealanders. But it does

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not refer to Māori – the Indigenous peoples of New Zealand – the Treaty of Waitangi (the Treaty) or indigenous rights more broadly. The omissions were intentional. During discussions on the then proposed supreme law Bill of Rights in 1985 it was originally intended that Māori rights under the Treaty be affirmed and recognised in the Bill in similar fashion to the recognition afforded to the aboriginal and treaty rights of Canada's Indigenous peoples in s 35(1) of Canada's Constitution Act 1982.[1] The White Paper that was produced in support of the proposed Bill asserted that a bill of rights had to address the Treaty. In the view of its drafters, "a bill of rights that ignored [the Treaty] would be at best an incomplete document. It could well be seen as simply one more Pakeha law, irrelevant to the deepest concerns of the Maori."[2] Ultimately, as a result of Māori apprehensions that incorporating the Treaty into the Bill would subject it to restrictive interpretation by the courts and to the reasonable limits provision now in s 5 of the Bill of Rights Act,[3] reference to Māori rights under the Treaty were omitted.[4] Few scholars have considered the impact of this exclusion or the impact of the Bill of Rights Act more generally on Māori, especially in recent years.[5]

The twenty-first anniversary of New Zealand's enactment of the Bill of Rights Act is a good opportunity to reflect on the extent to which the Bill of Rights Act protects the human rights and fundamental freedoms of Māori despite these omissions. In this paper I offer my reflections on the issue. I make a distinction between the Bill of Rights Act's protection of human rights generally, the

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1 Canada Act 1982 SC c 11 (UK), sch B. See Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 1 at 17 and 410.

2 Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) at [5.5]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis, Wellington, 2005) at 27.

3 See Paul Rishworth "Human Rights" [2003] NZ Law Rev 261 at 276; Rishworth and others, above n 1, at 17 and 410; Ripeka Evans "Is the Treaty of Waitangi a Bill of Rights?" in *A Bill of Rights for New Zealand* (Legal Research Foundation Seminar, Auckland, 1985) 195; and Shane Jones "The Bill of Rights and Te Tiriti o Waitangi" in *A Bill of Rights for New Zealand* (Legal Research Foundation Seminar, Auckland, 1985) 207.

4 See Rishworth and others, above n 1, at 17–18.

5 Scholars that have considered these issues include Paul Rishworth "Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights" (paper presented to International Center for Law and Religion Studies Australia Conference, Canberra, 2009) ["Rights to Culture, Language and Religion"]; Rishworth and others, above n 1; Rishworth "Human Rights", above n 3; Butler and Butler, above n 2; Claire Charters "BORA and Māori: The Fundamental Issues" [2003] NZLJ 459 ["BORA and Māori"]; Claire Charters "Māori, Beware the Bill of Rights Act!" [2003] NZLJ 401 ["Māori, Beware"]; Robert Kirkness "A Proud Democratic Tradition?" *NZLawyer* (online ed, 17 August 2007); Mai Chen "The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution" in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 123; Alexander Blades "Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand" [1994] 1 CNLR 1 as cited in Rishworth and others, above n 1, at 411, n 69; and Eddie Durie "Constitutionalising Māori" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 241 at 251–252.

benefits of which Māori enjoy alongside all other New Zealanders, and the Bill of Rights Act's protection of the rights of Māori as Indigenous peoples. I identify self-determination as the cornerstone of Māori rights as Indigenous peoples. I argue that the Bill of Rights Act offers the potential for a degree of protection of aspects of the categories of norms that elaborate the right to self-determination. The Act does this primarily through its affirmations of the right to freedom from discrimination in s 19 and the right of minorities to enjoy their culture, to profess and practise their religion and to use their language in s 20.[6] However, the protection offered is imperfect. The Bill of Rights Act does not explicitly affirm (amongst other rights) the right of Māori to self-government, to their lands and resources or to social welfare and development – three important categories of norms that also elaborate the right to self-determination. I argue that there is scope to protect aspects of these rights using, in particular, ss 19(1) and 20 and the justified limitations provision in s 5 but that the lack of explicit affirmation renders that protection vulnerable.

I then assess the extent to which the Bill of Rights Act's potential for protecting Māori rights as Indigenous peoples has been realised in practice. I argue that, thus far, the Bill of Rights Act has not demonstrated itself as an effective tool for protecting the rights of Māori as Indigenous peoples. No cases have been brought under s 19 of the Bill of Rights Act concerning the protection of the rights of Māori as Indigenous peoples. While several cases have referenced s 20 with specific regard to Māori rights, in none of these cases was s 20 a decisive factor in the Court's decision. In respect of both ss 19 and 20, arguments for the protection of Māori rights as Indigenous peoples are most noticeable for their absence.

In the final part of the paper I consider why this is so. I argue that a combination of factors are at play: the lack of awareness of, and concern for, Bill of Rights Act issues amongst the general public (including Māori) and legal practitioners; the Bill of Rights Act's lack of retrospectivity; the largely ineffectual remedies available where a civil Bill of Rights Act breach is found; and the distrust that the Bill of Rights Act engenders in Māori given its potential to suppress the self-determination norms as much as it protects them. However, ultimately, I attribute the lukewarm reaction of most Māori to the Bill of Rights Act to the Act's failure to recognise expressly Māori as Indigenous peoples. For this reason Māori continue to rely on the Treaty – which explicitly acknowledges the tino rangatiratanga or self-determination of iwi (nations) and hapū (kinship groups) – as the foundation for their claims.

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6 Given space constraints I focus on ss 19 and 20 of the New Zealand Bill of Rights Act 1990 [the Bill of Rights Act]. However, other provisions of the Act may be relevant depending on the context (and more than one may be invoked). For example ss 12 (the right to vote), 21 (the right to be secure against unreasonable search or seizure) and 27(1) (the right to natural justice) have all featured in arguments before the courts and the Waitangi Tribunal in support of Māori rights as Indigenous peoples. See for example *Taiaroa v Attorney-General* [1995] 1 NZLR 411 (CA); Waitangi Tribunal *The Pakakohi and Tangahoe Settlement Claims Report* (Wai 758 and Wai 142, 2000) at [1.16]; Waitangi Tribunal *The Waimumu Trust (SILNA) Report* (Wai 1090, 2005) at [3.6.5]; and Rishworth and others, above n 1, at 274.

II DISTINGUISHING THE BILL OF RIGHTS ACT'S PROTECTION OF MĀORI RIGHTS AS INDIGENOUS PEOPLES FROM ITS GENERAL PROTECTIONS

The Bill of Rights Act is widely regarded as a part of New Zealand's constitutional canon.[7] This statute, which applies to acts done by the government and persons performing a public function,[8] was enacted, in part, to give effect to New Zealand's commitment to the International Covenant on Civil and Political Rights (the ICCPR), which New Zealand ratified in 1978.[9] It affirms a range of civil and political rights concerning: the life and security of persons; democratic and civil rights; non-discrimination and minority rights; and search, arrest and detention.[10] These rights are not absolute. Under s 5 they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Nor is the Bill of Rights Act supreme law. Under s 4 no court can invalidate, impliedly repeal or decline to apply an enactment simply because it is inconsistent with the Bill of Rights Act. Under s 6, though, where a Bill of Rights Act-consistent interpretation "can be given" it should be preferred.[11]

The Bill of Rights Act has improved the protection afforded to human rights in New Zealand, exceeding commentators' expectations for a watered-down statutory bill of rights. The Bill of Rights Act's general benefits, which Māori and all other New Zealanders enjoy, are most marked in the criminal sphere. These positive developments include, for example, the Court of Appeal's early establishment of a prima facie rule of exclusion of evidence where such evidence had been obtained in breach of the Bill of Rights Act,[12] although the rule has been relaxed in recent years.[13] In fact, given the extreme overrepresentation of Māori in the criminal justice system,[14] the benefits to Māori

7 See for example Rishworth and others, above n 1, at 2–3; Butler and Butler, above n 2, at 9; and *R v Whareumu* [2001] 1 NZLR 655 (CA) at 656 per Thomas J.

8 Bill of Rights Act, s 3.

9 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [the ICCPR]; and Bill of Rights Act, long title (b). It was also enacted more generally to affirm, protect, and promote human rights and fundamental freedoms in New Zealand: see Bill of Rights Act, long title (a).

10 Bill of Rights Act, ss 8–27.

11 See generally Butler and Butler, above n 2, at 3.

12 *R v Jefferies* [1994] 1 NZLR 290 (CA).

13 *R v Shaheed* [2002] 2 NZLR 377 (CA). Essentially the assessment is now whether exclusion of the evidence would be a "proportionate" response. The Evidence Act 2006, s 30 adopts the balancing assessment used in *Shaheed*: see Sian Elias "Limiting Rights under a Human Rights Act: A New Zealand Perspective" (address to the Australian Bill of Rights Conference, University of Melbourne Law School, 3 October 2008) at 25–26; and Butler and Butler, above n 2, at 1106–1109.

14 James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum – The Situation of Maori People in New Zealand* A/HRC/18/35/Add4 (2011) at [62].

of the Bill of Rights Act developments in the criminal sphere should not be downplayed. The Bill of Rights Act has also paved the way for additional remedies for rights violations, such as compensation.[15] The Bill of Rights Act has, it is hoped, made the legislature and executive (as well as other public actors) more cognisant of human rights matters given, for example, its reach under s 3 and the Attorney-General's legislative vetting process under s 7.[16] The Bill of Rights Act has also contributed to increased awareness (although perhaps only slightly) of human rights issues amongst the New Zealand public: the impression is that rights discourse is now more visible in the media and in submissions to parliamentary select committees, amongst other areas.[17] All of these developments are likely to have had, and to continue to have, flow-on benefits for Māori alongside other New Zealanders. But such general benefits have been well traversed and are not my concern here.[18] Here I am concerned with the protection that the Bill of Rights Act offers the rights that attach to Māori as Indigenous peoples.[19]

Distinguishing between the Bill of Rights Act's general protection of human rights and its protection of the rights of Māori as Indigenous peoples is important.[20] It is an attempt to capture the extent to which the Bill of Rights Act affords protection to those rights that Māori themselves have identified as important to them as Indigenous peoples. These "indigenous rights" are not special privileges but rather an expression of the human rights that all persons enjoy in ways meaningful and appropriate to Indigenous peoples.

Self-determination – loosely captured in the terms mana motuhake and tino rangatiratanga – has consistently been identified by Māori as the cornerstone for enjoyment of their rights as Indigenous

15 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*]; and Butler and Butler, above n 2, at 1111.

16 Butler and Butler, above n 2, at 1103–1106. Although note, for example, Elias' criticisms that: "It is difficult to see however that the [s 7] reports have led to wider public awareness of the human rights issues": see Elias, above n 13, at 9.

17 Butler and Butler, above n 2, at 1116.

18 See for example Butler and Butler, above n 2, at 1103–1119.

19 In a paper that focuses on the impact of s 20, Paul Rishworth makes a similar distinction: see Rishworth "Rights to Culture, Language and Religion", above n 5, at 1–2.

20 Rishworth, for example, examines the extent to which the Bill of Rights Act implements the Treaty of Waitangi [the Treaty]. I do not limit my assessment to the provisions of the Treaty, although I acknowledge the importance of the Treaty in understanding those rights that Māori have identified as important to them as Indigenous peoples. See Rishworth and others, above n 1.

peoples.[21] Self-determination is a complex and contested concept but at its root it concerns the ability of Indigenous peoples to "control their own destinies".[22] It is often associated with full self-government over a defined territory, or autonomy in particular areas such as cultural concerns.[23] However, self-government or autonomy is only part of its content.

Legal scholars have discerned five general categories of norms that elaborate the right to self-determination: self-government, non-discrimination, cultural integrity, lands and resources, and social welfare and development.[24] These norms provide that: Indigenous peoples must be able to maintain their own autonomous institutions and at the same time be able to participate in all decision-making that affects them; there must be an absence of invidiously discriminatory policies and practices towards Indigenous peoples; Indigenous peoples must be able to maintain and develop their cultural identities; the rights of Indigenous peoples to their lands and resources (including intellectual property) must be respected; and Indigenous peoples must be able to access social welfare programmes and to enjoy economic, social, cultural and political development.[25] These norms are at various stages of crystallisation under international law.[26] What is important for the purposes of this paper is that Māori, along with other Indigenous peoples, have asserted that these rights inhere to them as Indigenous peoples. The United Nations General Assembly's 2007 *Declaration on the Rights of Indigenous Peoples*,[27] which Māori were heavily involved in drafting,

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21 See for example Ranginui Walker *Ka Whawhai Tonu Matou – Struggle Without End* (revised ed, Penguin Books, Auckland, 2004); Waitangi Tribunal *Te Urewera: Pre-Publication Part I* (Wai 894, 2009); and Waitangi Tribunal *Te Urewera: Pre-Publication Part II* (Wai 894, 2010). Of course, it is not possible to identify precisely the rights that Māori identify as important to them as Indigenous peoples; there is no unitary Māori, iwi, hapū or whānau voice. What rights matter to Māori at an individual level will depend on the intersection of a host of factors including the age, gender and class of each individual: see Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (University of Otago Press, Dunedin, 2005) at 36; and Mason Durie *Nga Kahui Pou: Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 218 and 308.

22 See James Anaya *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 2004) at 290.

23 Raizda Torres "The Rights of Indigenous Populations: The Emerging International Norm" (1991) 16 YJIL 127 at 142; and Maaka and Fleras, above n 21, at 19, 29–30, 45 and 50.

24 Anaya, above n 22. Others have also used similar categories: see for example Torres, above n 23. These categories are not without criticism but provide a useful framework for analysis for the purposes of this article.

25 Anaya, above n 22, especially at 129, 131, 141, 148 and 151.

26 Anaya, above n 22, at 129, 131, 141, 148 and 151.

27 *Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007). New Zealand belatedly offered its support for the *Declaration* in 2010: see Pita Sharples, Minister of Māori Affairs "Ninth Session of the United Nations Permanent Forum on Indigenous Issues, 19–30 April 2010" (New York, 19 April 2010) New Zealand Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>.

is perhaps the clearest example of this.[28] Corresponding norms have also been identified by notable Māori scholars such as Sir Mason Durie.[29]

I use these five categories of norms that elaborate indigenous self-determination as a reference point for assessing the extent to which the Bill of Rights Act protects the rights of Māori as Indigenous peoples. I term them the "self-determination norms". In this paper where I speak of "the rights of Māori as Indigenous peoples" I am referring to Māori enjoyment of self-determination as elaborated by these five self-determination norms. There are, of course, manifold different ways of understanding Indigenous peoples' right to self-determination both within and outside of the discipline of law. In articulating these five self-determination norms my intention is not to suggest that they are comprehensive, settled or appropriate to all contexts. Rather, conscious of the concept's complexity, I use the five self-determination norms in this paper instrumentally, as a tool to throw light on some of the dimensions of self-determination that the Bill of Rights Act may protect.

III THE BILL OF RIGHTS ACT'S POTENTIAL TO PROTECT MĀORI RIGHTS AS INDIGENOUS PEOPLES

The Bill of Rights Act offers the potential for a degree of imperfect protection of Māori rights as Indigenous peoples. The Bill of Rights Act does not affirm the right of Māori to self-government. It neither affirms the right of Māori, iwi, hapū or whānau (extended family) to participate in all decision-making that affects them, nor to maintain their own autonomous institutions. The right of all citizens over the age of 18 to vote in parliamentary elections is affirmed in s 12 of the Bill of Rights Act but this is an individual right. Paul Rishworth argues, and I agree, that s 12 does not even stretch so far as to protect the Māori electorates that are currently in place to ensure Māori representation in the House of Representatives.[30] Given the close association between self-determination and self-government, this is a serious limitation for Māori. But its omission from the Bill of Rights Act is unsurprising given New Zealand's reluctance to recognise the right of Māori to self-govern except in a more limited corporate sense.[31] Had the Bill of Rights Act recognised the Treaty, as

28 The *Declaration on the Rights of Indigenous Peoples*, above n 27, explicitly affirms Indigenous peoples' right to self-determination in art 3 and it is also implicit throughout the rights that follow. The five categories of norms elaborating the right to self-determination are reflected in, for example, arts 2–5, 9–16, 18–21, 23, 25–29 and 31–34. There is also a connection between these categories of norms and the guarantees in the Treaty: see Part III of this article.

29 Sir Mason Durie has highlighted the pervasive importance of mana motuhake, or self-determination, in securing Māori cultural identity, promoting vibrant self-sufficient and autonomous Māori communities, promoting Māori language and culture and in the recreation of a Māori land base: see Mason Durie, above n 21, at 310–319.

30 Rishworth and others, above n 1, at 271–274.

31 See for example Annette Sykes "Bruce Jesson Memorial Lecture 2010" (Bruce Jesson Foundation, Auckland, 5 November 2010).

mooted early in its drafting stages, this may have provided an avenue for recognition of self-government through the affirmation of tino rangatiratanga in art 2 of the Māori language text.[32]

Nor does the Bill of Rights Act affirm the right of Māori to own, use, develop and control their traditional lands, territories and resources. Absent from the Bill of Rights Act, in contrast to human rights instruments in many other jurisdictions, is even a general right not to be unjustly deprived of property.[33] Unsuccessful attempts have been made in the past to include a general property right in the Bill of Rights Act, the most recent in 2005–2007.[34] A statement by then Minister of Justice Hon Simon Power in 2010 and the terms of reference of the Government's 2011–2014 constitutional review, suggest that inclusion of a property right is back on the Government's agenda.[35] Noticeably absent from debate on inclusion of a property right is robust discussion of the potential benefits for Māori. Again, had the Bill of Rights Act recognised the Treaty, art 2 of both the Māori and English texts would have provided an avenue for protection of Māori lands and resources.

Similarly, the Bill of Rights Act does not contain any economic or social rights, which could provide a basis for protecting Māori rights to social welfare and development. The Government rejected early calls to include economic and social rights in the Bill of Rights Act, despite ratifying the International Covenant on Economic, Social and Cultural Rights at the same time as the ICCPR.[36] Economic and social rights are essential to the enjoyment of human rights for all peoples, including Māori. This was recognised during the 1993 Vienna World Conference on Human Rights.[37] The socio-economic position of Māori prompted recent concerned comment from the United Nations Special Rapporteur on the rights of Indigenous peoples, who described Māori

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32 In Canada, for example, the Supreme Court has held that the recognition of aboriginal and treaty rights in s 35(1) of the Canadian Constitution Act includes self-government claims: see for example *R v Pamajewon* [1996] 2 SCR 821.

33 See for example United States Constitution, amends V and XIV; and Constitution of the Republic of South Africa Act 1996, ch 2, s 25. See generally Butler and Butler, above n 2, at 4; and Andrew Butler and Petra Butler "Protecting Rights" in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011) 157 at 162 ["Protecting Rights"].

34 New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2007 (255). See also Butler and Butler, above n 2, at 4–5; Butler and Butler "Protecting Rights", above n 33, at 157; and Chen, above n 5, at 131.

35 Simon Power, Minister of Justice "Speech to Bill of Rights Act Symposium" (11 November 2010) New Zealand Government <www.beehive.govt.nz>; and Cabinet Paper "Consideration of Constitutional Issues" (6 December 2010) CAB 44/3.

36 See Justice and Law Reform Committee *Final Report on a White Paper on a Bill of Rights for New Zealand* (1988) at 10; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [the ICESCR].

37 The Vienna Declaration and Programme of Action (adopted 25 June 1993 by the World Conference on Human Rights) asserted in art 5 that: "All human rights are universal, indivisible and interdependent and interrelated."

disadvantage as "extreme" in comparison to the rest of New Zealand society.[38] Organisations such as the New Zealand Human Rights Commission have kept the question of economic and social rights on the agenda, although there have been no serious moves to incorporate them into the Bill of Rights Act.[39]

The Bill of Rights Act does, however, explicitly affirm aspects of the non-discrimination and cultural integrity categories of norms. Section 19(1) of the Bill of Rights Act explicitly affirms the right to freedom from discrimination on the grounds contained in the Human Rights Act 1993, which include "race" and the related grounds of "colour", "ethnic or national origins" and "religious belief".[40] Differential treatment by the government or a public actor, whether direct or indirect, will breach the Bill of Rights Act where it is based on one of the prohibited grounds, results in a material disadvantage and cannot be objectively and reasonably justified under s 5 of the Bill of Rights Act.[41] Being Māori, a "racial" or "ethnic" group, is a prohibited ground of discrimination.[42] Thus, the non-discrimination provision in s 19(1) can be used by Māori to seek the removal of barriers in order to allow them to participate in broader society.

However, Māori seek more than this, as art 2 of the Māori text of the Treaty, with its affirmation of rangatiratanga, attests.[43] Māori also seek ongoing recognition of their difference. Here, s 19(1) is of some use too, for it is capable of affording a degree of protection to the discriminatory treatment of Māori culture and its various expressions. For example, s 19(1) will apply where legislation unjustifiably discriminates between Māori customary property rights and non-Māori property rights. The Bill of Rights Act featured in successive Attorney-General's s 7 vets of both the Foreshore and Seabed Bill 2004 and the Marine and Coastal Area (Takutai Moana) Bill 2010 (the Takutai Moana Bill) on this basis, although in each case the Attorney-General found the prima facie discriminatory treatment was justified under the reasonable limitations provision in s 5.[44] A degree of indirect

38 Anaya, above n 14, at [57].

39 New Zealand Human Rights Commission *Tui Tui Tuituia: Race Relations in 2012* (Wellington, 2013); and Butler and Butler, above n 2, at 1121.

40 Human Rights Act 1993, ss 21(1)(c), 21(1)(e), 21(1)(f) and 21(1)(g).

41 Butler and Butler, above n 2, at 483, 502–503, 505 and 510–511; and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

42 Overseas jurisprudence suggests that differential treatment on the basis of "race" will be scrutinised particularly closely: see Butler and Butler, above n 2, at 506.

43 For further explanation of art 2, see below n 70 and associated text.

44 Foreshore and Seabed Bill 2004 (129-1); and Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) [the Takutai Moana Bill]. Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Foreshore and Seabed Bill* (6 May 2004) [*AG Report on the Foreshore and Seabed Bill*]; Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Marine and Coastal Area (Takutai Moana) Bill* (2 September 2010) [*AG Report on the Takutai Moana Bill*].

protection could thus be afforded under s 19(1) to the land and cultural rights of Māori and the corresponding self-determination norms. Commentary by the United Nations Human Rights Committee (the UN Human Rights Committee), the treaty body responsible for monitoring state compliance with the ICCPR, offers some support for this approach.[45]

Some might argue that s 19(2) can also provide a basis for recognition of the social welfare and development category of self-determination norms. I disagree. Section 19(2) of the Bill of Rights Act provides that measures taken in good faith to assist persons or groups of persons disadvantaged because of prohibited discrimination under Part II of the Human Rights Act do not constitute discrimination. The fact that the relevant person or group must have been disadvantaged suggests that the measure could only last so long as it was required to address that disadvantage.[46] Further, the wording of the subsection reveals that such measures are discretionary.[47] Here the distinction made at the outset between the Bill of Rights Act's general protection of human rights and its protection of the rights of Māori as Indigenous peoples comes to the fore. If measures to respect Māori rights as Indigenous peoples to social welfare and development are classified as affirmative action measures, their implementation will be temporary and discretionary. Yet international jurisprudence indicates that the rights of Indigenous peoples should not be subject to these limitations.[48]

One way to understand the distinction is to bear in mind that the underlying aim of affirmative action measures is integration. To the extent that Māori desire social welfare and development programmes that integrate them into broader society, for example, through the establishment of quotas into mainstream higher education courses in which Māori have historically been

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45 For example in its 2010 concluding observations on New Zealand, the United Nations Human Rights Committee expressed its concern "that the [Foreshore and Seabed Act 2004] discriminates against the Māori, and extinguishes their customary title over the foreshore and seabed. (arts 2, 26 and 27)": *Concluding Observations of the Human Rights Committee: New Zealand* CCPR/C/NZL/CO/5 at [19] [*HRC Concluding Observations*]. Articles 2 and 26 of the ICCPR concern equality and non-discrimination. For discussion of the relevance of international instruments, norms and jurisprudence when considering alleged breaches of the Bill of Rights Act, see Butler and Butler, above n 2, at 3 and 60–70; Elias, above n 13, at 13–14; Rishworth and others, above n 1, at 15–16; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; and *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC).

46 Fleur Adcock "Equality, Indigenous Peoples and Positive Measures: Are Positive Measures for Māori Justified?" (LLM Thesis, Victoria University Wellington, 2006) at 60–61.

47 However, s 19(1) Bill of Rights Act could provide a basis for arguing that affirmative action measures are *required* in order to avoid a discriminatory effect. For comment on the use of ss 19(1) and 5 to justify affirmative action measures, see Butler and Butler, above n 2, at 508–512; and Adcock, above n 46, at 61–63.

48 See for example *Concluding observations of the Committee on the Elimination of Racial Discrimination: NEW ZEALAND* CERD/C/NZL/CO/17 (2007).

underrepresented, affirmative action measures can play a useful role. These measures are available to all ethnic (and other) groups disadvantaged because of prohibited discrimination. To the extent that Māori desire social welfare and development programmes that recognise their distinctive status as Indigenous peoples, for example, through the devolution of responsibility for some local healthcare services to iwi providers, s 19(2) is not an appropriate ground. Such measures are grounded in the maintenance of the distinctiveness of Māori as *peoples* and should be neither discretionary nor temporary.[49] The distinction is an important one, especially given that measures targeted at Māori continue to be a subject of controversy, in particular due to the enflamed rhetoric of former National and ACT Party leader Don Brash.[50]

The Bill of Rights Act also explicitly affirms, in s 20, that minorities are not to be denied the right to enjoy their culture, to profess and practise their religion or to use their language. As a numerical minority and non-dominant sector of society s 20 applies to Māori.[51] I acknowledge the tension in relying on s 20 – a minority rights provision – to protect Māori rights as Indigenous peoples. Māori, like other Indigenous peoples, have strongly resisted their designation as a minority ethnic group;[52] and rightly so. Indigenous peoples have rights that are distinct from ethnic minorities.[53] Yet I argue that s 20 may nevertheless support aspects of the categories of norms that elaborate Indigenous peoples' right to self-determination. I am bolstered in this endeavour by the fact that Māori have invoked s 20 before the New Zealand courts in a small number of cases despite

49 In a similar vein Rishworth acknowledges the tendency in debate to lump together "needs-driven" and "Treaty-driven" "favourable treatment for Māori". Earlier on in his paper he suggests that this has the resulting "cost of making it look like Treaty-honouring was some sort of dishonourable exception to a general principle of equality": Rishworth "Rights to Culture, Language and Religion", above n 5, at 19–22. See also Rishworth and others, above n 1, at 271–274; and Rishworth "Human Rights", above n 3, at 277.

50 Don Brash, Leader of the National Party "Nationhood" (address to the Rotary Club of Orewa, Silverdale, 27 January 2004); and ACT Party "Fed up with Pandering to Māori Radicals?" (9 July 2011) ACT <www.act.org.nz>.

51 Paul Rishworth notes that the wording does raise the question whether iwi or hapū, as traditional groupings, could also qualify as "minorities": see Rishworth and others, above n 1, at 407.

52 See Rishworth "Rights to Culture, Language and Religion", above n 5, at 11–12; and Michael Dodson "First Fleets and Citizenships: The Citizenship Status of Indigenous Peoples in Post-Colonial Australia" in Salomon Rufus David (ed) *Citizenship in Australia: Democracy, Law and Society* (Constitutional Centenary Foundation, Melbourne, 1996) 189 at 201.

53 See for example Erica-Irene Daes and Asbjørn Eide for the Sub-Commission on the Promotion and Protection of Human Rights *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples* E/CN4/Sub2/2000/10 (2000).

its "minority" terminology.[54] Further, Indigenous peoples from other parts of the globe have invoked the corresponding minority rights provision in the ICCPR – art 27 – in support of their claims.[55] Importantly for Māori, the broad meanings that attach to culture can include connections to natural resources such as rights to hunt and fish.[56] Thus, this affirmation affords a degree of Bill of Rights Act protection to the cultural integrity category of norms for Māori,[57] as well as a degree of indirect protection to the lands and resources (and perhaps even to the social welfare and development categories of norms).[58] However, the protection afforded by the provision is limited. It is constrained by the fact that it is aimed at protecting defined minority rights, not Māori rights as Indigenous peoples.

The UN Human Rights Committee's jurisprudence is instructive as to the potential of s 20 for the protection of Māori rights as Indigenous peoples. The Human Rights Committee has acknowledged the applicability of the ICCPR's corresponding article – art 27 – to Indigenous peoples in *General Comment 23*,[59] in its consideration of states' periodic reports,[60] and in its

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54 See for example *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* HC Wellington CP682/92, 12 October 1992 [*Sealords Case* (HC)]; *New Zealand Underwater Assoc Inc v Auckland Regional Council Planning Tribunal* A131/91, 16 December 1991; *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (CA); *RL v Chief Executive of the Ministry of Social Development* [2010] NZSC 18; *Keelan v Peach* [2003] 1 NZLR 589 (CA); *Fenwick v Trustees of Nga Kaihautu o Te Arawa Executive Council* HC Rotorua CIV 2004-463-847, 13 April 2006; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. For discussion see Rishworth and others, above n 1, at 401–403; and Rishworth "Rights to Culture, Language and Religion", above n 5, at 12–15.

55 The ICCPR, art 27. See for example *Lovelace v Canada* CCPR/C/13/D/24/1977 (1981); and *Kitok v Sweden* CCPR/C/33/D/197/1985 (1988). See generally Rishworth and others, above n 1, at 401–403.

56 Most of the United Nations Human Rights Committee's jurisprudence under art 27 has concerned conflict between state regulation and minority expressions of culture associated with access and use of natural resources: see *Lovelace*, above n 55; *Kitok*, above n 55; *Länsman v Finland* CCPR/C/58/D/671/1995 (1996); and *Ominayak v Canada* CCPR/C/38/D/167/1984 (1990). For discussion see Rishworth and others, above n 1, at 401–403 and 409–410.

57 This is the only place in the Bill of Rights Act where culture and language rights are recognised. Rights to practise religion are also affirmed in ss 13, 15 and 19: see Rishworth and others, above n 1, at 401.

58 The United Nations Human Rights Committee jurisprudence indicates that economic activities, such as reindeer herding and fishing, may count as "culture" where the activity is an essential element of the minority culture, even where it is not the sole means of subsistence and modern technology is used: see *Kitok*, above n 55; *Länsman*, above n 56, at [10.2]; and *Mahuika v New Zealand* CCPR/C/70/D/547/1993 (2000). For discussion see Rishworth and others, above n 1, at 407.

59 United Nations Human Rights Committee *General Comment No 23: The Rights of Minorities (Art 27)* CCPR/C/21/Rev1/Add5 (1994) at [3.2] and [7].

60 For example, in its consideration of New Zealand in 2010, the United Nations Human Rights Committee drew on art 27 when commenting on the Foreshore and Seabed Act 2004. It referred New Zealand to its *General Comment 23* and urged that "special attention should be paid to the cultural and religious significance of access to the foreshore and seabed for the Māori": *HRC Concluding Observations*, above

consideration of communications under the ICCPR's First Optional Protocol.[61] Section 20 of the Bill of Rights Act and art 27 of the ICCPR are virtually identical. Like art 27, s 20 is framed in individual terms: the right attaches to "a person".[62] But the rights of that person depend on the minority group having the ability to maintain its culture, language or religion so there is also a group dimension.[63] Claire Charters provides an insightful discussion of the potential collective–individual tensions inherent in s 20.[64] Again, like art 27, s 20 is a negative right. Section 20 does not require a state to "undertake positive measures to promote a minority culture, religion or language" but the Human Rights Committee has indicated that the state may be required to "undertake measures to ensure that neither it nor private persons deny these rights."[65] "Denial" is a high threshold,[66] although Human Rights Committee jurisprudence suggests that "significant interference with the enjoyment of culture" could constitute a denial.[67] The Human Rights Committee jurisprudence also indicates that some interference may be justifiable where, for example, it is of benefit to the whole

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n 45, at [19]. Also referring to art 27, the Human Rights Committee noted the difficulties Māori faced invoking the Treaty before the courts and noted concern that historical Treaty settlements do not appropriately reflect traditional ownership at [20].

61 Optional Protocol to the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976). See for example *Kitok*, above n 55; *Länsman* above n 56; *Mahuika*, above n 58; and *Poma v Peru* CCPR/C/95/D/1457/2006 (2009).

62 The United Nations Human Rights Committee in its *General Comment 23* on the rights of minorities has emphasised that the right is conferred on individuals (and is therefore able to be the subject of complaint under the individual complaint mechanism under the Optional Protocol to the ICCPR): see United Nations Human Rights Committee *General Comment 23*, above n 59, at [1] and [3].

63 United Nations Human Rights Committee *General Comment No 23*, above n 59, at [6.2]; and Rishworth and others, above n 1, at 400.

64 Claire Charters argues that s 20's individual focus means that Indigenous peoples as a collective do not hold rights. As a result, in a situation where there are competing claims by an indigenous individual and an indigenous collective (that is captured by the Bill of Rights Act because of, say, a public function it performs) the interests of the collective are unlikely to be balanced against the interests of, for example, the indigenous individual claiming discrimination by the collective under the Bill of Rights Act: see Charters "BORA and Māori", above n 5, at 460 and 462.

65 United Nations Human Rights Committee *General Comment No 23*, above n 59, at [6.1]; Butler and Butler, above n 2, at 529; Rishworth and others, above n 1, at 403–405; and Ryszard Cholewinski "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988) 16 HRQ 344. Compare Blades, above n 5. See also Durie, above n 5, at 251–252.

66 As Paul Rishworth relates, denial requires "a drastic matter": see Rishworth and others, above n 1, at 408–410.

67 See for example *Lovelace*, above n 55. See also Rishworth and others, above n 1, at 408.

group, or where the interests of the minority and the broader community have been appropriately considered following consultation.[68]

Section 5 of the Bill of Rights Act, the justified limitations provision, potentially offers an avenue for bringing Treaty rights and thus the self-determination norms, into play in a Bill of Rights Act analysis when they come into conflict with rights directly protected by the Bill of Rights.[69] Arguably the Treaty elaborates, in very broad terms, the self-determination norms. Article 2 of the Māori language text provides a basis for asserting broad claims of Māori self-determination, including rights to self-government, cultural integrity, lands and resources, and social welfare and development, while art 3 reflects the principle of non-discrimination.[70] Comparative and international jurisprudence suggests a context-specific approach to determining what reasonable limits are.[71] The Treaty has been identified as "part of the fabric of New Zealand society"[72] and is generally relevant as a statutory interpretation aid.[73] Thus, it is appropriate, and in some cases it may even be necessary, that the Treaty is considered when assessing whether a limitation on a right is justified in New Zealand. Yet, the government's characteristically antagonistic stance towards the Treaty (evident, for example, in its recent efforts to restrict the protection afforded the Treaty in s 9 of the State-Owned Enterprises Act 1986 in order to facilitate the partial privatisation of several state-owned companies) suggests that governments will accord the Treaty little weight in assessing

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68 Rishworth and others, above n 1, at 408–410 and 414–417. See for example *Poma*, above n 61, at [7.6]; *Mahuika*, above n 58; *Kitok* above n 55; and Anaya, above n 22, especially at 256–257.

69 See Charters "BORA and Māori", above n 5, at 462.

70 The Treaty, signed by a number of rangatira (Māori chiefs) and representatives of the British Crown in 1840, has two texts. Under the terms of the Māori language text the rangatiratanga (self-determination) of iwi (tribes) is affirmed over their taonga (treasures) in art 2 in exchange for British kawanatanga (governorship) in art 1. Under art 3 Māori are also guaranteed all of the same rights and duties as British citizens. A fourth, unwritten article, guarantees religious freedom. The English translation of the Māori version of the Treaty referred to is by Ian Hugh Kawharu: see Claudia Orange *An Illustrated History of The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 39 and 280–282; see also *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets Case*]. Most Māori signed the Māori language text so on that basis, and the rule of contra proferentem (ambiguous terms are interpreted against the interests of the imposing party), this text should be preferred: see Rishworth and others, above n 1, at 413; and FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law & Legitimation* (Auckland University Press, Auckland, 1999). The right of Māori to be self-determining is not affirmed in the English text, although the norms of lands and resources and non-discrimination are affirmed.

71 See for example *R v Oakes* [1986] 1 SCR 103 at 135–140; and *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757 at [30]. For discussion see Butler and Butler, above n 2, at 142–148.

72 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 [the *Huakina Case*].

73 See for example the *Huakina Case* above n 72; and Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 207.

whether a limitation on a right is justified in practice.[74] It will more likely fall on Māori claimants to litigate in order to have the Treaty considered by the courts in an assessment of whether a limitation on a right is justified.

IV TO WHAT EXTENT HAS THE BILL OF RIGHTS ACT'S POTENTIAL TO PROTECT MĀORI RIGHTS AS INDIGENOUS PEOPLES BEEN REALISED?

The brief analysis given above identifies the Bill of Rights Act's potential to offer a degree of imperfect protection to aspects of Māori rights as Indigenous peoples, but a degree of protection nonetheless. To what extent has this potential been realised in practice?

To date the Bill of Rights Act has not demonstrated itself to be a significant protector of the rights of Māori as Indigenous peoples. Rishworth, in an examination of the impact of s 20 of the Bill of Rights Act on Māori, reaches the same conclusion.[75] Few cases relying on s 19 have come before the New Zealand courts,[76] and none of those cases have concerned the rights of Māori as Indigenous peoples.[77] Section 19(1) has been mentioned in at least one Waitangi Tribunal report, although the section and its application were not discussed in any depth in that report.[78]

More obvious are those situations where s 19(1) has not been used to protect the rights of Māori as Indigenous peoples. The protection of Māori customary rights over the foreshore and seabed is a high profile example. Few issues have captured the New Zealand public's imagination as vividly in recent years as the potential for Māori freehold interests to be recognised over the foreshore and seabed, as provided for in *Ngati Apa v Attorney-General*.[79] The controversy and debate that followed that judgment led to the enactment of the Foreshore and Seabed Act 2004 and that Act's

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74 See the Public Finance (Mixed Ownership Model) Amendment Act 2012, s 45Q. For comment on some concerns with s 45Q while the legislation was going through the legislative process, see Carwyn Jones "Submission to the Finance and Expenditure Committee on the Mixed Ownership Model Bill" (24 April 2012) New Zealand Parliament <www.parliament.nz> [12]–[16]. On the government's antagonistic stance towards the Treaty more generally see Walker, above n 21.

75 Rishworth "Rights to Culture, Language and Religion", above n 5, at 2–3.

76 See Butler and Butler, above n 2, at 490 and 1109.

77 Affirmative action measures favouring Māori were considered for consistency with s 73(1) of the Human Rights Act 1993 by the Complaints Review Tribunal in *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1996) 2 HRNZ 225 [*Amaltal*].

78 In the Waitangi Tribunal's report on its urgent inquiry into the Government's proposed foreshore and seabed legislation the Tribunal was of the view that human rights norms were relevant in addition to Treaty norms. It referred specifically to the right to be free from discrimination under s 19(1) and the right to natural justice in s 27(1): see Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [4.3.3(4)].

79 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

replacement, early in 2011, with the Marine and Coastal Area (Takutai Moana) Act 2011 (the Takutai Moana Act). Both pieces of legislation have attracted comment from international human rights mechanisms, with the Foreshore and Seabed Act receiving particularly strong criticism.[80] For example, in 2011 the Special Rapporteur on the rights of Indigenous peoples observed that the Takutai Moana Act represented "a notable effort to reverse some of the principal areas of concern" regarding the Foreshore and Seabed Act but cautioned that the law should be implemented consistently with the principles of the Treaty and international standards regarding the rights of Indigenous peoples to their traditional lands and resources.[81] In particular, he noted concerns regarding extinguishment of Māori rights to their traditional lands and resources, the Act's weak acknowledgement of the Treaty and its six-year time limit for assertion of customary interest claims.[82] Large numbers of Māori opposed the Foreshore and Seabed Bill and the Takutai Moana Bill and continue to oppose the Takutai Moana Act for retaining many of the Foreshore and Seabed Act's discriminatory aspects.[83] Prominent Māori commentators, such as Moana Jackson, have framed their criticisms of the legislation with reference to the Treaty and even in some instances

80 United Nations Committee on the Elimination of Racial Discrimination *Decision 1(66): New Zealand Foreshore and Seabed Act 2004* CERD/C/66/NZL/Dec1 (2005); Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* E/CN4/2006/78/Add3 (2006); *Concluding observations of the Committee on the Elimination of Racial Discrimination: NEW ZEALAND*, above n 48, at [19]; United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: NEW ZEALAND* A/HRC/12/8 (2009) at [81], recommendation 58; Anaya, above n 14, at [56]; and *Concluding observations of the Committee on the Elimination of Racial Discrimination: NEW ZEALAND* CERD/C/NZL/Co/18–20 (2013) at [13]. For some discussion see Claire Charters and Andrew Erueti "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 VUWLR 257.

81 Anaya, above n 14, at [78]–[79].

82 At [55]–[56].

83 See "Relationship and Confidence and Supply Agreement between the National Party and the Maori Party" (16 November 2008) New Zealand National Party <www.national.org.nz> at 2; Ministerial Review Panel *Ministerial Review of the Foreshore and Seabed Act 2004* (30 June 2009) vol 1 at 118, 134, 137 and 139; Treaty Tribes Coalition "Submission on the Marine and Coastal Area (Takutai Moana) Bill to the Māori Affairs Select Committee" (16 November 2010); Moana Jackson "A Further Primer on the Foreshore and Seabed: The Marine and Coastal Area (Takutai Moana) Bill" (8 September 2010) Converge <www.converge.org.nz> ["A Further Primer"]; Carwyn Jones "Marine and Coastal Area (Takutai Moana) Bill" (13 September 2010) Ahi-kā-roa Blogspot <http://ahi-ka-roa.blogspot.com>; Television New Zealand "Harawira's Mana Party Becomes Official Today" (12 May 2011) Television New Zealand <http://tvnz.co.nz>; Kaitiaki o te Takutai "Summary of Maori submissions on the Marine and Coastal (Takutai Moana) Bill 2010" (22 February 2011) Converge < http://www.converge.org.nz>; and Marae TVNZ "Dr Rawiri Taonui Talks About the Taku Tai Moana Bill" (20 March 2011) TVNZ <www.youtube.com>.

international human rights law rather than the Bill of Rights Act.[84] But arguments for[85] and against[86] the legislation in the public domain did refer to the Bill of Rights Act.

Commentators have expressed concern that the Bill of Rights Act has not been used to challenge formally either the Foreshore and Seabed Act or the Takutai Moana Act. For example, Robert Kirkness registers his surprise that Māori did not pursue a declaration that the Foreshore and Seabed Act unfairly discriminated against Māori under Part 1A of the Human Rights Act through the Human Rights Review Tribunal.[87] The tie between the Human Rights Act and Bill of Rights Act here is that discrimination under Part 1A of the Human Rights Act is defined, in relation to public actors, as acts or omissions inconsistent with s 19 of Bill of Rights Act.[88] As far as I am aware, no declaration has yet been pursued through the Tribunal regarding the Foreshore and Seabed Act's replacement, the Takutai Moana Act. Nor has a declaration been pursued in the courts that either piece of legislation is discriminatory under s 19(1) or that it denies Māori their right to practise their culture in relation to the foreshore and seabed under s 20.[89] A challenge to the foreshore and seabed legislation through the courts, rather than the Human Rights Review Tribunal, is more problematic given that it remains unclear whether the courts may issue a declaration of inconsistency under the Bill of Rights Act.[90] The Tribunal, on the other hand, has the explicit ability to issue declarations under the Human Rights Act (and, thus, in relation to breaches of s 19 of the Bill of Rights Act).[91]

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84 In none of Moana Jackson's numerous primers on the Foreshore and Seabed Bill, Foreshore and Seabed Act 2004, Takutai Moana Bill or Marine and Coastal Area (Takutai Moana) Act 2011 has Jackson mentioned the Bill of Rights Act despite the fact that, in some instances, he refers to international human rights norms such as those contained in the Convention on the Elimination of Racial Discrimination. See for example Moana Jackson "A Primer on Making Submissions on the Foreshore and Seabed Bill" (25 May 2004) Converge <www.converge.org.nz> at 3; and Moana Jackson "A Further Primer", above n 83.

85 *AG Report on the Foreshore and Seabed Bill*, above n 44; *AG Report on the Takutai Moana Bill*, above n 44. For discussion see Butler and Butler, above n 2, at 523–527.

86 Kirkness, above n 5; Ministerial Review Panel, above n 83, at 118, 134, 137 and 139; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, above n 78; and Treaty Tribes Coalition "Submission on the Marine and Coastal Area (Takutai Moana) Bill", above n 83.

87 Kirkness, above n 5.

88 Human Rights Act 1993, s 20L.

89 Much of the focus in the Bill of Rights Act debate over the foreshore and seabed legislation has centered on s 19(1) rather than s 20. See for example *AG Report on the Foreshore and Seabed Bill*, above n 44; and *AG Report on the Takutai Moana Bill*, above n 44.

90 See Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613; and Butler and Butler, above n 2, at 1022–1027.

91 Human Rights Amendment Act 2001, s 92J. This is discussed further in Part V of this article.

In contrast to s 19(1), several cases in New Zealand have referred to s 20 with specific reference to Māori rights.[92] The two most significant cases to consider s 20 are *New Zealand Underwater Association Inc v Auckland Regional Council*,[93] and the litigation concerning the Māori fisheries settlement (the Sealords Deal), which resulted in an appeal to the Court of Appeal and a communication to the UN Human Rights Committee under the First Optional Protocol to the ICCPR.[94] Both cases are discussed by Rishworth.[95] Suffice to note here that in the former case, although decided on other grounds, the Māori plaintiffs had attempted to argue that the dumping of harbour dredgings in the Hauraki Gulf was offensive to their culture and religion, an argument that struggled to meet the high threshold of "denial" of culture and religion required by s 20.[96] In the latter case, the High Court rejected an argument that the Sealords Deal effectively terminated Māori cultural fishing rights and replaced them with uncertain benefits in breach of s 20 of the Bill of Rights Act on the basis that the limitations imposed by the deal did not amount to a denial of the right.[97] In the Court of Appeal the claim was rejected on other grounds.[98] As Rishworth points out, neither case adds anything to a claim based on the Treaty or its principles.[99] Section 20 was not decisive in these cases, or in any of the others, and there has been little substantive comment on its content and application. The two cases highlight the high threshold required by a "denial" of rights under s 20 and the low level of engagement with s 20 arguments by the courts. Section 20 is also referenced, but not substantively discussed, in several Waitangi Tribunal reports.[100]

Again, Bill of Rights Act arguments under s 20 are most conspicuous by their absence. As noted above, the foreshore and seabed legislation has not been challenged in the courts under s 20. In her

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92 See for example *Sealords Case* (HC) above n 54; *New Zealand Underwater Assoc Inc*, above n 54; *Ngati Apa Ki Te Waipounamu Trust*, above n 54; *RL v Chief Executive of the Ministry of Social Development*, above n 54; *Keelan v Peach*, above n 54; *Fenwick*, above n 54; and *Takamore*, above n 54. For discussion, see Rishworth and others, above n 1, at 401–403.

93 *New Zealand Underwater Assoc Inc*, above n 54.

94 *Sealords Case* (HC) above n 54; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords Case* (CA)]; and *Mahuika*, above n 58.

95 Rishworth "Rights to Culture, Language and Religion", above n 5.

96 *New Zealand Underwater Assoc Inc*, above n 54. For discussion see Rishworth "Rights to Culture, Language and Religion", above n 5, at 12–13.

97 *Sealords Case* (HC), above n 54.

98 *Sealords Case* (CA), above n 94. See Rishworth and others, above n 1, at 14, n 79 and 417. A complaint was subsequently lodged with the United Nations Human Rights Committee claiming, amongst other things, a breach of art 27 of the ICCPR. The Committee found no breach: see *Mahuika*, above n 58.

99 Rishworth "Rights to Culture, Language and Religion", above n 5, at 15.

100 See for example Waitangi Tribunal *Te Whanganui-a-Orotu Report* (Wai 55, 1995) at [9.12.8]; and Waitangi Tribunal *Kiwifruit Marketing Report* (Wai 449, 1995) at [4.7].

s 7 vet of the Foreshore and Seabed Bill the Attorney-General dismissed the existence of even a prima facie breach of s 20 of the Bill of Rights Act on the basis of a debateable interpretation of the UN Human Rights Committee's jurisprudence on art 27. Notably, she argued that Māori rights under s 20 were only affected to the extent that the cultural practices claimed were "dependent on the recognition of an exclusive title" which, in her view, was not the case in respect of Māori cultural practice regarding the foreshore and seabed.[101] In the s 7 vet of the Takutai Moana Bill a potential breach of s 20 of the Bill of Rights Act was not even considered, the focus being solely on whether the Bill was unjustifiably discriminatory under ss 19 and 5 of the Bill of Rights Act.[102] Nor, as Rishworth points out, was s 20 mentioned in the case that triggered the Government's foreshore and seabed policy in the first instance: *Ngati Apa v Attorney-General.*[103] Section 20 claims did not feature in arguments in support of guaranteed Māori seats on the recently merged Auckland "Super City" Council despite its arguable relevance, along with ss 12 (the right to vote), 19 and 5. The low level of Māori representation in local government is a topical issue, having been identified as a concern by the Special Rapporteur in his 2011 report on New Zealand.[104] Section 20 arguments were also noticeably absent from the 2012 case by Greenpeace and Te Rūnanga o Te Whānau-a-Apanui against the Government, relating to the grant of offshore exploratory mining permits for the Raukumara Basin to Petrobas International in June 2010, allegedly without adequate consultation with the affected iwi.[105] The Special Rapporteur expressed concern at the Government's inconsistent application of its consultation procedures with Māori in his report, recommending that those procedures accord with international standards and traditional Māori decision-making procedures and that the barriers to the effective participation of Māori in decision-making be addressed.[106]

In the latter situation the absence of a s 20 claim is understandable. The Crown Minerals Act 1991 governs the management and allocation of petroleum rights and, under s 4 of that Act, regard must be had to Treaty principles. Such statutory incorporations of the Treaty – common since the mid-1980s – provide a similar but arguably stronger ground for recognition of Māori rights (given, for example, the Treaty principle of active protection and the limiting operation of s 4 of the Bill of

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101 *AG Report on the Foreshore and Seabed Bill*, above n 44, at [36].

102 *AG Report on the Takutai Moana Bill*, above n 44.

103 *Ngati Apa v Attorney-General*, above n 79. Another case that Rishworth identifies as failing to mention s 20 of the Bill of Rights Act where mention could have been expected was the *Broadcasting Assets Case*, above n 70: see Rishworth "Rights to Culture, Language and Religion", above n 5, at 23.

104 Anaya, above n 14, at [15]–[18] and [68].

105 *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422.

106 Anaya, above n 14, at [21] and [69].

Rights Act).[107] However, the recent move to water down the protection afforded the Treaty in one such Act (s 9 of the State-Owned Enterprises Act 1986, as noted above in Part III), although ultimately unsuccessful, has emphasised the insecurity of these statutory incorporations. Section 20 will remain the primary domestic ground for action in those fields where there is no statutory reference to the Treaty or its principles.

V WHY HAS THE BILL OF RIGHTS ACT BEEN A LARGELY INEFFECTUAL TOOL FOR PROTECTING MĀORI RIGHTS AS INDIGENOUS PEOPLES?

In practice then the Bill of Rights Act has not proven itself a very effective tool for protecting Māori rights as Indigenous peoples. Why is this so?

A combination of factors work together to explain why the Bill of Rights Act has been a largely ineffectual tool for protecting Māori rights as Indigenous peoples. Some of these factors are of general relevance and are indicative of why persons outside of the criminal sphere choose not to litigate using the Bill of Rights Act: it is not just Māori who have not rushed to embrace the Bill of Rights Act's potential.[108] Other factors are more specific to the status of Māori as Indigenous peoples. I consider several of these factors below.

First, a number of commentators have suggested that the New Zealand public generally lacks awareness of, or concern for, constitutional issues and by implication the Bill of Rights Act.[109] While, as identified at the outset, the impression is that there is growing awareness of human rights issues in New Zealand, the Bill of Rights Act does not have the same status as, for example, the United States Constitution.[110] This lack of awareness or concern translates into lower levels of initiation of Bill of Rights Act claims across the board in New Zealand. However, although relevant,

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107 Since the mid-1980s a number of references have been made to the Treaty and its principles in various pieces of legislation. For example, s 9 of the State-Owned Enterprises Act 1986 provides that: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi"; s 4 of the Conservation Act 1987 provides that the Act "shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi"; and s 8 of the Resource Management Act 1991 requires the principles of the Treaty of Waitangi to be taken into account. As Rishworth notes, these clauses have had considerable impact in some instances. For discussion see Rishworth "Rights to Culture, Language and Religion", above n 5; and Rishworth and others, above n 1, at 17–18. See for example *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA); *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA); and *Te Runanga o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20 (CA).

108 Tellingly, Butler and Butler identify that outside of the criminal sphere "BORA's impact has been relatively limited": see Butler and Butler, above n 2, at 1109.

109 See for example Chen, above n 5, at 125. For discussion see Butler and Butler, above n 2, at 1117–1118.

110 Butler and Butler, above n 2, at 1116–1117.

this factor may be less of an inhibitor for Māori as for other New Zealanders. Constitutional issues have been high on the Māori agenda since the signing of the Treaty of Waitangi in 1840.[111] Further, Māori have embraced human rights-based arguments in the international arena demonstrating an awareness of, and concern for, human rights issues at the international level.[112] However, the small number of matters in which Bill of Rights Act arguments have been engaged suggests that, perhaps like the New Zealand public generally, Māori lack a broad level of familiarity with the Bill of Rights Act.

This lack of human rights awareness arguably extends to New Zealand legal practitioners as well. For example, one practitioner felt the need to remind New Zealand lawyers to advise clients on the human rights dimensions of issues and to raise them in argument before the relevant decision-makers.[113] Of relevance to Māori rights claims, his comments were prompted by concern at the apparent lack of legal advice provided to Māori clients on the human rights dimensions of the now repealed Foreshore and Seabed Act. Without such advice few clients, Māori and non-Māori alike, may be aware of the opportunity to pursue a Bill of Rights Act claim.

Second, retrospectivity is also a limiting factor. The Bill of Rights Act can only be invoked in respect of actions or omissions that occurred after it came into effect on 25 September 1990. There has been a long history of state actions and omissions that have discriminated against Māori and that have, sometimes explicitly, sought to deny Māori the ability to enjoy their culture, practise their religion and speak their language.[114] To the extent these acts occurred prior to 25 September 1990 they cannot be litigated under the Bill of Rights Act. Since 1985 the Waitangi Tribunal has had the retrospective jurisdiction to inquire into Māori Treaty grievances dating back to 1840. However, its jurisdiction is largely recommendatory[115] and, since 2 September 2008, it has not been permitted to register new historical claims or historical amendments to contemporary claims.[116]

Third, there are the largely ineffectual remedies available for breaches of ss 19 and 20 of the Bill of Rights Act. Damages may be possible for a breach of ss 19 and 20 under the Bill of Rights Act as a result of *Simpson v Attorney-General (Baigent's Case)*.[117] Andrew Butler and Petra Butler identify

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111 See Mike Smith "Interview with Moana Jackson on constitutional change" (27 September 2007) Youtube <www.youtube.com>.

112 The actions taken regarding the Foreshore and Seabed Act, discussed above, are a good example.

113 Kirkness, above n 5.

114 See for example the Tohunga Suppression Act 1907. On retrospectivity see generally Rishworth and others, above n 1, at 22.

115 Treaty of Waitangi Act 1975; and Treaty of Waitangi Amendment Act 1985. For discussion see David Williams "Honouring the Treaty of Waitangi – Are the Parties Measuring Up?" [2002] 9 Mur UEJL.

116 Treaty of Waitangi Act 1975, s 6AA as inserted by s 6 of the Treaty of Waitangi Amendment Act 2006.

117 *Baigent's Case*, above n 15.

that there have been a small number of cases overseas in which an award of damages has been made for breach of a constitutional right to equality.[118] Remedies for breach of s 19 of the Bill of Rights Act, including damages, may also be available under Part 1A of the Human Rights Act.[119] Judicial review of an administrative or judicial decision is also available where there is as an alleged breach of ss 19 or 20.[120]

However, extensive applicable statutory schemes and the operation of s 4 of the Bill of Rights Act mean there is often little scope for the Bill of Rights Act to have a positive impact on rights recognition. For example, Butler and Butler point out that the lack of litigation under s 19 of the Bill of Rights Act may be explained by the fact that "much official discrimination has the sanction of primary legislation."[121] Where the legislation is unambiguous in its intent (precluding a role for s 6 of the Bill of Rights Act), the operation of s 4 means that there is no practical point in challenging the rights violating legislation.[122] There is, Butler and Butler argue, "no real reward for a plaintiff if the conclusion reached is that the statute in issue is clear and must prevail, notwithstanding the unreasonableness of the limits it places on a BORA right."[123] Conscious of this insecurity, the Special Rapporteur recommended that the principles enshrined in the Treaty and related internationally protected human rights, which would include the ICCPR (the international instrument from which the Bill of Rights Act is derived), "be provided security within the domestic legal system of New Zealand so that these rights are not vulnerable to political discretion."[124]

There has been much debate over whether the New Zealand courts have the power to issue formal declarations that legislation is inconsistent with the Bill of Rights Act.[125] Unlike, for example, the Human Rights Act 1998 (UK), the Bill of Rights Act grants no such explicit power.[126] Recent case law has suggested, but not confirmed, that the courts may have an implied power to make declarations of inconsistency.[127] The matter has been resolved as far as s 19 claims are concerned.

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118 Butler and Butler, above n 2, at 531.

119 Human Rights Act 1993, ss 92I–92W.

120 Butler and Butler, above n 2, at 531.

121 At 1109.

122 At 1109.

123 At 1115.

124 Anaya, above n 14, at [77].

125 See Geiringer above n 90; and Butler and Butler, above n 2, at 1022–1027.

126 Human Rights Act 1998 (UK), s 4.

127 See for example *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *R v Poumako* [2000] 2 NZLR 695 (CA); *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC); *Taunoa v Attorney-General* [2006] NZSC 95; and *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1. For discussion see Geiringer, above n 90; and Butler and Butler, above n 2, at 1022–1027.

Under the Human Rights Amendment Act 2001, the Human Rights Review Tribunal and, on appeal, the courts, can issue declarations of inconsistency where legislation is in breach of s 19 of the Bill of Rights Act.[128] The Tribunal exercised this power for the first, and to date only, time in 2008 in *Howard v Attorney-General*, a case concerning New Zealand's accident compensation legislation.[129] But a declaration of inconsistency is just that: a declaration. It does not affect the validity, application or enforcement of the enactment in respect of which it is made.

Admittedly, it does spark a form of judicial–legislative dialogue.[130] Where a declaration is made, the minister responsible for the enactment must bring the fact of the declaration to the attention of the House of Representatives and report on the government's response to that declaration within 120 days.[131] But that dialogue is dependent on plaintiffs bringing a claim in the first place, a likelihood hampered by the lack of incentives to do so.[132] Given the paucity of declarations made, it is unclear to what extent the declarations might encourage legislative amendment to bring the offending legislation into conformity with the Bill of Rights Act.[133] Also, judicial–legislative dialogue is not guaranteed outside of the Human Rights Act process. Even if the courts do decide that they have the ability to issue declarations of inconsistency under the Bill of Rights Act, absent legislative amendment, there will be no obligation on the responsible minister to bring the declaration to the attention of the House of Representatives or report on the government's response.[134]

The limitations of the remedies available for legislation that violates the Bill of Rights Act likely go a long way towards explaining the unwillingness of Māori, to date, to challenge legislation on Bill of Rights Act grounds. For example, it may explain why Māori did not challenge the Foreshore and Seabed Act and have not yet challenged its replacement legislation, the Takutai Moana Act, in the Human Rights Review Tribunal or the courts for unfairly discriminating between Māori and non-Māori property rights in the foreshore and seabed. Litigation is time- and energy-consuming, not to mention expensive.[135] Iwi and hapū may have weighed those costs against the symbolic victory of an "indication" or "declaration" of the legislation's inconsistency with the Bill of Rights

128 Human Rights Amendment Act 2001, s 92J.

129 *Howard v Attorney-General (No 3)* [2008] NZHRRT 10, (2008) 8 HRNZ 378.

130 For general discussion regarding this "dialogue", see Geiringer, above n 90.

131 Human Rights Act 1993, ss 92J(2) and 92K. See Butler and Butler, above n 2, at 56.

132 Butler and Butler, above n 2, at 1114–1116.

133 Kirkness suggests, looking at the United Kingdom's experience, that "declarations are a highly effective means of encouraging changes to legislation inconsistent with human rights": see Kirkness, above n 5.

134 Butler and Butler, above n 2, at 1115.

135 At 1115.

Act.[136] If the Bill of Rights Act offered the ability to strike down legislation presumably Māori would have challenged the foreshore and seabed legislation in the courts.

Yet, this argument is countered to some degree by the time, energy and expense that iwi and hapū are willing to expend to obtain similarly symbolic victories in the international human rights system. For example, representatives of Te Rūnanga o Ngāi Tahu and the Treaty Tribes Coalition travelled to New York in 2004 to bring the discriminatory impact of the Foreshore and Seabed Bill to the attention of the United Nations Permanent Forum on Indigenous Issues. The Permanent Forum has no specific mandate to hear complaints regarding state violations of Indigenous peoples' rights but in practice it does issue recommendations, and on occasion it has conducted its own investigations regarding such violations.[137]

In July 2004, the Taranaki Māori Trust Board, Te Rūnanga O Ngāi Tahu and the Treaty Tribes Coalition requested that the United Nations Committee on the Elimination of Racial Discrimination (the CERD Committee), the United Nations body responsible for monitoring implementation of the Convention on the Elimination of all Forms of Racial Discrimination, consider the racially discriminatory impact of the Foreshore and Seabed Bill. The CERD Committee found that the Foreshore and Seabed Act discriminated against Māori and requested that New Zealand resume dialogue with Māori, closely monitor the Act's implementation and mitigate its discriminatory effects.[138] Yet, beyond its ability to "name and shame" New Zealand during its periodic reports under the Convention, the CERD Committee itself has no power to enforce its recommendations. Nor does the Special Rapporteur, who has issued recommendations concerning both the Foreshore and Seabed Act and Takutai Moana Bill.[139]

While the time and financial costs involved in pursuing claims within the international human rights system may be less than in the domestic arena, they can still be significant.[140] However, the

136 Rawiri Taonui suggested that Māori opposition to the Takutai Moana Bill was less vocal than it was in respect of the Foreshore and Seabed legislation because Māori were still in shock at the Māori Party's support for the Takutai Moana Bill: see Taonui, above n 83.

137 *Establishment of a Permanent Forum on Indigenous Issues* ESC Res 2000/22 E/Res/2000/22 (2000). See for example the United Nations Permanent Forum on Indigenous Issues' recommendations to address human rights violations experienced by the Indigenous peoples of the Chittagong Hill Tracts: Permanent Forum on Indigenous Issues *Report on the Tenth Session* E/2011/43–E/C19/2011/14 (2011) at [102]; and United Nations Permanent Forum on Indigenous Issues *Summary and Recommendations of the Report of the Mission of the Permanent Forum on Indigenous Issues to Paraguay* E/C19/2010/5 (2010).

138 *Decision 1 (66) on the New Zealand Foreshore and Seabed Act 2004* CERD/C/DEC/NZL/1 (2005) at [7]–[9]; see Butler and Butler, above n 2, at 526.

139 Kirkness, above n 5; Stavenhagen, above n 80; and Anaya, above n 14.

140 See for example International Service for Human Rights "Human Rights Monitor Quarterly" (Issue 3, 2011) at 31–32.

evidential burden will be lower and, despite being situated half a globe away, perversely these mechanisms may be more accessible to (some) Māori. They also have the added benefit of bringing Māori rights concerns to a wider audience.

A key reason why Māori may choose to pursue symbolic victories in the international arena over symbolic victories domestically is because the chance of securing a favourable finding is (at least perceived as) greater in the international arena. It is not a given that the New Zealand courts will agree that unfair discriminatory legislation is in fact unjustifiably discriminatory under the Bill of Rights Act, a point well illustrated by the majority decision of the New Zealand Court of Appeal in the same sex marriage case *Quilter v Attorney-General.*[141] The failure of successive Attorney-Generals to find either the Foreshore and Seabed Bill or the Takutai Moana Bill in breach of the Bill of Rights Act generates little further faith in the Bill of Rights Act process. This is especially so given that the Foreshore and Seabed Act was found to be discriminatory by both the CERD Committee and the former Special Rapporteur. As noted above, after having examined the Takutai Moana Bill the current Special Rapporteur also noted areas of concern, including an aspect of the Bill that he considered was inconsistent with the *Declaration on the Rights of Indigenous Peoples.*[142]

Political factors are likely also at play. For example, Māori Party support for the Takutai Moana Act may affect claims that the legislation is in breach of ss 19 and 20 of the Bill of Rights Act in that the Party's support suggests "Māori" support, or at least that the legislation is a workable compromise. Because the Act was a highly politically charged legislative response to a decision of the courts, Māori are no doubt conscious that the courts are likely to be unwilling to wade in again.

In addition, not one of the claims made under s 20 of the Bill of Rights Act has been the basis for a successful finding in the New Zealand courts to date. While this may say more about the merits of the respective claims brought before the courts so far, and the manner of their argument, the longer the Bill of Rights Act is in place without a successful precedent for establishing a denial of culture under s 20, the more detached Māori may view their interests from the provision. On the whole, the courts have not been very radical in their approach to interpretation and application of the Bill of Rights Act, bar perhaps their early development of remedies for Bill of Rights Act breaches.[143] There are also hints of a more conservative approach in recent years illustrated, for example, in the courts' unwillingness to explicitly assert their power to make declarations of inconsistency under the Bill of Rights Act.[144]

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141 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). For discussion see Butler and Butler, above n 2, at 490–495 and 1109–1110.

142 Anaya, above n 14, at [56].

143 See Butler and Butler, above n 2, at 1110–1112.

144 See Butler and Butler, above n 2, at 1111.

In contrast, human rights bodies in the international arena have produced some progressive jurisprudence concerning indigenous rights. The Human Rights Committee, the CERD Committee, the Human Rights Council (through its universal periodic review) and the Committee on Economic, Social and Cultural Rights, which monitors state compliance with the International Covenant on Economic, Social and Cultural Rights, have demonstrated "strong support for indigenous peoples' land, political and cultural rights and international instruments that promote indigenous peoples' rights."[145] The CERD Committee, in particular, has shown itself to be particularly progressive in the field.[146]

However, bringing a claim in the international arena is, of course, not a guarantee that it will be a success. The success of individual claims of violations under art 27 of the ICCPR (through its First Optional Protocol), for example, has been mixed.[147] Historically, also, New Zealand has not responded well to international criticism directed at its treatment of Māori,[148] emphasising again the symbolic nature of any "victory". Yet, while the government cannot be compelled to implement the recommendations and findings of international human rights bodies, it must be prepared to answer questions on its non-compliance before international fora (and domestically when raised by civil society actors). The government has also shown recent signs of greater receptivity to international criticism of its treatment of Māori,[149] although whether this translates into the actual implementation of the recommendations and observations of international bodies remains to be seen.

A fourth factor that may help to explain why the Bill of Rights Act has been such an ineffective tool for protecting Māori rights is the fact that, while the Bill of Rights Act has the ability to advance aspects of the self-determination norms, the Bill of Rights Act is also capable of suppressing them. This has led to a sense of distrust amongst some Māori of the Bill of Rights Act. Claire Charters, for example, warns Māori to "beware the Bill of Rights Act!"[150] She argues that the Bill of Rights Act could place obligations on a number of pan-Māori, iwi and hapū organisations and individuals through the application of ss 3 and 6. She identifies the potential for a clash between

145 Fleur Adcock and Claire Charters "Indigenous Peoples Under International Law" [2009] 7 NZYBIL 308 at 314. See also United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: NEW ZEALAND*, above n 80.

146 Not to mention the work of the other treaty monitoring bodies, such as the United Nations Committee on the Rights of the Child and the United Nations Committee against Torture, who have also engaged on indigenous rights issues in the course of their work: see Adcock and Charters, above n 145, at 308.

147 See for example *Mahuika*, above n 58.

148 See for example Deputy Prime Minister Michael Cullen "Response to UN Special Rapporteur Report" (2006) New Zealand Government <www.beehive.govt.nz>.

149 For example, New Zealand took a constructive approach to the United Nations Human Rights Council's universal periodic review in 2009: see Adcock and Charters, above n 145, at 310.

150 Charters "Māori, Beware", above n 5.

the exercise of a Treaty right (such as the practice of tikanga) in accordance with a statutory recognition of Treaty principles by a Māori organisation or individual, and the enjoyment of Bill of Rights Act rights by other Māori organisations and individuals. She argues that the courts are ill-equipped to balance appropriately the Bill of Rights Act rights, Treaty rights, tikanga and international law issues likely to arise in such cases, suggesting that the issues are best resolved "as a policy exercise with the participation of Maori."[151] Charters' caution reminds us that in those situations where tikanga, the Treaty and indigenous rights should or can be taken into account in a Bill of Rights Act analysis, we need to question whether the courts are the appropriate body, with the appropriate skill set, to undertake that assessment. For in the very act of deciding upon the parameters of the exercise of tikanga, the Treaty and indigenous rights, a court will be encroaching upon the self-determination of the relevant iwi, hapū or group.[152]

The Bill of Rights Act may also provide a basis for challenging Māori enjoyment of the cultural integrity category of norms. Rishworth identifies several possible examples. He raises the possibility of a challenge under s 13 of the Bill of Rights Act (which affirms the right to freedom of thought, conscience, religion and belief) to the practice of incorporating "Māori ceremonial protocol and culture", which "is infused with both Christian and traditional Māori religious practices", into government and other public bodies' public proceedings. He considers this a serious issue requiring attention.[153] Rishworth also raises the possibility of a challenge under s 12 (the right to vote) to the dedicated Māori parliamentary seats, although he does not consider s 12 the decisive basis for debating the desirability of such representation.[154] Further, Rishworth flags the issue of whether "legislation or policies designed to advance Māori interests might be conceived as discriminatory in relation to other racial groups whose interests are not similarly advanced" under s 19 of the Bill of Rights Act.[155] This challenge has already been signalled above in Part III in discussion of affirmative action measures under s 19(2) of the Bill of Rights Act. It concerns the confusion of temporary affirmative action measures, with their integrationist goal, and permanent measures to advance the rights of Indigenous peoples as distinct *peoples*. The former measures are justified for Māori (as they are for any targeted group) under the Bill of Rights Act provided they meet the requirements of s 19(2) (or arguably where they are justified under ss 19(1) or 5). The latter are measures designed to recognise the self-determination norms, which have a degree of imperfect

151 Charters "BORA and Māori", above n 5, at 461.

152 Charters "BORA and Māori", above n 5, at 461–462.

153 Rishworth and others, above n 1, at 303–306.

154 At 271–274.

155 Rishworth "Rights to Culture, Language and Religion", above n 5, at 19–21. As noted above, affirmative action measures favouring Māori were considered for consistency with s 73(1) of the Human Rights Act 1993 by the Complaints Review Tribunal in *Amaltal*, above n 76.

recognition under the Bill of Rights Act but are affirmed in the Treaty and in international instruments.[156]

Similarly, s 5 of the Bill of Rights Act may act as a double-edged sword for Māori. While it is an important vehicle for including Treaty considerations in analyses of the Bill of Rights Act, its deference to a presumed community standard has the ability to further marginalise "minorities" such as Māori. The concern is that assertions that decisions are based on an inferred community standard acts to "simply mask in many cases the Judge's preference."[157] It is a reminder of the unconscious ease with which alternative minority views may be sidelined in s 5 analyses.[158]

Underlying this last factor is the concern that I view as at the heart of the Bill of Rights Act's ineffectiveness in the protection of Māori rights as Indigenous peoples. It was signalled at the outset and was considered in particular in Parts III and IV. It is this: Māori have not embraced the (admittedly limited) rights protection offered by the Bill of Rights Act because they are not reflected in it. Māori as individual citizens of New Zealand are reflected in the Bill of Rights Act; the rights of all individuals are clearly laid out. But the Bill of Rights Act was not designed to recognise Māori as Indigenous peoples. As a result, the affirmations of the rights of Māori as Indigenous peoples that can be drawn from the Bill of Rights Act are piecemeal and incomplete. Some aspects of the self-determination norms are explicitly reflected in the Bill of Rights Act, others are arguably implicit in its terms. But core self-determination norms – the right to self-government, the right to lands and resources, and the right to social welfare and development – are left to be incorporated via interpretation rather than through an explicit acknowledgment. Even in that section where Māori cultural rights are afforded their clearest recognition – s 20 – the rights are framed as "minority rights" relegating Māori (in language at least) to simply another New Zealand minority ethnic group.

As a result, the Treaty remains the core basis for assertions of Māori rights as Indigenous peoples,[159] with the international human rights framework the second choice.[160] Unlike the Bill of

156 See for example, the *Declaration on the Rights of Indigenous Peoples*, above n 27.

157 Elias, above n 13, at 23 discussing Ronald Dworkin "The Judge's New Role: Should Personal Convictions Count?" (2003) JIJC at 4.

158 It is notable that the affirmation of aboriginal and treaty rights in Canada's Constitution Act is not expressly subject to the Canadian Charter of Rights and Freedoms' reasonable limits provision: see Rishworth and others, above n 1, at 17, n 99.

159 Rishworth "Rights to Culture, Language and Religion", above n 5, at 24. See generally Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

160 While the international instruments could also be criticised for failing to recognise Indigenous peoples as peoples, the common art 1 guarantees of the self-determination of all peoples in the ICCPR and the ICESCR and the *Declaration on the Rights of Indigenous Peoples*, above n 27, explicit affirmation of Indigenous peoples' right to self-determination in art 3 counter this argument.

Rights Act, the Treaty acknowledges Māori as peoples. The Treaty's Māori language text explicitly acknowledges the self-determination of iwi and hapū over their tangible and intangible taonga (treasures), including their lands and resources, language and culture. Further, it contains no reasonable limits provision. Thus, it is understandable that for the most part, Māori have sought domestic recognition of their rights as Indigenous peoples through the Waitangi Tribunal, direct negotiation with the Crown for Treaty breaches and, in those instances where statutory references are made to the Treaty or its principles, on the basis of those statutory references. These avenues are also flawed. For example, the orthodox legal position is that the Treaty requires incorporation into legislation in order to be a source of legally enforceable rights; it is not a source in itself.[161] Accordingly, the potential to pursue Treaty claims in the courts is dependent on statutory incorporation of a reference to the Treaty, a trend governments have moved away from in recent years. The Waitangi Tribunal's powers are, as noted above, for the most part recommendatory only. But where the government does move to implement the Tribunal's recommendations, tangible protection of Māori rights as Indigenous peoples can be secured.[162] Further, the direct Treaty settlement negotiations process is heavily weighted towards the Crown.[163] It says something of the Bill of Rights Act's flaws regarding the protection of Māori rights as Indigenous peoples that these are the preferred avenues for protection.

VI CONCLUSION

In this paper I have made a distinction between the Bill of Rights Act's protection of human rights generally, the benefits of which Māori enjoy alongside all other New Zealanders, and the Bill of Rights Act's protection of the rights of Māori as Indigenous peoples. I have considered the Bill of Rights Act's ability to protect Māori rights as Indigenous peoples by analysing the extent to which the Bill of Rights Act offers protection to the self-determination norms. I argue that the Bill of Rights Act does have the potential to recognise, in a limited and piecemeal way, aspects of Māori rights as Indigenous peoples. It does this primarily through its explicit affirmations of the right to freedom from discrimination in s 19(1) and the right of minorities to enjoy their culture, to profess and practise their religion, or to use their language in s 20. These affirmations accord a degree of protection to the norms of non-discrimination and cultural integrity. The Bill of Rights Act does not explicitly affirm a right of Māori to self-governance, to their lands and resources, or to social welfare and development, three core components of the right to self-determination. I argue that there

161 *Te Heuheu Tukino v Attorney-General* [1941] NZLR 590 (PC). Although the orthodox position still holds, note the impact of later cases including *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); and the *Huakina Case*, above n 72.

162 For example, the Waitangi Tribunal's Motunui–Waitara report helped to secure cultural redress for pollution of Te Ati Awa's natural resources by establishing a facility for the land based disposal of waste: see Waitangi Tribunal *Motunui–Waitara Report* (Wai 6, 1983).

163 See for example Anaya, above n 14.

is scope to protect aspects of these rights using ss 19(1) and 20 and the justified limitations provision in s 5 but that the lack of explicit affirmation renders that protection vulnerable.

I have also assessed the extent to which the Bill of Rights Act's potential for protecting Māori rights as Indigenous peoples has been realised in practice. I argue that, thus far, the Bill of Rights Act has not demonstrated itself as an effective tool for protecting the rights of Māori as Indigenous peoples. In my view, arguments under ss 19 and 20 of the Bill of Rights Act for the protection of Māori rights as Indigenous peoples are most noticeable for their absence.

In the last part of this paper I have offered some thoughts as to why this might be so. I argue that a combination of factors are at play: the lack of awareness of, and concern for, Bill of Rights Act issues amongst the general public (including Māori) and legal practitioners; the Bill of Rights Act's lack of retrospectivity; the largely ineffectual remedies available where a civil Bill of Rights Act breach is found; and the distrust that the Bill of Rights Act engenders in Māori given its potential ability to suppress the self-determination norms as much as it protects them. Ultimately, though, I attribute the lukewarm reaction of most Māori to the Bill of Rights Act to the Bill of Rights Act's failure to recognise Māori as Indigenous peoples. For this reason Māori continue to rely on the Treaty – which explicitly acknowledges iwi Māori as peoples – as the foundation for their rights claims.

Yet, I am of the view that the Bill of Rights Act should not be written off. As the potential, if somewhat limited, of the Bill of Rights Act to protect Māori rights demonstrates, the executive, legislature, judiciary and Māori have all missed opportunities to draw on the Bill of Rights Act in support of Māori rights. For all its limitations, the Bill of Rights Act – like the international human rights framework that Māori have demonstrated a far greater willingness to call upon – is another (imperfect) tool for protecting Māori rights as Indigenous peoples. At a time when these rights remain the subject of interference and incursion, all tools should be brought to hand.

This is not to say that Māori should be complacent about the flaws in the Bill of Rights Act and the lack of recognition it affords them as Indigenous peoples. There is an opportunity for New Zealand's constitutional framework – of which the Bill of Rights Act is one part – to be rethought in both the Government's and the iwi-driven constitutional reviews.[164] It will be interesting to see how Māori view the Bill of Rights Act (if it is of interest at all) in those discussions.

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164 The Bill of Rights Act was on the agenda of the Government's constitutional review: see Cabinet Paper, above n 35. It is noticeably absent from the instruments on which the parallel iwi-driven independent Constitutional Transformation Working Group's (Matike Mai Aotearoa) review is based. Instead that review is to be based on Māori *kawa* (protocol) and *tikanga* (custom), the 1835 Declaration of Independence and the Treaty: see The Working Group for Constitutional Transformation "Primer Number One" (April 2012) <www.converge.org.nz>.