

## TE TIRITI O WAITANGI, THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, AND CONSTITUTIONAL ISSUES

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*Te rangi e tū nei, te papa e takoto nei*

*Waitemata Moana, e piata nei, tēnā koe*

*Ngā Maunga whakahī, tēnā koutou*

*Orākei marae e hora, tēnā koe Tumutumuwhenua whare, e tū, e tū, e tū*

*Ngā Hapū: Ngaoho, Te Tao-u, Te Uri-ngutu tēnā koutou e manaaki nei i a  
tātou, tēnā koutou.*

*E te uri o ēnei hapū, e Sharon tēnā koe i tō whakamana mai i te kaupapa nei.*

*E ngā iwi o te Ao, o te motu ki roto i tō tātou whare, ā tinana, ā rorohiko,  
tēnā tātou.*

*E ngā mana whakawā o ngā kōti katoa o Aotearoa, e Helen, e Susan, e Caren,  
e te matua e Heemi, tēnā koutou.*

*E rau rangatira mā, kia ora.*

### ***1 Introduction***

Te Tiriti o Waitangi/the Treaty of Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration)<sup>1</sup> and constitutional issues is — ahem — a big topic, let alone for 30 minutes. Māori have been seeking to uphold te Tiriti o Waitangi, and constitutional change, for 180 years.<sup>2</sup>

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1 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

2 See generally Ranganui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin Books, Auckland, 2004) and Aroha Harris *Hīkoi: Forty Years of Māori Protest* (Huia Publishers, Wellington, 2004).

In the hopes of making it more relevant to you, as an audience of predominantly judges from around the globe, I want to start with the international issues before moving to a domestic — Aotearoa/New Zealand — focus. I hope to highlight issues that are especially important for adjudication and, of course, women, including women judges.

As the audience will also have different levels of knowledge of New Zealand law and Indigenous peoples' legal issues, I hope to be sufficiently descriptive so all can follow but also to be sufficiently substantive to be of interest to our domestic audience too. Nonetheless, I am aware — and my much-loved mother always told me — you can't please everybody all of the time.

My focus is on realising tino rangatiratanga/mana motuhake for Māori under te Tiriti o Waitangi, sometimes understood as New Zealand's founding constitutional document,<sup>3</sup> and Indigenous peoples' self-determination in the UN Declaration. Basically, then, I am interested in the ways in which states recognise Māori authority, often expressed through the practice and application of tikanga Māori, or Māori law. To achieve greater Indigenous peoples' self-determination, at least to the extent required by te Tiriti o Waitangi and the UN Declaration, would require constitutional change. So, the topics overlap.

I have three foci:

1. adjudication and interpretation of the UN Declaration, including our right to self-determination, and Indigenous women's rights at the international level;
2. recent recommendations for constitutional change in Aotearoa/New Zealand based on the UN Declaration and te Tiriti o Waitangi; and
3. how New Zealand courts, and possibly other state courts, should address Indigenous authority and sovereignty.

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3 For example, Sir Robin Cooke when he was President of the Court of Appeal described the Treaty as "simply the most important document in New Zealand's history." R B Cooke *Introduction – Special Waitangi Edition* (1990) 14 NZULR 1.

If there are any overarching theses to my presentation, it would be that:

1. Judges have an important role in interpreting Indigenous peoples' rights under the UN Declaration and in te Tiriti consistently with Indigenous peoples' interpretations — i.e. not deferring exclusively to state interpretations without reference to Indigenous peoples' voices.
2. Judges need not feel they are undermining the state or their own authority when recognising and realising Indigenous peoples' self-determination, or tino rangatiratanga, or mana motuhake.

## *II Indigenous Peoples' Rights in the UN Declaration*

So, first, Indigenous peoples' rights in the UN Declaration and, especially, our right to self-determination under international law.

The primary article in the UN Declaration is art 3, which sets out Indigenous peoples' right to self-determination. All commentary, and Indigenous peoples ourselves, stress this point of self-determination as the central and most important right in the UN Declaration.

Despite four states opposing the General Assembly's adoption of the UN Declaration in 2007, including New Zealand, all four have since changed their position, meaning no state opposes it. Some states are incorporating the UN Declaration into domestic law through legislation, policy and judicial decision. British Columbia and the Canadian Federal Parliament have both done this<sup>4</sup>. As I discuss, the New Zealand government has requested advice on how to realise the UN Declaration.

Prior to the UN Declaration, self-determination had been understood, during the decolonisation era, to permit, amongst options, full sovereignty and independence if the relevant group so chose. In practice, many Indigenous peoples were excluded from that process because the colonial or dominant state occupied our territories.

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4 Declaration on the Rights of Indigenous Peoples Act SBC 2019 c 44; and United Nations Declaration on the Rights of Indigenous Peoples Act SC 2021 c 14. The Bill received Royal Assent on 21 June 2021.

In other words, only peoples who were regulated by a coloniser located outside of the peoples' territories were entitled to self-determination. Think Africa, with colonial governments ruling from afar.

There is some constructive ambiguity about the meaning of self-determination for Indigenous peoples. Indigenous peoples argued for the full gamut of rights under the heading of self-determination — and hence the UN Declaration includes in art 3 the express right to self-determination — but also accepted language that provides for ideas of pluralism and authority with and alongside a state, concepts such self-governance and autonomy and the requirement of Indigenous peoples' free, prior and informed consent. This reflects Indigenous peoples' own varied demands of self-determination, from sovereign independence, to rights to authority along state governance, to more inclusion in state governance and protection of our rights.

The types of practices that fall within the practice of self-determination across the globe are thus varied, and will be the subject of a soon-to-be-released report from the United Nations Expert Mechanism on the Rights of Indigenous Peoples.<sup>5</sup>

They range from almost full sovereignty, akin to that of a state, in Greenland for example, to pluralism, which we see in the United States — recently affirmed, profoundly so, in the United States Supreme Court's decision in *McGirt v Oklahoma*.<sup>6</sup> That case sees most of Tulsa, Oklahoma — a city with a population of approximately 1.5 million — within American Indian jurisdiction contrary to an understanding to the contrary and more than a century of state and federal government regulation. In Canada, First Nations, federal and provincial governments have been undertaking contemporary treaty negotiations for some time. In addition to recognising territorial rights, First Nations' exclusive jurisdiction over some matters is formally set out, with shared jurisdiction over other issues, and some federal and provincial

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5 Office of the United Nations High Commissioner for Human Rights "Expert mechanism on the rights of indigenous peoples: call for submissions" <[www.ohchr.org](http://www.ohchr.org)>. A draft of the report is now available: *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination: Draft report of the Expert Mechanism on the Rights of Indigenous Peoples* UN Doc A/HRC/EMPRIP/2021/2 (3 May 2021).

6 *McGirt v Oklahoma* 140 US 2452 (2020).

legal jurisdiction too. Examples abound, from the Sami Parliaments in Finland, Norway and Sweden, to the extensive autonomy practiced by the Kuna in Kuna Yala, Panama, to the recognised authority of Indigenous peoples' law in many African and Pacific nations. Indeed, New Zealand stands out — alongside Australia — as formally still rejecting Indigenous peoples' autonomous authority. This is a hangover from the British, especially Diceyan idea of sovereignty, which is now debunked by some of the United Kingdom's most highly regarded public lawyers.

From an adjudication perspective, the issue that has arisen is *who* is now interpreting what self-determination means both internationally and in respective jurisdictions, and the courts are part of that. Unfortunately, as efforts to realise the UN Declaration increase, so too has state — including judicial — jurisdiction to interpret what it means, and to the exclusion of Indigenous peoples' voices.

On the one hand, there is the issue of the proliferation of international bodies with authority to interpret the UN Declaration. This is a widely commented upon phenomena across international law and institutions generally.<sup>7</sup> In the Indigenous context, there are a number of bodies actively interpreting the UN Declaration, for example, United Nations human rights treaty bodies, specialist bodies focused on Indigenous peoples and their rights, including the United Nations Special Rapporteur on the Rights of Indigenous Peoples,<sup>8</sup> and the Human Rights Council.<sup>9</sup>

At the domestic level, courts have an interpretative mandate albeit to greater and lesser degrees depending on the state's approach to international law. Just as tribunals do — such as the Waitangi Tribunal and the Human Rights Commission in the case of Aotearoa/New Zealand. Governments and legislatures also interpret the

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7 See generally Martti Koskenniemi and Päivi Leino "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *Leiden Journal of International Law* 553.

8 Office of the United Nations High Commissioner of Human Rights "Special Rapporteur on the rights of indigenous peoples" <[www.ohchr.org](http://www.ohchr.org)>.

9 Office of the United Nations High Commissioner of Human Rights "OHCHR and indigenous peoples" United Nations Human Rights Council <[www.ohchr.org](http://www.ohchr.org)>.

UN Declaration when implementing policy and legislation giving effect to the UN Declaration.

Broadly, one issue is that different institutions might interpret the UN Declaration differently. Incoherence is possible. There is also the question of forum-shopping — for both states and Indigenous peoples to seek determinations most favourable to them by the institution most favourable to their interpretation.

For me, however, the most worrying issue is one of “adjudication”, broadly understood: the irony that it is principally international and state institutions that have the authority to interpret the UN Declaration — we don’t have self-determination over the interpretation over our own self-determination!

In my view, state judicial officers and other decision makers should give spaces for Indigenous peoples’ voices before making a determination and, possibly, even defer to the interpretation preferred by the relevant Indigenous peoples. This might require remodelled rules of evidence and the development of new doctrine around courts’ jurisdiction over Indigenous matters. At the very least, domestic courts might proactively review governmental and legislative decisions that are inconsistent with Indigenous peoples’ own understandings of our rights under the UN Declaration, arguably hinted at in the Supreme Court’s decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*.<sup>10</sup> Here, the courts have a role in protecting the rights of Indigenous peoples: to dull the impact of non-Indigenous majoritarian institutions determining our rights in a way that preferences the majority.

### ***A Indigenous Women, Advocacy on the International Stage***

Sadly, during the negotiations on the UN Declaration, the possibility that collective rights might permit Indigenous peoples to discriminate against Indigenous women was

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10 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] NZLR 116.

a preoccupation — an infuriating one at that — of the United Kingdom.<sup>11</sup> In fact, it is colonisation, and colonial power, that has been the primary source of harm to Indigenous women, with horrific consequences today.

In Aotearoa/New Zealand, Māori women comprise more than 60 per cent of women's prisons.<sup>12</sup> We are more likely to die earlier than Pākehā women,<sup>13</sup> are poorer,<sup>14</sup> suffer more domestic violence,<sup>15</sup> and so on. These issues are not exclusive to us here in Aotearoa/New Zealand, as reports into missing and disappeared Indigenous women in North America highlight so tragically,<sup>16</sup> as do Indigenous women's experiences of "development" in Africa, Latin America, Asia and the Pacific. This is not to say that Indigenous peoples don't need to be vigilant in supporting and protecting our women, but Indigenous peoples, especially Indigenous women, are very cautious of state interference given how we fare under the state.

Despite this, or maybe because of this, Indigenous women have been central to the Indigenous peoples' movement on the international stage, especially in "norm-making" activity at the UN, such as the development of the UN Declaration. We have also brought our specific concerns to the highest bodies of the UN. We have fulfilled some of the highest positions at the UN for Indigenous representatives.

One 'earlier' case of Indigenous women's voices making an impact, but still important, is the 1995 Beijing Declaration of Indigenous Women, critical of the Beijing Declaration and Plan of Action.<sup>17</sup> Reflecting broader divergences of opinions, Indigenous women

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11 See notes on file with author.

12 Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (9 June 2019) at 23.

13 Stats NZ "Growth in life expectancy slows" (20 April 2021) <[www.stats.govt.nz](http://www.stats.govt.nz)>.

14 See, for example, *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (Welfare Expert Advisory Group, February 2019) at 42-43.

15 Leigh-Marama McLachlan "'Every day I was beaten' - Māori women three times more likely to be killed by partner" (2 March 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

16 National Inquiry into Missing and Murdered Indigenous Women and Girls *Reclaiming Power and Place: Executive Summary of the The Final Report: National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019).

17 Indigenous Peoples Council on Biocolonialism "Beijing Declaration of Indigenous Women" (7 September 1995) <[www.ipcb.org](http://www.ipcb.org)>.

made a point of highlighting what they saw as their specific concerns, potentially different from other women's concerns, including:

1. the need for protection of mother earth;
2. our role as holders of Indigenous knowledge;
3. a rejection of colonisation;
4. concern about neo-liberal development;
5. support for Indigenous peoples' self-determination; and
6. calls for practices discriminating and harming women to be eradicated.

There is, however, also concern about how the international human rights system, and domestic judges, might interpret Indigenous women's rights under, for example, the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>18</sup> It requires states to take measures to modify or abolish customs and practices that discriminate against women. The claim is that the paradigm here is too Western and liberal, namely requiring the state to come in and "save" women from the harms caused by our own people.

Again a question of interpretation arises. It will be very important for any judicial body to take into account and also potentially defer to Indigenous peoples' authority over these matters and/or the cultural and other rationale for the practices. That's not to say that — where they exist — discriminatory practices ought not to be abolished, but to make a point about which legal system should determine whether the practice, law or regulation constitutes discrimination taking into account factors germane to that system and the associated culture.

Interestingly, there is a strong movement by Indigenous women for the CEDAW Committee, which oversees states' compliance with CEDAW, to adopt a general recommendation on Indigenous women. It is described as an attempt for Indigenous women to realise their own vision of Indigenous women's rights. I am relatively

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18 Convention on the Elimination of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981).



confident that this would include concern about discrimination under colonisation, and also support for Indigenous peoples' self-determination, while also requiring equality for Indigenous women, consistently with our own Beijing Declaration.

### ***III Constitutional Reform in Aotearoa/New Zealand: Obligations under te Tiriti o Waitangi and the UN Declaration***

Recognition of Māori self-determination has been a hot topic of discussion this week here in Aotearoa/New Zealand as the National Party — centre-right-leaning party — called a report, *He Puapua*, from the government working group on a plan to realise the UN Declaration “separatist” and divisive.<sup>19</sup> Just for disclosure purposes, I chaired that group.

Calls for constitutional reform by Māori have a long history dating back to initial colonisation. As the British Crown increasingly asserted authority over Māori and the territories of Aotearoa/New Zealand, Māori fought back to protect both authority and lands and territories.

Today, most Māori claims centre on, or are framed as, breaches of te Tiriti o Waitangi. The Treaty is written in English and in te reo Māori, and the translation of the English into te reo Māori is not the same. The English text speaks of Māori consent to the Crown's sovereignty and protection of Māori rights including to lands, territories and resources.<sup>20</sup> Te reo text refers to Crown governance and the retention by Māori of our tino rangatiratanga and treasures, including all our lands, territories and resources.<sup>21</sup>

Recent historically-based scholarship of the English text suggests that the British intended that any cession of sovereignty to the Crown was only with respect to

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19 Judith Collins “Leader’s speech to 2021 Northern Regional Convention” (1 May 2021) National <[www.national.org.nz](http://www.national.org.nz)>; and Luke Malpass “Judith Collins issues race relations warning, says Labour planning ‘two systems by stealth’” (2 May 2021) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>. See Declaration Working Group *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Wellington, November 2019) at ii.

20 Treaty of Waitangi 1840, arts 1–2.

21 Te Tiriti o Waitangi 1840, arts 1–2.

authority to govern settlers,<sup>22</sup> so perhaps there is little difference in fact between the texts. Government publications also maintain, as do historians, that oral representations at the time were consistent with this: Māori would retain their self-determination.<sup>23</sup> Clearly, in fact, over time the Crown imposed its own governance and the peculiar type of absolute sovereignty consistent with the British legal tradition. This allows for no recognition of authority separate from the Crown, at least not formally.

Jumping forward, and over much significant history in between, there is movement for constitutional change at the moment, in part to finally realise the guarantees in te Tiriti o Waitangi and, now, the UN Declaration.

In this context, it is worth noting for our international friends that New Zealand does not have a “higher-law” constitution, and we do not have one legal document setting out New Zealand’s constitution. In effect, this means, from a Māori perspective, and minorities’ perspective, Parliament — giving effect to the majority views — can easily trample on the rights of Māori. Unless there is some textual ambiguity, the courts have no authority to prevent this beyond, perhaps, a declaration of inconsistency with our New Zealand Bill of Rights Act 1990.<sup>24</sup>

On the other hand, what few in our domestic context appreciate is that New Zealand is an outlier in this respect, in not subjecting legislation to judicial review for consistency with higher constitutional norms. In other words, that our constitution permits the majority to breach human rights, and Indigenous rights. Australia is also an outlier in that its Constitution does not expressly recognise rights, although they can be read in, but it does permit judicial review of the legislature. And while the United Kingdom is similar to Aotearoa/New Zealand, formally, there are many stronger human rights protections built into its system.

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22 Ned Fletcher “A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi” (PhD Thesis, University of Auckland, 2014) at iii–iv.

23 See, for example, Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at xxii.

24 New Zealand Bill of Rights Act 1990, ss 4 and 7.

So, back to Aotearoa/New Zealand. Recent developments in the direction of constitutional reform include, for example, a report commissioned by the iwi chairs' forum to realise te Tiriti o Waitangi, which was the output of 252 hui, or meetings, between Māori.<sup>25</sup> The *Matike Mai* Report called for a new governmental — pluralist — structure with six possible options, all requiring shared authority between Māori and the state, albeit in different ways.<sup>26</sup>

In 2019, in response to ongoing pressure at the domestic and international level, the Government established the Declaration Working Group (DWG) to advise the Government on a plan of action on how it might realise the UN Declaration. The UN's Expert Mechanism on the Rights of Indigenous Peoples came to Aotearoa/New Zealand to support that process. In the report, the DWG recommends a process for engagement and then provide a "line of sight" as to the forms that might take.<sup>27</sup> The DWG was informed as much by te Tiriti o Waitangi as the UN Declaration, given the overlap in content.

On the basis that New Zealand provides comparatively well for Māori participation in state governance, the DWG focused more on establishing spheres of Māori authority, albeit within the New Zealand state. It put forward some options under an umbrella of Māori governance over some matters, shared governance over others and Crown governance over others.<sup>28</sup> These approaches would require constitutional change given Aotearoa's strict compliance with a model of authority that does not permit authority or sovereignty being exercised by any body other than the state, with Parliament at the pinnacle. We also made recommendations for the return of much land, especially from the Crown estate, for Māori control of Māori culture and for equity between Māori and non-Māori.<sup>29</sup>

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25 Network Waitangi Ōtautahi "Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation" <[www.nwo.org.nz](http://www.nwo.org.nz)>.

26 The Report of Matike Mai Aotearoa - The Independent Working Group on Cultural Transformation (25 January 2016).

27 *He Puapua*, above n 19, at ii.

28 At 11.

29 At 65–91.

The DWG’s report was released as a result of an Official Information Act 1982 request rather than proactive release by the Government, which is unfortunate. As mentioned, the National Party has described it as separatist and divisive — but we might expect that is because it has used the “race card” before when running low in the polls. The contrary is in fact true: that realisation of te Tiriti and the UN Declaration is necessary to achieve unity. Unity requires equality and until we can achieve that for Māori, as the political partner with the Crown in establishing the New Zealand state, unity will be elusive.

My sense is that we are on a path from which there is no turning back, and constitutional transformation is the end of the road. I have a sense of youth comfort — albeit confined mainly to law students — with the idea of shared power, and the need to address the ongoing injustice associated with Crown’s assumption of exclusive legal authority of Māori. I also sense a dawning understanding of the consequences of continuing to subject Māori to Crown rule in the form of law and policies.

Watch this space!

#### ***IV How States’ Courts Should Address the Reality of Unique Indigenous Authority and Sovereignty, and Developments for Judiciary in This Space***

So, where and how do the courts fit in with the UN Declaration, with te Tiriti o Waitangi, and with constitutional moves to better realise Māori tino rangatiratanga?

I have a couple of points to make here, drawing on previously published work.<sup>30</sup>

The first is that courts should transparently acknowledge that the New Zealand Crown’s claim to legitimacy is questionable, as a matter of law, although arguably not as matter of “political reality”.

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30 See generally Claire Charters “The Elephant in the Court Room: An Essay on the Judiciary’s Silence on the Legitimacy of the New Zealand State” in Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (Lexis Nexis, Wellington, 2020) 91.

Currently, the courts create, and function under, the fiction that the state is legitimate. The courts' support of the New Zealand state is ordinary, implicit and usually silent by continuing to act as the judicial arm of the state, applying state law in a routine fashion and upholding constitutional doctrine such as parliamentary sovereignty. However, this tacit approval of state legitimacy is being exposed as unfair and inaccurate as public awareness of te Tiriti o Waitangi, the UN Declaration and moves for constitutional reform grows.

What should the courts do about this? I argue that they should transparently acknowledge the questionable legitimacy of the state. Does this, then, mean state courts should put down their pens? I argue no. They might expressly justify their continued role on the basis that, as state courts, they are authorised as a matter of state law to determine disputes and so long as state law is the political reality, they must continue to do so.

The second point I make is that New Zealand courts are, in fact, increasingly showing openness to arguments that challenge the legitimacy of the state. In other words, that they are some way down the track, albeit not explicitly and as openly as I think might be ideal. We see this by way of their increasing recognition of tikanga Māori in the law, which is nothing short of remarkable, and positive.

Consider cases from the Supreme Court, including, for example, *Takamore v Clarke* and *Paki v Attorney-General (No 2)*, which reference the UN Declaration and also the role of tikanga Māori in the development of the common law.<sup>31</sup> In so doing, New Zealand's highest courts are implicitly recognising the continuation of a non-state legal system, and its relevance to state law. Non-state legal authority is only legally possible if the state does not have complete sovereignty. Put another way, in *Takamore*, and other cases that recognise tikanga Māori, the courts implicitly recognise that state sovereignty is not absolute over the territories we know of as Aotearoa/New Zealand.

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31 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; and *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

A recent decision that makes this especially apparent is in Palmer J's judgment in *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* where he recognises iwi tikanga and rangatiratanga and notes the courts' inability to make a determination as to tikanga Māori.<sup>32</sup> He writes:<sup>33</sup>

Tikanga Māori was the first law in Aotearoa. It is recognised by Acts of Parliament. It is also recognised by the common law of New Zealand. Tikanga Ngāti Rehua-Ngātiwai ki Aotea lies at the heart of this dispute. But a court must be very careful about "finding" tikanga as a fact, even where it is requested by the relevant iwi or hapū to do so. Any recognition by a court can only be a snapshot at a certain point and only for the particular purpose of the particular case before it at the time. What is recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga. ... But I do not consider it is the role of the Court, or is even possible for the Court, to determine the whakapapa of the two people. That is for Ngāti Rehua-Ngātiwai ki Aotea.

This approach is maybe especially interesting given the recent Ngāti Whātua litigation before Palmer J around mana whenua in places around Tāmaki Makaurau. Should the courts effectively deny jurisdiction?

Moreover, courts should balance Māori rights to authority with other rights, including individuals' rights.

My final point here is a short one, as we have heard from Chief District Court Judge Taumaunu: that New Zealand courts are adapting in various ways to better reflect — in their processes and form — tikanga Māori methods of dispute resolution.

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32 *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291.

33 At [2].

## *V Conclusion*

In conclusion, to sum up, I have tried to address three issues, namely:

1. adjudication and interpretation of the UN Declaration, including our right to self-determination, and Indigenous women's rights at the international and domestic levels;
2. recommendations for constitutional change in Aotearoa/New Zealand: based on the UN Declaration and te Tiriti o Waitangi; and
3. how New Zealand courts, and possibly other state courts, should address Indigenous authority and sovereignty, as well as some developments for judiciary in this space.

The overarching theses to my presentation, are that:

1. Judges have an important role in interpreting Indigenous peoples' rights under the UN Declaration and in te Tiriti consistently with Indigenous peoples' interpretations i.e., not deferring only to state interpretations — from the Executive, legislature, for example.
2. Judges need not be "afraid", or feel they are undermining the state or their own authority, when recognising and realising Indigenous peoples' self-determination, or sovereignty, or mana motuhake.

Nō reira, tēnā koutou, tēnā koutou, tēnā koutou kātoa.