

**Māmari Stephens**  
**Te Rarawa, Ngāti Moetonga, Te Rokekā**

**AN INDEPENDENT INDIVIDUAL RIGHT TO  
DETERMINE INDIGENOUS IDENTITY IN THE  
DRAFT DECLARATION ON THE RIGHTS OF  
INDIGENOUS PEOPLES.**

**LLM Paper for the requirements of LLB(Hons)**

**Laws 530 – Human Rights**

**Law Faculty**  
**Victoria University Of Wellington**

**2001**

S834 STEPHENS, M. An independent individual right...

S741  
UW  
66  
834  
001



VICTORIA  
UNIVERSITY OF  
WELLINGTON

*Te Whare Wananga  
o te Upoko o te Ika a Maui*



LIBRARY



## ABSTRACT

Word Length: 15,467

The construction of indigenous identity is vital in the New Zealand context of treaty settlements and tensions within Māori communities over asset allocation. The Draft Declaration on the Rights of Indigenous Peoples (DDRIP) is a document that aspires to protect the identity and therefore the human dignity of indigenous peoples. Does the Draft fulfil the needs of the most marginalised indigenous people; those separated from their group identity and cultural heritage?

To narrow the scope of enquiry, this paper focuses on Article 8 of the DDRIP, which enables indigenous peoples to identify as part of a group indigenous identity. This paper argues to include in Article 8 an independent individual indigenous right to determine an indigenous identity that may be a group identity or an individual identity. There are significant numbers of indigenous peoples who are clearly disadvantaged by the present concentration of group rights in the Draft Declaration, but most particularly they are excluded from being able to identify as part of an indigenous group. Until group membership can be achieved (and it can, over time) such marginalised indigenous individuals and their already compromised indigenous identities are left unprotected when they are arguably most in need of the rights and protections of the Draft Declaration. An individual right to determine an indigenous identity that may be independent of the group could protect such individuals. Such a right could introduce more indigenous people to the group entity and ultimately to the group protections of the Draft Declaration. An amended Article 8 would better reflect the contemporary reality for many indigenous people, including Māori. With appropriate limitations, such an article can also be a useful tool for indigenous peoples and Courts in resolving conflicts that arises from the clash of the individual and collective rights to determine identity. At least such a tool could be devised by indigenous peoples and not imposed upon them.

Ko Whangatauatia te pae maunga  
Ko Kariri Kura te tai mihi tangata  
Ko Ahipara kāmehehema te marae  
Ko Te Ōhākī te Tūrangawaewae  
Ko te Rarawa te iwi  
Ko Ngāti Moetonga rāua ko Te Rokekā ngā hapū  
Tihewa mauriora!



The Commission on Human Rights, established in 1946, is the main international body for the promotion and protection of human rights. It was created by the Economic and Social Council of the United Nations. The Commission has a mandate to promote and protect human rights, to investigate and report on human rights violations, and to recommend measures to the United Nations to address such violations. It has a subsidiary body, the Human Rights Council, which was established in 2006.

The Commission on Human Rights, established in 1946, is the main international body for the promotion and protection of human rights. It was created by the Economic and Social Council of the United Nations. The Commission has a mandate to promote and protect human rights, to investigate and report on human rights violations, and to recommend measures to the United Nations to address such violations. It has a subsidiary body, the Human Rights Council, which was established in 2006.



## I INTRODUCTION

Article 8 of the Draft Declaration on the Rights of Indigenous Peoples (DDRIP) includes the important individual and collective rights to self-identification.<sup>1</sup> This article, due to the use of the word “peoples” and when read in context, appears to enable indigenous groups and individuals only to maintain and develop group identities. The individual right spoken of in this Article appears to be the right to identify as part of an indigenous people. However, many indigenous individuals are excluded from the indigenous groups. This paper will demonstrate that group entities and group rights are unable to protect many indigenous individuals who are not part of a functioning group. This paper will specifically argue that Article 8 should be amended to better enable indigenous individuals as well as indigenous peoples to have the right to determine indigenous identity. The individual right already present in Article 8 must be expanded to enable indigenous individuals to determine an indigenous identity that may not be a recognisably ‘group’ identity. I have named this expanded right an ‘independent’ individual right to determine indigenous identity. By amending Article 8 to include an expanded ‘independent’ individual right ensures that the person holding such a right is not bound to exercise it only in the context of group identity.

Such an independent individual right to determine indigenous identity could be vitally important to introduce more indigenous peoples to the full protections of the Draft Declaration, including the group rights. The individual decision to determine their own indigenous identity is the first step for many to re-integrate into indigenous cultures. After a period of time, such reintegrated individuals can also claim group identity and the group right to determine indigenous identity and other group rights. This reintegration can be demonstrated within the contemporary New Zealand experience.

Any Article 8 individual right, expanded or not, to determine indigenous identity can conflict with the group right to determine that indigenous identity. In Canada the Canadian Federal Courts have so far resolved such conflict bluntly by over-riding indigenous customary and contemporary practices with an analysis based on individual rights contained within the United Nations Declaration of Human Rights. Such conflict can,

---

<sup>1</sup> Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.



however, be resolved within the terms of an amended Article 8 of the DDRIP. Indigenous individuals must be allowed to determine indigenous identity alongside the indigenous group. Individuals would still need to have recognition from and dialogue with groups to establish their indigenous group identity. Such groups can be said to be under a duty to recognise indigenous individuals who can be incorporated into the group. Indigenous individuals who may not be members of a functioning group identity can also establish an individual indigenous identity. To do so they must pass the test of recognition by significant others in their lives. Claiming such individual indigenous identity can eventually lead to these individuals also being able to claim an indigenous group identity.

#### A Structure

Section II of this paper identifies particularly influential definitions of indigenous peoples that inform the UN Draft Declaration on the Rights of Indigenous People. These definitions tend to emphasise indigenous peoples as group entities; a tendency that may actually exclude large numbers of indigenous individuals from rights protection. The somewhat ambiguous wording of the Draft Declaration itself enhances this perception. This section will then look at the theoretical concept of group rights, showing the dynamism of groups and the difficulties of identifying groups for rights-bearing purposes.

Section III demonstrates the difficulty of applying group rights to the Māori community in New Zealand. Identifying the Māori group in law has proved difficult as the High Court decision of *Te Waka Hī Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* has shown in its definition of the term 'iwi'.<sup>2</sup> Paradoxically the legal definitions of 'iwi' differs from the Court of Appeal's definition of an 'ethnic group' in *King-Ansell v. Police*.<sup>3</sup> The formation of the traditional and the contemporary group in Māori society further illustrates the complexity of ascertaining those to whom group rights might accrue. Furthermore the contemporary assumption that Māori are primarily a collective people does not stand up to scrutiny, and individualism is indeed strong in the Māori community. As a result, the notion of the group and group rights simply excludes many Māori individuals on the edges of the Māori community.

---

<sup>2</sup> [2000] 1 NZLR 285

<sup>3</sup> [1979] 2 NZLR 531



In view of the inadequate coverage of group rights Section IV argues for the redrafting of Article 8 to include an independent individual right to determine either group or individual indigenous identity. This individual right could become a necessary trigger, which will eventually enable the individual to claim genuine group membership and be eligible for the group protections hitherto unavailable to significant numbers of marginalised indigenous individuals. Inevitably groups and individuals will conflict over who should be recognised as indigenous and who should not. The group right to determine its own identity is limited to a certain extent. Concomitant with that group right must be a group duty for the members of an indigenous community to include, protect and respect all eligible individual members. This independent individual right to determine indigenous identity also needs to be limited and defined and requires recognition by other indigenous individuals or groups. A line will have to be drawn in the sand as to who may be called indigenous and qualify for the right and who may not. This paper tentatively suggests that the test for whether an individual can assert an independent individual right to determine a particular indigenous identity depends on the recognition afforded that individual by significant others, some of whom also hold that indigenous identity. That test must be an open one, in the sense that recognition itself need have no compulsory boxes to tick, such as blood quantum or specific genealogy. The limitations that can be read into the collective and independent individual rights to determine indigenous identity in an amended Article 8 of the Draft Declaration may enable some resolution of potential conflict between those rights.

## ***II INDIGENOUS IDENTITY AND THE PROBLEMS OF GROUP RIGHTS***

The Draft Declaration on the Rights of Indigenous Peoples is a comprehensive aspirational statement of indigenous rights. The DDRIP seeks to protect indigenous peoples because all people are entitled to human dignity. As stated in the Preamble to the document, the colonisation and the dispossession of lands, territories and heritage demonstrate that indigenous peoples have not received equal acknowledgement of their human dignity and the human rights to which they are entitled merely by virtue of their humanity. Indigenous peoples are also *sui generis*, unique to themselves.<sup>4</sup> In order to have the full measure of human dignity and human rights indigenous peoples need the protection of their unique

---

<sup>4</sup> Davis, K "Self Determination and Constitutional Change" (2000) 9 Auck ULR 235, 240



identity. Protection of that indigenous identity necessarily entails protection and development of the indigenous social, political and cultural structures, histories and values.

The right to identify as indigenous is therefore supremely important because it would allow access to the protections of indigenous rights. Article 8 of the DDRIP is vital because it includes the individual and collective rights to identify as being part of an indigenous people. Indigenous rights discourse, including this article, focuses on the presumed collectivity of indigenous peoples and seems to assume that group rights would best serve all indigenous people. Some of the more commonly used definitions of indigenous people emphasise collectivity as a primary criterion of indigenous identity. This paper argues that an independent individual right to determine a group *or* individual indigenous identity exists to enable indigenous individuals unaffiliated to indigenous groups also to be included in indigenous rights discourse. Those isolated indigenous individuals have lost so much of their indigenous identity and are therefore arguably most in need of the Draft Declaration. They too need the acknowledgement of their human dignity as indigenous people.

This section will identify the definitions most commonly used in discussions around the Draft Declaration. Once such definitions are explored, the concept of group rights and its possible application to indigenous groups must be investigated. There are difficulties in tying down the organism to which group rights can be applied. The group changes constitution, unlike the individual. There is also considerable argument between scholars about whether group rights even exist, or whether group rights are merely individual rights writ large. As will be shown, groups are units capable of bearing rights, but the concept of group rights proves inadequate for extending the fullest possible right protection to many contemporary indigenous people.

#### **A     *Definitions And The Draft Declaration On The Rights Of Indigenous Rights.***

In the *Final Report: Study on the Problem of Discrimination Against Indigenous Populations* Jose Martinez Cobo defined indigenous people in phrases often used as a



'working definition' by other rights commentators.<sup>5</sup> Cobo's definition can be broken down to reveal its underlying assumptions about the nature of indigenous populations.<sup>6</sup>

"Indigenous peoples" and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.

This excerpt from Cobo's definition makes a number of assumptions. Use of the term 'peoples' in this opening sentence implies a level of cohesion or 'groupness' among members of an indigenous population. Furthermore, this excerpt also assumes level of cultural self-awareness among descendants of indigenous peoples as well as the existence of a common self-identification.

Another component of this part of Cobo's definition is that indigenous people are assumed to have historical continuity with pre-invasion and pre-colonial cultures. For people such as the Métis, the mixed blood population of Western Canada, their distinctive, self-identified group identity did not eventuate until after contact with Europeans. The Métis insist on retaining and maintaining their unique mixed indigenous identity, including their language and culture. Arguably they would not be covered by Cobo's definition.<sup>7</sup> Much of the debate in New Zealand centres on the needs of urban Māori and mirrors similar concerns. Some Māori have lost ties with their traditional tribal connections, and often can only express identity in pan-Māori, mixed-heritage terms within urban marae facilities such as Victoria University's Te Herenga Waka. For such Māori historical continuity with identifiable pre-colonial Māori remains true only at a generalised level abstracted from every-day life. Cobo's definition continues:

They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

The assumption here that indigenous peoples must only be non-dominant is problematic. The term indigenous itself does not imply any state of subordination at all, only the fact

<sup>5</sup> See for example Alison Quentin-Baxter "The UN Draft Declaration on the Rights of Indigenous Peoples - the international and constitutional law contexts." (1999) VUWLR 29 1 85

<sup>6</sup> In Erica-Irene Daes "Some Considerations on the Rights of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs. 1, 4

<sup>7</sup> See Larry Chartand "Are We Métis or are we Indians? A Commentary on *R v Grumbo*" (2000) 31 2 Ottawa L Rev 267, 269



that the population belongs to a particular territory and is not foreign to it. The phrase 'non-dominant' is ill defined and does not automatically apply to populations such as indigenous Fijians, for example, although the phrase may apply in certain indices.

In this second excerpt, a certain coherence of thought and action between members of indigenous populations may also be assumed. There is an implied commonality of experience and cultural practice. The 'ethnic identity' spoken of presupposes a whole set of actions, rituals, beliefs, language use and worldview that make up such an identity. The patterns, institutions and systems mentioned presuppose that, for indigenous peoples to be included in the definition, they must be able to demonstrate adherence to and understanding of those things. In short, Cobo's whole definition assumes collectivity of indigenous identity and experience. Exceptions to that definition can be easily found.

As noted by Debeljak, another current definition is the Working Group on the Draft Declaration's (WGDD) own statement that indigenous peoples are 'the descendents of the original inhabitants of conquered territories possessing a minority culture and recognising themselves as such.'<sup>8</sup> This definition also describes certain collective, group behaviours among people with a specific sense of ethnic or cultural identity.

Despite the use and prevalence of these definitions, the Draft Declaration itself includes no definition of indigenous people. Many indigenous representatives to the WGDD recognise that defining indigenous peoples automatically excludes those to whom the current definitions cannot apply.<sup>9</sup> These representatives reject the notion of definition on the grounds that any definition would 'violate their right to self-determination; that is, the right of indigenous peoples to identify themselves.'<sup>10</sup> However, despite the exclusion of a definition within the Draft Declaration, a closer look at the provisions of the Draft reveal the strong influence of the definitions and assumptions that have already been discussed.

### *1. Assumptions in the Draft Declaration*

According to submissions made by indigenous representatives to the WGDD's report on the sixth session, the concept of 'peoples' is fundamental to interpreting the Draft

<sup>8</sup> Debeljak Julie 'Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations' (2000) 26 Monash ULR 182

<sup>9</sup> This difficulty was discussed by Tracy Whare reporting on her experience working with the Working Group of the Draft Declaration of the Rights of Indigenous Peoples. Any attempt to define indigenous peoples for the purpose of inclusion within the scope of the draft declaration will cut out some people, causing controversy.

<sup>10</sup> Debeljak, Julie 'Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations' (2000) 26 Monash ULR 159, 183



Declaration.<sup>11</sup> As stated by indigenous representatives: 'It would be discriminatory, illogical and unscientific to identify us in the United Nations Declaration on the Rights of Indigenous Peoples as anything less than peoples.'<sup>12</sup> The WGDD reported on the ongoing conflict between states and indigenous people over this issue.<sup>13</sup>

Some states can accept the use of the term "indigenous peoples". Other states cannot ...in part because of the implications this term may have in international law with respect to self-determination and individual and collective rights. Some delegations have suggested other terms...such as "indigenous individuals", "persons belonging to an indigenous group", "indigenous populations" "individuals in community with others" or "persons belonging to indigenous peoples"...

Indigenous peoples have so far rejected suggestions by states to interpolate the term 'individuals' in the Draft Declaration. Ratification remains in a state of apparent 'indefinite stalemate'.<sup>14</sup>

The Draft does include some rights that extend to individuals. Aside from the aforementioned Article 8, other such rights include the Article 1 right to enjoyment of all human rights, the Article 2 right to be free from adverse discrimination, the Article 5 right to a nationality and the Article 7 right not to be subject to ethnocide or genocide.<sup>15</sup> Most of the individual rights in the Draft Declaration are also granted specifically to collectives as well, as in Article 7. There does however, appear to be some inconsistency in the drafting of the Draft Declaration in regard to the use of the term 'peoples' and 'individuals'. In some articles indigenous individuals are explicitly identified as being distinct from indigenous peoples. This distinction occurs in Articles 2, 9, 11 and 18. Article 2 states:

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

The explicit reference to individuals in some articles, as well as the indigenous determination to retain the primacy of the term 'peoples' in the Draft supports an assumption that remaining articles that do not explicitly refer to individuals are to refer

<sup>11</sup> See also Davis, K "Self Determination and Constitutional Change" (2000) 9 Auck ULR 235, 242

<sup>12</sup> Proposals by Indigenous Representatives to the WGDD during the sixth session (20 November to 1 December 2000) E/CN.4/2000/WG.15/CRP.4 page 6

<sup>13</sup> Recommendation by Government groups to the WGDD during the Sixth session (20 November to 1 December 2000) E/CN.4/2000/WG.15/CRP.4 page 2

<sup>14</sup> Term used in the Report of the WGDD during the sixth session (20 November to 1 December 2000) E/CN.4/2000/WG.15/CRP.4, 2

<sup>15</sup> Other specifically individual rights granted within the Draft Declaration include Article 8's right to identify oneself as indigenous; the Article 9 right to belong to an indigenous community in accordance with traditions and customs of that community and Article 18's right not to be



only to 'peoples'. Of 45 provisions, 32 are directed at 'peoples'. However, interpretation of term 'peoples' can be a little ambiguous. Article 1, for example, refers to all 'peoples' having full enjoyment of the rights in the UNDHR. These rights are individual rights that presumably apply to individuals within 'peoples'. Yet some of the other articles that refer to 'peoples' appear to define individual and collective rights accruing *only* to peoples.<sup>16</sup> Article 8 is an example of this.

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

As the primary actors in this sentence are 'indigenous peoples' it appears that the 'distinct identities' referred to are group identities, although these rights may be *asserted* on a collective and individual basis. An individual indigenous identity that is not connected to a functioning group does not appear to be recognised within this article. Furthermore, as will be discussed in Section IV, the individual right that does exist in Article 8 may also be in danger of losing recognition due to the emphasis placed on collective rights and collective identities strongly present in the Draft Declaration.

The text of the Draft Declaration itself largely assumes that indigenous people function within discrete, culturally aware groups. This assumption can also be seen in Article 12 that grants indigenous peoples the 'right to practice and revitalise their cultural traditions and customs.' Similarly, Article 13 grants the right to 'manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies.' Article 21 grants the right to 'maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development.' Other articles speak of the 'distinctive spiritual and material relationship with lands, territories, waters and coastal seas' or to 'own, develop, control and use the lands and territories...which they have traditionally owned or otherwise occupied or used.'<sup>17</sup> These articles assume a commonality of experience and intent that is expressed within group dynamics. In short, the assumptions underlying the Draft Definition about the nature of indigenous people are the same as those underlying the definitions discussed a little earlier. Even though there is

---

discriminated against in matters of labour. Article 32 grants the right to determine membership and structure of their institutions. Article 42 guarantees that all rights in the Draft Declaration are guaranteed equally to male and female individuals.

<sup>16</sup> Article 6 applies to 'peoples' and includes the collective right to live in freedom, peace and security as distinct peoples and the individual right to life, physical and mental integrity, liberty and security of person. Article 7 applies to 'peoples' and includes 'the collective and individual right not to be subjected to ethnocide and cultural genocide'.

<sup>17</sup> Article 25 and 26.



no official definition of indigenous people in the Draft, the Draft Declaration applies to functioning groups with common culture and common experience who are dominated within their territories by other populations. Notwithstanding the concerns of the indigenous representatives to avoid defining indigenous peoples in the Draft Declaration, Cobo's definition appears to have been incorporated *de facto* if not *de jure*.

In the Draft Declaration there is understanding that indigenous culture and group identity are often severely threatened. This acknowledgement is present in the rights of self-determination as well as the rights to revitalisation and development of cultural, spiritual and social practices.<sup>18</sup> This acknowledgement does not, however, necessarily amount to any acknowledgement that some indigenous people may not hold functional group identity and share common experience and culture with other descendants of a given indigenous population.

### *1. Assumptions in Other International Organs*

The assumption that indigenous peoples must exhibit cultural distinctiveness and group identity is also present in other international organs. Article 1 of Convention 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries states that the Convention applies to:

tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.

In the International Covenant on Civil and Political Rights, a similar assumption exists,<sup>19</sup> even as minority status is protected. Article 27 grants a right 'in community' and states that:

In those states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

<sup>18</sup> See, for example, Articles 3, 12, 13 and 14

<sup>19</sup> See also The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993.



The notion of indigenous rights seems to rely on the existence of a fully functioning, even if disadvantaged *group*. As will soon be shown, the general application of indigenous rights is particularly problematic for many individuals most in need of those rights in the Draft Declaration mentioned earlier. The assumptions that indigenous peoples operate as coherent and culturally self-aware groups adds strength to any argument that such groups should be and are eligible for the application of group rights. However, as will be shown in the next section, the concept of group or collective rights is very difficult to define, apply and demonstrate. The actual operation of group rights potentially excludes many indigenous people.

### **B     *Pinning Down The Idea Of Collective Rights***

The concept of collective rights is notoriously slippery to define. In part, this difficulty is due to the fact that discussion of such collective rights is often phrased in terms of their relationship to the idea of individual rights. Collective rights are often seen to be dangerous and antagonistic to the existence of individual rights, such as those expressed within the United Nations Universal Declaration of Human Rights.<sup>20</sup> Discussion of collective rights is more rarely undertaken for its own sake.

#### *2. Identifying the group*

Perhaps the first step to defining collective rights is to define the nature of the group, then to investigate whether such a group would be entitled to collective rights. Many different types of associations bind human beings. Some associations may be described merely as aggregations or sets, for example the aggregation of all left handed people, or six foot tall men.<sup>21</sup> These are associations by virtue of stable characteristics, but it is unlikely that such groupings have a distinct culture whereby individuals feel normatively bound to each other *beyond* a certain commonality of experience. It is this normative bonding, or, according to Michael McDonald, an *internal sense of recognition* that underpins a collective identity.

---

<sup>20</sup> Darlene M Johnston "Native rights as collective rights: a question of group self-preservation" (1989) 2, 1 CJLT 19, 20

<sup>21</sup> Narveson Jan. Collective Rights? (1991) 4, 2 CJLT 330 Darlene M Johnston "Native rights as collective rights: a question of group self-preservation" (1989) 2, 1 CJLT 19, 22



He also distinguishes the nature of collectivities by the voluntary or involuntary nature of membership.<sup>22</sup>

There is then, a tendency of each group member to see herself as part of an *us* rather than just a separate me...[A]llegiance to an identifying group structures personal identity; it indicates who I am...the most profound sorts of self-identification are non-voluntary and not a matter of choosing to identify with some group or other.

According to McDonald associations based on will are essentially artificial and include teams, political parties and the like. In comparison, associations that are 'natural' will include families and communities, including ethnic groups such as native tribes.<sup>23</sup> These types of groupings are not based on choice and are more important, being 'more basic or deeper' than voluntary associations.<sup>24</sup>

### 3. *Not all groups can hold rights*

Even supposing that a group or collective can be satisfactorily identified, the next question would be to determine if such a group could be entitled to hold group rights. The problem is that group rights presumably do not apply to all groups, whereas the assumption within human rights discourse is that individual rights apply to all, provided the rights of others are not infringed upon.<sup>25</sup> One interpretation of the 'rights idea' is that rights exist to afford protection to those who have corresponding 'needs' that 'ought' to be met in order of urgency.<sup>26</sup> Certain groups are not in urgent need of protection of their group identities. Even within the subset of indigenous groups, some groups do not need urgent protection to the same extent as others indigenous groups.<sup>27</sup> How is it possible to determine which groups are eligible for group rights and which are not?

### 4. *Groups are dynamic*

According to Clinton, indigenous rights and responsibility 'exist only within the framework of ...familial, social and tribal networks.'<sup>28</sup> In addition, some commentators

<sup>22</sup> McDonald, Michael "Should communities have rights? Reflections on liberal individualism." (1991) 4, 2 CJLT 217

<sup>23</sup> In Darlene M Johnston 'Native rights as collective rights: a question of group self-preservation' (1989) 2, 1 CJLT 19, 31

<sup>24</sup> In Darlene M Johnston 'Native rights as collective rights: a question of group self-preservation' (1989) 2, 1 CJLT 19, 23

<sup>25</sup> Narveson Jan, *Collective Rights?* (1991) 4, 2 CJLT 330

<sup>26</sup> Ramon Daz, lecture March 26 2001, Laws 520 Human Rights Seminar Series

<sup>27</sup> Fact Sheet No 9 (Rev 1) *The Rights of Indigenous Peoples* (United Nations High Commissioner for Human Rights, 1995) 2

<sup>28</sup> Clinton Robert N 'The rights of indigenous peoples as collective group rights' 32.4 (1990) *Ariz L Rev* 742



maintain that 'without land, native existence is deprived of its coherence and distinctiveness.'<sup>29</sup> Pentney asserts that collective rights are meaningless without the continued existence and vitality of the group.<sup>30</sup> Without land, according to this thought, there can be no group identity. This view of group identity depends on the maintenance of a certain static cultural identity and possession of resources.<sup>31</sup>

This understanding of indigenous identity does not acknowledge that groups are dynamic and at one time in their history may be in need of protection, yet another time of their history may not be in need of protection. How do we decide when a group warrants, or does not warrant protection for its identity? For many indigenous people who are landless, or on the point of becoming so, their group identity is precarious, and for some, possibly non-existent. It is at that very point of dispossession that the idea of collective rights, as a protective mechanism within the Draft Declaration on the Rights of Indigenous Peoples, is at its strongest. Yet, are such dis-integrated people even eligible for the protection as a group? Erica-Irene Daes, Chairperson-Rapporteur of the United Nation's Working Group on Indigenous Populations, apparently recognises this difficulty for modern indigenous populations. She has stated that at issue is not the differences or similarities between indigenous and non-indigenous populations today, but 'the fact that two peoples have had, for millennia, separate histories which touched each other very little or not at all.'<sup>32</sup> Perhaps on this observation, the objective genealogical link between an individual and that separate history would be all that is required to qualify for membership of a collective.<sup>33</sup>

Presumably a group that is presently stable and in less need of protection might need such protection at some later point. As the social, political and economic environment of the group changes, what happens to the nature of the rights that can accrue to it? Isaac states that individual rights and group rights need be triggered only when those rights are threatened.<sup>34</sup> However, there is no point in Western discourse at which an individual can be redefined as no longer being an individual for the purpose of claiming individual rights. It *is* conceivable to many commentators that groups may lose their group identity and

<sup>29</sup> Darlene M Johnston "Native rights as collective rights: a question of group self-preservation" (1989) 2, 1 CJLT 19, 32

<sup>30</sup> In Darlene M Johnston "Native rights as collective rights: a question of group self-preservation" (1989) 2, 1 CJLT 19, 28

<sup>31</sup> Debeljak recognises the difficulties of assuming a static cultural understanding and suggests that definition of indigenous peoples should only be undertaken by indigenous peoples. Julie Debeljak "Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations" (2000) 26 Monash ULR 159, 181 However, as can be shown in the second part of this essay, indigenous peoples themselves contribute to such understandings of indigenous culture.

<sup>32</sup> Erica-Irene Daes "'Some Considerations on the Rights of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs 1, 6

<sup>33</sup> As will be demonstrated later, this is the view that has been followed in New Zealand case law in the definition of *iwi*. This debate arises in the context of determining the rights of Urban Māori to be recognised as a collective for the purposes of the allocation of fishing assets.

<sup>34</sup> Thomas Isaac "Individual versus collective rights: aboriginal people and the significance of *Thomas v. Norris*" 21, 3 (1992) Man LJ 626



therefore group rights, depending on observable criteria such as cultural practice, distinctiveness and land ownership.

### *C Conclusion*

Group rights are difficult to identify and quantify, and it appears that within the context of indigenous rights a confusing discourse is emerging that challenges usual definitions of what may qualify to be called a group. On the one hand, there is a certain insistence that indigenous identity is immutable and connected to strong notions of collectivity. On the other hand, the externally imposed definition of an indigenous group would have to be stretched wider and wider to accommodate modern indigenous experience. This can be demonstrated by the aforementioned comments from the Chairperson-Rapporteur of the Working Group on the DDRIP, Erica Irene-Daes.

The definitions and rights discussed in the Draft Declaration and in other instruments that emphasise collectivity concentrate on similarities of experience between indigenous groups. In fact, as discussed by Māori rights theorist Maurice Ormsby, the Draft Declaration is intended to be 'a normative instrument'.<sup>35</sup> This concentration on normative standards for the conceptualisation of indigenous people perhaps feeds into the creation of a 'grand narrative' of indigenous experience and identity that attempts to place indigenous people once more at the centre of discourse about their lives and histories.<sup>36</sup> Such standardisation of contemporary indigenous experience, as expressed in the Draft Declaration and elsewhere, does not acknowledge that many descendants of indigenous populations may not demonstrate cultural membership of the indigenous group or may have little or no access to participation in indigenous group identity. However, these descendants are increasingly likely, in countries such as Canada and New Zealand, to participate in cultural resurgence in order to activate and access cultural and group membership. Discussions of indigenous peoples and indigenous rights have not so far adequately reflected these peoples' experiences and the complexity of contemporary indigenous life. The indigenous people most marginalised and colonised by their histories and experiences are the ones who have lost their language, their cultural history and their full and active membership of the indigenous group identity. They are the people most

<sup>35</sup> M J Ormsby 'Individual and Collective Rights' (Unpublished paper prepared for the Ministry of Justice, 1997) 47.

<sup>36</sup> See also Adeno Addis 'Individualism, Communitarianism and the Rights of Ethnic Minorities' 66, 1219 (1991) *Notre Dame L Rev* 615, 649



excluded by current definitions and most in need of the protections offered by the Draft Declaration and the attendant discourse. Section III will examine some of the concepts so far discussed and demonstrate their application with reference to traditional and contemporary Māori in New Zealand.

### III MĀORI COLLECTIVE IDENTITY

The slipperiness of collective rights theory as discussed in Section II can be demonstrated by the Māori experience(s) in New Zealand. Much contemporary comment about Māori society tends to treat Māori traditional society and Māori contemporary society as a seamless whole. Māori culture is often described in terms of a traditional, collective past. This tendency creates an ideological discourse that ignores political and social reality that may ultimately undermine Māori aspirations to achieve recognition of indigenous rights. The High Court decision of *Te Waka Hī Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* has attempted to distil the actual history and status of Māori in New Zealand today to come up with a definition of the term 'iwi'.<sup>37</sup> As will be demonstrated, this definition bears little resemblance to the Court of Appeal's definition of an 'ethnic group' in the leading case on the matter; *King-Ansell v. Police*.<sup>38</sup> Furthermore, this definition necessarily undermines traditional criteria of the primary functional Māori group: the hapū.

Traditional Māori notions of functioning group identity include hapū and other larger, less permanent group structures as iwi. With the arrival of Pākehā to New Zealand and subsequent colonisation, the notion of Māori as a racial and cultural group separate to Pākehā arose. The Treaty of Waitangi has secured some collective rights for iwi and hapū under Article Two. Contemporary life, for many Māori however directly erodes traditional functioning groups, calling into question the appropriate application of group rights.

#### A Identifying The Group

In New Zealand, the legal definition of ethnic group identity is rare. One example is the term 'ethnic origins' contained within the Human Rights Act 1993.<sup>39</sup> Other grounds for discrimination under the Act including sex, marital status, age and sexual orientation can

---

<sup>37</sup> [2000] 1 NZLR 285

<sup>38</sup> [1979] 2 NZLR 531



be defined without reference to others who fall into the same aggregate. In contrast, 'ethnic origins' as discussed by Schnackenberg, 'cannot be fully encapsulated within one person.'<sup>40</sup> The 1979 Court of Appeal case *King-Ansell v. Police* remains the leading authority in New Zealand case-law in defining an ethnic group.<sup>41</sup> This case examined whether the 1971 Race Relations Act's use of the terms 'ethnic' and 'group' could be used to describe the New Zealand Jewish community.<sup>42</sup> Woodhouse and Richardson JJ adhered to definitions that included the ethnic group's subjective idea of its own identity as well as objective elements, such as the opinions of others outside the relevant group.<sup>43</sup>

...the test for contemporary purposes would be a subjective belief by the members of the group of *being alike* by reason of *accepting and sharing* the kind of characteristics already mentioned and of feeling different on that ground; together with *objective opinion of others* that they should be so regarded...I think the issue will be answered by the strength of the ancestral ties, whether real or assumed, and the traditional and cultural values and beliefs that have been handed down and are ...adhered to by all. (Emphasis added)

When this definition is added to McDonald's idea that the more morally important a group is, the more involuntary its constitution, there seems to be an assumption that group identity is static and homogeneous in behaviour and self-regard.

It could be argued that these assumptions fail to take into account the idea that group identity or culture can be learned and unlearned. What, for example, happens to children of intermarriage between definable cultural groups? Woodhouse J's 'objective opinion of others' would perhaps ignore such children who don't look like members of one or other of the groups, or who do not share certain behaviours with members of that group. However, as will be discussed in Section IV the recognition of others is indeed important for defining who is and who is not an indigenous person, entitled to hold indigenous rights. It must be acknowledged, however, that Woodhouse J, by use of the term 'objective' implies that any reasonable member of an ethnic group would recognise other members of the group. Colonial history however tells us that there are many occasions where individuals who are the progeny of mixed marriages may well not be recognised objectively as members of either one or both of the cultures of their parents.

---

<sup>39</sup> Human Rights Act 1992 s21(d)

<sup>40</sup> See Carl Schnackenberg 'Ethnic Origin Discrimination: A Place for Iwi in the Human Rights Act?' 8, 14 (1999) Auck ULR 1213

<sup>41</sup> [1979] 2 NZLR 531

<sup>42</sup> The Race Relations Act 1971 is the predecessor to the Human Rights Act 1993

<sup>43</sup> [1979] 2 NZLR 531, 538-539



These definitions of groupness may not acknowledge the fact that it is also quite possible for the children of such relationships to *elect* to activate their memberships of a specific grouping in deliberate pursuit of McDonald's aforementioned 'internal sense of recognition.' In that sense then, such members do act voluntarily. If the membership of those who elect to pursue their membership can be defined as voluntary (and this is still problematic), are they then entitled to group rights that they can theoretically opt out of?<sup>44</sup>

Certainly, an expanded view of group membership is reflected in the decision of the New Zealand High Court in *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*.<sup>45</sup> Called upon to determine whether the word 'iwi' applied only to traditional Māori tribes or could also be used to apply to Urban Māori Authorities, the Court replied that only traditional Māori tribes could claim the term iwi (per Paterson, J). However, the Court proffered a definition of iwi that takes into account the changes wrought by colonisation and other massive social pressures.<sup>46</sup>

Thus a "traditional tribe" comprises those Māori people who claim descent from a named common ancestor and whose ancestors were at some time in the past recognised as living in a particular tribal area...the traditional tribe must have been recognised as such by other sections of Māoridom.

In this definition, there is no mention of a 'common culture' or traditional and cultural values. There has been no comment so far on the differences between this definition of the tribal group 'iwi', and the Court of Appeal's approach to the definition of an ethnic group in *King-Ansell v. Police*. Interestingly, the New Zealand High Court defines iwi in a way that perhaps pushes the notion of the indigenous group closer to the objective idea of the aggregate with which we began this discussion. As will now be illustrated, this definition also sidesteps traditional means of identifying group membership of the main operational Māori group identity, the hapū.

### 1. Identifying the Traditional Group

Scholarship on traditional Māori social organisation shows the importance of being able to identify group members in order to facilitate social and cultural life. Anthropologists have

<sup>44</sup> This recalls Professor Paul Morris' discussion of the inability of systems that recognise group rights to cope with 'boundary crossers', for example, secularists in modern day Israel. (lecture 19<sup>th</sup> of March 2001)

<sup>45</sup> [2000] 1 NZLR 285

<sup>46</sup> [2000] 1 NZLR 285, 325



long acknowledged whakapapa as the major determinant of group relationships. However, it is far more difficult to establish the boundaries of functioning groups in traditional Māori society. Such scholarship has demonstrated a useful differentiation between Māori 'descent categories' and 'Māori descent groups'.<sup>47</sup> Descent categories merely include all descendants of a nominated ancestor, regardless of the social and cultural interaction between descendants. On the other hand, only regular contact and identification between members can form descent groups. Such groups are also known as 'corporate groups' and in Māori society the hapū was the pre-eminent corporate group: 'its members could unite to pursue some group objective, such as the defence of its territory, or large scale fishing operations.'<sup>48</sup>

For members of a hapū to claim rights over the resources on a certain piece of land, those members had to be able to show regular and recognised interaction and habitation with other hapū members. This principle of land tenure is known as ahi kaa, or keeping the home fires burning. Māori Land Court minutes are replete with examples of hapū members seeking to demonstrate their maintenance of ahi kaa through occupation of a particular piece of land. There are also examples of hapū members who have failed to maintain regular interaction with other members of the hapū, allowing their group membership to lapse, thereby extinguishing ahi kaa. Such rights could be re-established, but often only with difficulty, and re-establishment could take up to or more than three generations to cement.<sup>49</sup> Should erstwhile group members choose not to re-activate their membership of the group, they would, of course, retain their membership of the descent category. Kinship ties were often complex and marriage relationships allowed group membership to extend, to a certain point, to those who claimed primary hapū membership elsewhere. Members of other closely related hapū often attempted to demonstrate their rights in territory judged by the Māori Land Court to "belong" to another hapū. Such testimony show the fluidity of hapū relationships and that some limited rights in one piece of land could traditionally accrue to members of more than one hapū, provided those claiming the rights could show appropriate levels of corporate interaction with members of the hapū dominant in the claimed area.

---

<sup>47</sup> Eructi in Boast, R A Eructi, D McPhail and N F Smith *Māori Land Law* (Butterworths, Wellington, 1999) 33

<sup>48</sup> Eructi, above n 42, 36

<sup>49</sup> Eructi, above, n 42, 35



Traditional methods of 'closing' group membership included fulfilling the criteria required by ahi kaa, and patrilocal and patrilineal bias whereby hapū membership and residence were usually (but not always) defined by the male line.<sup>50</sup> As the 19<sup>th</sup> century wore on, however, traditional ways of determining group membership were undermined by the Native Land Court process. Patrilineal bias was extinguished at common law by the *Papakura* case.<sup>51</sup> This was a succession case regarding Māori freehold land that trumped custom by insisting that Māori inherit property on an equal basis according to common law principles. Instead of rights to parcels of land passing to eldest sons, such land would be divided equally into ever-diminishing shares down the generations. This change has directly contributed to the overcrowded Māori land titles we see today. The practice of ahi kaa did remain important in the Native Land Court for determining who might be identified as the common law owners of Māori land. However, the *Papakura* case shows that the Court began to rely more heavily on claims of ancestry alone to determine who had rights to land, to the exclusion of other rights claims.<sup>52</sup> As New Zealand moved into the 20<sup>th</sup> century, genealogy became a primary indicator of group membership, not levels of corporate interaction.

## 2. *Identifying the Contemporary Group*

With the advent of the Treaty of Waitangi, colonisation, and urbanisation traditional formation of the Māori group has been largely undermined. In addition to hapū membership now being determined in many cases primarily by genealogy, many Māori now gain group identity from other types of contemporary groups. Church, sporting organisations, Urban Māori Authorities, pan-tribal groups and national organisations such as the Māori Women's Welfare League and the National Māori Council all offer a level of largely voluntary group membership. The range of group identities available for contemporary Māori is vastly different to that available to their ancestors.

The language of the Treaty of Waitangi accords different types of rights to rangatira, hapū and individuals. In effect, these rights now extend also to iwi and pan-iwi organisations, as well as to all Māori regardless of iwi or hapū affiliation. As accepted by the Court of

<sup>50</sup> Erueti, above, n 42, 34

<sup>51</sup> *Papakura - Claim of Succession* (12 April 1867), 1867 *Gazette* 19-20 in Boast, R A Erueti, D McPhail and N F Smith *Māori Land Law* (Butterworths, Wellington, 1999) 77

<sup>52</sup> Boast, R A Erueti, D McPhail and N F Smith *Māori Land Law* (Butterworths, Wellington, 1999) 45



Appeal in *New Zealand Māori Council v Attorney General*, the Treaty is a document 'relating to fundamental rights...as a living instrument taking account of subsequent developments of International Human Rights norms.'<sup>53</sup> If indeed the DDRIP is intended to be a normative international human rights document, the Treaty should be interpreted in line with it. Alison Quentin Baxter suggests that the Draft Declaration could be a guide as a source of principles for implementing the Treaty, particularly in reconciling the exercise of rangatiratanga by Māori at the local and national level and kawanatanga by executive Government and Parliament.<sup>54</sup>

Despite the existence of new types of groups in contemporary Māori society it is less certain which groups operate as socially functional groups rather than aggregates or interest groups.<sup>55</sup> In reality significant number of Māori today exhibit fewer factors that distinguish us as an ethnic group according to traditional criteria and the definition offered in *King-Ansell v. Police*. Anthropologist Joan Metge recognises the modern, disparate nature of Māori identity and includes this quote from Mason Durie in her attempt to define the Māori community.<sup>56</sup>

Far from being homogenous Māori individuals have a variety of cultural characteristics and live in a number of cultural and socio-economic realities. The relevance of so-called traditional values is not the same for all Māori, not can it be assumed that all Māori wish to define their ethnic identities according to classical constructs. At the same time, they may well describe themselves as Māori, rejecting any notion that they are 'less Māori than their peers'...self-identification conveys little in...lifestyle...and participation in...whānau and hapū.

Māori society and the shape of its components have always been dynamic. Hapū were always waxing or waning, with less powerful groups being absorbed by more powerful groups or disappearing altogether.<sup>57</sup> Contemporary Māori society is similarly fluid. This fluidity illustrates the difficulty of the nature of the rights such groups could hold. Many Māori, for example, are the products of the demographic disruptions of the Second World War and the rapid urbanisation of the 1950s and 1960s.<sup>58</sup> Younger Māori have been part of

<sup>53</sup> [1987] 1 NZLR 641, 655

<sup>54</sup> Alison Quentin-Baxter 'The UN Draft Declaration on the Rights of Indigenous Peoples - the international and constitutional law contexts.' 29 (1999) VUWLR 85, 97-98

<sup>55</sup> An example of Māori commonly expected to act in concerted group interest is the commonly expressed idea that Māori on the Māori electoral roll will somehow pursue group interests, despite the fact that such people are collected together mainly as an aggregation rather than a functioning group.

<sup>56</sup> Mason Durie in Joan Metge *New Growth from Old - The Whānau in the Modern World* (1995, Victoria University Press, Wellington) 19

<sup>57</sup> Ballara, A *Iwi - The Dynamics of Māori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998) 124. See also Schwimmer in Boast, R A Eructi, D McPhail and N F Smith *Māori Land Law* (Butterworths, Wellington, 1999) 36

<sup>58</sup> See for example, recent discussion on the development of pan-tribal culture groups such as Ngāti Pōneke in Wellington in the 21930s, 1940s and beyond. As mentioned by Irihāpeti Ramsden co-author of a recent book *The Silent Migration* on the history if the club, it came together



the Māori Renaissance, almost from its very inception 30 years ago. They or their children are arguably freer to live their public lives in a far more culturally 'Māori' way than could previous generations. On the other hand many of these Māori now receive their cultural education from tertiary education providers and Urban Māori Authorities rather than the hapū or iwi group. The nature of contemporary group identity for Māori has thus greatly changed and is still changing. Therefore identifying those in the contemporary Māori population eligible for group rights is difficult.

### **B Māori Views Of Individualism and Collectivism**

The submissions of indigenous representatives underlying the current form of the DDRIP strongly advocates that indigenous peoples are primarily collective peoples.<sup>59</sup> Similarly, discourse about contemporary Māori identity can reflect an assumption that Māori essentially comprise a collective society. In part, this assumption has been fuelled by debate about the relationship between the treaty partners. This debate lends itself to an assumption of homogenous needs and characteristics within 'the Māori community' that does not accurately reflect social reality for many Māori. Undeniably collectivism is a strong aspect for many Māori in contemporary society, as it was in traditional society. That individualism has always been strong in Māori thought is less discussed in a rights context.

#### *5. The Māori World View*

The following quote describes an idea that reappears in various forms in contemporary comment about Māori values and Māori society.<sup>60</sup>

This indivisibility or inter-relationship [between the spiritual and the temporal] reflected what may be called the Maori view of the world – a warm and lasting communal bond among all things in nature with a common view of their inter-dependence. This consciousness created a collective culture that has proved resilient...it continues to be the centre of the tribal circle, the foundation of a whispering ideology, identity strength and self-determination.

---

through people who were often not related to each other at all. 50 years later there is a far higher degree of blood-kinship between the later generations who now make up the club. The basis for group association may be altering from commonality in experience to genealogical ties. Interview with Irihāpeti Ramsden (Chris Laidlaw 'Sunday Morning', National Radio 30 September 2001)

<sup>59</sup> See comments made by the Aboriginal and Torres Strait Islander Commission, elders of the Wangurri Clan, the Noongah People, and the Consejo Inio de Sudamerica in Julie Debeljak 'Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations' (2000) 26 Monash ULR 159, 181, 170. See CHR Report on the fourth open-ended inter-sessional WGDD E/CN.4/1998/WG.15/1

<sup>60</sup> Moana Jackson 'Criminality and the exclusion of Māori' 20, 3 (1990) VUWLR 29.



Such commentators frequently discuss such a 'Māori view of the world' as if it is current and prevailing for Māori in general, with little analysis as to whether this is actually the case. An example of this type of assumption is present in Brian Garrity's 1999 article 'Māori and Western concepts of Intellectual property.'<sup>61</sup> He consistently conflates the traditional world view with the contemporary Māori world view with no analysis that takes into account the enormous and drastic changes undergone by Māori society in the past 160 years. According to this long-lived view, Māori are a collective people.<sup>62</sup> To stand beyond the group as an individual is to risk being called whakahihi – arrogant; a Māori version of the 'tall poppy syndrome.'<sup>63</sup> Instead, membership of the whānau, hapū and iwi are the major determinants of status and identity. Elsdon Best is an early and influential proponent of the notion of 'Māori communism'.<sup>64</sup>

In Māori society the individual could scarcely be termed a social unit, he was lost in the whānau or family group...[T]he individual is as nothing- he does not exist as it were, as an individual, but only as part of the group or clan.<sup>65</sup>

This view is present to an extent in the writings of Buck and other earlier commentators, as well as in the work of latter authors such as Patterson describing the 'essentially collective identity' of Māori.<sup>66</sup> Recent Māori commentators have also made such statements without critical analysis of what this 'collective identity' means.<sup>67</sup> There has, however, also been a strand of New Zealand anthropological scholarship that has criticised this polarised view of Māori society. Raymond Firth was one of the first commentators to make such criticism.<sup>68</sup>

[T]he individual can never be studied in entire isolation from the society; this does not entitle one to embrace the extreme position of ascribing all individual actions to the dictates of the group interest.

<sup>61</sup> 8 (1999) Auck ULR 1193-1209.

<sup>62</sup> See also Mason Durie *Te Mana, Te Kawanatanga The Politics of Māori Self-Determination* (Oxford University press, Auckland 1998) 21, Tauri J and A Morris "Reforming justice: the potential of Māori processes" (1997) 30:2 *Australian and New Zealand Journal of Criminology* 150

<sup>63</sup> New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 32. See also Linda Tuhiwai Smith 'In Search of a language and a Shareable Imaginative World' in Du Plessis and Alice (eds) *Feminist Thought in Aotearoa New Zealand* (1998, Oxford University Press, Auckland) 99.

<sup>64</sup> In Raymond Firth *Economics of the New Zealand Māori* (Government Printer, Wellington, 1959) 135

<sup>65</sup> See also *He Hinatore ki te Ao Māori – A Glimpse into the Māori World – Māori Perspectives on Justice* (Ministry of Justice, Wellington, 2001). At page 68, in the discussion of utu, the report notes 'the individual was simply a unit of the wider group.'

<sup>66</sup> John Patterson *Exploring Māori Values* (The Dunmore Press, Palmerston North, 1992) 154.

<sup>67</sup> See Hineani Melbourne (ed) *Māori Sovereignty – The Māori Perspective* (Hodder Moa Beckett, Auckland, 1995). This book offers a series of interviews with prominent Māori leaders. Many of these commentators discuss the rise of tribalism and emphasis Māori collectivism, although few of these commentators illuminate the workings of collectivism beyond an ideal.

<sup>68</sup> Raymond Firth *Economics of the New Zealand Māori* (Government Printer, Wellington, 1959) 138. It does seem, on an admittedly shallow reading as yet, that ethnographers placed great emphasis on polarisation in Māori thought. (see for example, the writings of Alan and Louise Hanson, Hirini Mead and Anne Salmond) Hence the insistence on seeing concepts such as 'tapu' and 'noa' as diametrically opposed to each other (often translated still as 'sacred' and 'profane'), whereas the truth is far more likely to be found in the *inter-relationship* between the two concepts. This is not to say that conceptual polarisation did not exist at all, rather, shades of grey are also an important part of Māori philosophy and social organisation.



Of course there is plenty of evidence to illustrate the importance of the collective to the operation of Māori society. There is also plenty of evidence to show that there is an identifiable Māori view of the world. However, overstatement of the place of the collective denigrates the position of the individual in Māori thought. Furthermore, the assumption of the general application of such values ignores the reality for many contemporary Māori today.

## 2. *The Place of the Individual in Māori Thought*

The place of the individual in Māori traditional society was strong. This is indicated within Māori mythology, where fearless individuals such as Māui Tikitiki-a-Taranga engage in conflict and force change upon society, albeit ultimately for the benefit of the group. The place of the individual is also enshrined in concepts such as mana tangata, whereby mana could be gained and enhanced by individual action, often providing, of course, that there proved to be some benefit for the group from the increased mana of the individual.<sup>69</sup> Positions of leadership within the hapū or iwi such as the role of the tohunga were certainly revered for their individual, specialist abilities. Apirana Ngata described the traditional role of the tohunga before Parliament in 1907, emphasising individual aspects of the role.<sup>70</sup>

The law that governed the tribe practically emanated from...the tohunga...The law which meant life and death which dealt with everything pertaining to their cultivations, everything pertaining to their industries, everything pertaining to their moral life, and everything pertaining to their religious life emanated from tohunga. His word was law.

This is a view of tohunga; as 'one marked out by signs.'<sup>71</sup> This view contrasts with other views of decision-making processes that align more with the idea of Māori as collective.<sup>72</sup>

Tribal and sub-tribal policy was forged by consensus, with all the chiefs and elders having a say. Whenever the group gathered, matters of policy were discussed and the best orators commanded great influence...oratory became crucial to the exercise of leadership.

<sup>69</sup> New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) 33-34

<sup>70</sup> (July 19 1907) 139 NZPD 518

<sup>71</sup> Above n 10, 46

<sup>72</sup> Anne Salmond *Hui: A Study of Māori Ceremonial Gatherings* (2ed, Reed Methuen, Auckland, 1976) 14



It seems that the exercise of leadership fell between the spheres of the individual and the collective. Similarly, transmission of knowledge depended on relationships between teachers and pupils. A promising pupil would be fostered within the *whare wānanga*, house of learning, and responsibility for that knowledge was transferred through these relationships. The idea of collective ownership of knowledge was not widespread. Te Miringa Hohaia describes traditional Taranaki teaching he received at Parihaka.<sup>73</sup>

You look for any evidence that can prove that knowledge, *matauranga Maori* was owned collectively by the *hapu* or by an *iwi*. It is just not so. Knowledge was carried by people who were capable of carrying it, and they were all individuals...knowledge is privately-owned. [I]t's not been given to the *iwi*. It's not been given to the *hapu* it's been given to you. You're the one that has to stand up and carry this, you're the one who has to look for people that you're going to pass this on to so you are responsible for us and yourself.

Māori traditional oral literature and *whakapapa* describes the actions and thoughts of individuals. Māori tribal formation has been dependent on the ability of able individuals to challenge and reject existing social arrangements, thereby creating new *hapū* and *whānau* groups.<sup>74</sup> Ultimately individuals were responsible to the collective for their status and their survival. An apt, although rather phallocentric proverb expresses concisely the traditional relationship between the Māori individual and the Māori collective.<sup>75</sup>

mā ngā raho ka tū te ure  
the penis stands by means of the testes

There has always been strong recognition in Māori thought of the individual who challenges the group, displaying unique qualities worthy of remembrance and song. To say otherwise is to deny a vital aspect of traditional Māori history and culture.

### 3. *The Contemporary World*

The place of the individual remains strong in Māori thought today, particularly taking into account the effects of colonisation. However, a significant amount of what is now written

<sup>73</sup> Te Miringa Hohaia, spokesperson, writer and historian for the Parihaka Pā (Māmari Stephens 17 November 2000) transcript provided by Pito-One Productions (Ngaruawahia).

<sup>74</sup> Ranginui Walker in Hincani Melbourne(ed) *Māori Sovereignty – The Māori Perspective* (1995 Hodder, Moa, Beckett Auckland) 26



about Māori relies implicitly or explicitly upon traditional notions of culture and society. A very recent and important report on Māori cultural practices from the Ministry of Justice, incorporating many Māori contributors certainly analyses the workings of collectivism in Māori traditional society but is silent on how such traditional modes of behaviour, such as collectivism, have translated into modern Māori life.<sup>76</sup> In this paper it has therefore been necessary to look a little further afield to gain some idea of any difference between traditional and contemporary notions of collectivism and individualism.

A psychological study released in February 2001 by Victoria University of Wellington's School of Psychology has examined and compared the link between Māori and Pākehā ideas of individualism and collectivism, self-esteem and enhancement. This study suggests that collectivism and individualism remain strong in the Māori community.<sup>77</sup>

Rather than finding New Zealanders of European and Māori origins polarised on measures of individualism/collectivism and self-enhancement, we found rather more subtle differences between them, anchored by large amounts of similarity.

In other words, Pākehā are not exclusively individualistic, nor are Māori exclusively collective in their expressions of identity. Measures of collectivism were significantly higher for Māori than for Pākehā, but not at the expense of the place of the individual. The common assumption that Māori are a *primarily* collective people, or collection of primarily collective peoples, simply does not stand up to scrutiny.

There are valid reasons why collectivism and traditionalism are emphasised in identity discourse. Traditional Māori knowledge and its application is recognised as a means of assisting Māori to extract themselves from subordination in New Zealand society. On the other hand, acknowledging the subordinate position and the socio-political reality facing many Māori today would require acknowledging that much of that precious knowledge has

---

<sup>75</sup> Traditional whakatauaiki. Timoti Karetu, former Māori Language Commissioner (Tainui Stephens, January 2001) transcript provided by Pito-One Productions (Ngaruawahia).

<sup>76</sup> *He Hinatore ki te Ao Māori – A Glimpse into the Māori World – Māori Perspectives on Justice* (Ministry of Justice, Wellington, 2001) To be fair, the introduction to the document states that the report illustrates traditional practices. Nevertheless, during the report there appears to be an underlying assumption that the values described therein remain normative for Māori today.

<sup>77</sup> Leigh Harrington and James H. Liu 'Self-enhancement and attitudes towards high achievers: A Bicultural view of the independent and interdependent self' (Unpublished paper February 2001, School of Psychology, Victoria University of Wellington) 18. This paper collated data from approximately 370 students of Māori and Pākehā descent. The study linked feelings of self-enhancement with notions of individual and collective self-identification. This sample is limited, but the results are supported by other data from larger surveys such as the 'Inter-Generational Relations and Positive Aging Research Programme.



been irrevocably lost. To write about the Māori world-view is always to be reminded of the pain of the loss of so much of that world-view.

That such a description is still common illustrates a response to the extraordinary historical and contemporary pressures faced by the Māori. Recent Marxist-influenced writers such as Steven Webster and Elizabeth Rata point to an emerging 'neotribalism' and an increasing gap between the portrayal of Māori culture and acknowledgment of Māori political and historical reality. As the Māori Renaissance continues, Māori seek collective autonomy or tino rangatiratanga, using the tools of '[e]thnification and indigenisation [as] attempts to restore traditional social relations and secure political and economic autonomy from dominant Pākehā society.'<sup>78</sup> The cost of this path, according to Webster, is a refusal effectively to acknowledge widespread loss of contact between many Māori and their political and historical reality.<sup>79</sup>

The ideological identification between Māori culture and Māori society conceals an actual separation between them; while every New Zealander knows of the closeness of Māori to their ancestral land in abstract terms, the specific historical struggles have often been...too exhausting even to remember these grievances, let alone emotionally to identify with the land and the ancestry from which they derive, and to organise politically...

Perhaps romanticising our Māori heritage has been a necessary step to reclaiming it. The idea of belonging to a collective identity prescribed by hapū and iwi is extraordinarily powerful and regenerative. What must be acknowledged is the journey that has to be taken by disenfranchised Māori individuals before they can truly claim/reclaim such valuable group membership. As will be demonstrated Section IV, many such indigenous individuals may well be unable eventually to claim this group membership without an independent individual right to determine indigenous identity.

### *C Conclusion*

Under customary law many Māori families gave up their rights to be included in the traditional hapū descent group. According to the Court of Appeal in *King-Ansell v. Police* such families would probably not be deemed practising members of an ethnic group. Under *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* such Māori

---

<sup>78</sup> Elizabeth Rata *A Political Economy of Neotribal Capital* (Lexington Books, Maryland, 2000) 6-7



still qualify, by reason of membership of the descent category, as members of an iwi. This is an odd fruit of colonisation and our unique history. Māori may be considered as members of a redefined traditional iwi without being members of an ethnic group or even traditionally recognised members of a hapū.

This anomalous situation will be similar for other indigenous societies still adapting and responding to their unique historical and cultural legacies. What then, is the application of a Draft Declaration of mainly group rights for people who may not fit under the category of 'group'?

Ultimately the concept of the 'group' behind the Draft Declaration on the Rights of Indigenous Peoples is problematic. The document is founded primarily in communitarianism, and according to Adeno Addis, ultimately this approach holds little hope for minorities wishing to reassert themselves.<sup>80</sup>

It is assimilationist in its nationalist dimension and exclusionist in its localist version...[T]he best way to think of groups is...to acknowledge their important and pervasive role in our lives, and ...to acknowledge their instability and transformability.

Many of the people who most desperately need the rights included in such a Declaration will find themselves excluded by externally and internally imposed definitions of the 'group'. It is time to investigate the concept of the independent individual right to determine indigenous identity as may be available under an amended Article 8 of the DDRIP. Such a right, with appropriate recognition, may ultimately enable indigenous individuals not only to claim indigenous identity, but also eventually to access group identification and entrée into group rights.

### **III AN INDEPENDENT RIGHT TO DETERMINE INDIGENOUS IDENTITY?**

Sections II and III have investigated the limited coverage of group rights for the needs of indigenous people. As the preceding pages have demonstrated, collective rights are difficult to apply to certain indigenous people for whom collective identity is non-existent, unsure, or nascent. For such people a compromise may be available in an independent

---

<sup>79</sup> Steven Webster *Patrons of Māori Culture – Power, Theory and Ideology in the Māori Renaissance* (University of Otago Press, Dunedin, 1998) 35



individual right to determine indigenous identity in an amended Article 8 of the Draft Declaration of the Rights on Indigenous Peoples. The suggested wording is shown in square brackets, in bold.

Indigenous peoples [**and individuals**] have the right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and be recognised as such.

This wording is similar in tone to the wording of Article 9 granting indigenous peoples and individuals the right to belong to an indigenous community or nation. Certainly the idea of an individual right to self-identify is not new and discussion of it predates the Draft Declaration.<sup>81</sup> The distinction in this discussion is that I refer to an 'independent' individual right to determine identity. Article 8 already acknowledges an individual right to determine indigenous identity. The use of the term 'Indigenous peoples' to open the article shows that nature of the indigenous identity able to be claimed is a *group* identity. An independent individual right to determine indigenous identity is a little different. The independent right enables indigenous people to claim an indigenous identity that may be but is *not necessarily* a group identity. There are many indigenous individuals that cannot simply claim a group identity on the basis of genealogy alone. They lack characteristics that enable them to be defined unequivocally as part of any indigenous group. Such individuals can, however, take on these characteristics voluntarily over a period of time. With appropriate recognition by other indigenous people of a particular indigenous group, such re-enfranchised indigenous people may ultimately be able to claim indigenous group identity. For such marginalised people, that claim can only result from the earlier exercise of a right in response to a human need; the independent individual right to determine indigenous identity.

The nature and extent of such a right has not yet been defined. As will be argued in this section the independent individual right to determine indigenous identity is an important moral right that exists independently of the right potentially contained in the DDRIP. Its place in the hierarchy of moral rights is yet to be determined because the right itself has only recently been discovered. The relationship between the individual right and the

<sup>80</sup> Adeno Addis 'Individualism, Communitarianism and the Rights of Ethnic Minorities' 66. 1219 (1991) *Notre Dame L Rev* 615, 647

<sup>81</sup> See, for example Adeno Addis 'Individualism, Communitarianism and the Rights of Ethnic Minorities' 66. 1219 (1991) *Notre Dame L Rev* 615, 630ff; Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, New Jersey 1992); Pamela Palmater 'An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians' 23 (2000) *Dalhousie LJ* 102, 105; Mick Dodson in Debeljak, Julie 'Barriers to the Recognition of Indigenous Peoples' *Human Rights at the United Nations* 26 (2000) *Monash ULR* 159, 183;



collective right to determine indigenous identity shows that both rights do depend on each other. For indigenous people it is essential that both rights be recognised to ensure the effective participation of indigenous individuals and groups in rights protection.

While both rights are essential for indigenous peoples there has been conflict between indigenous groups and indigenous individuals over the exercise of the right to determine indigenous identity. Indigenous peoples must recognise the existence of such conflict and work to ensure that individual and collective rights to determine indigenous identity are upheld by indigenous peoples as much as by non-indigenous peoples. Perhaps indigenous groups are under a duty concomitant with their right to include, respect and protect all indigenous members of their group, estranged or not. Indigenous individuals are also limited in the exercise of their right to determine indigenous identity. They must be subject to some test that limits the application of the right in some way. That test must be an open one to avoid the potential injustice and irrelevance of blood quantum requirements and the like. Ultimately recognition of the indigenous individuals by significant others also of that indigenous identity serves as an adequate test to determine those able to exercise an individual right to determine indigenous identity.

#### A *Recognising a Right*

The discourse about indigenous rights can be confusing and 'the clarity of the concept has, unfortunately, not matched its popularity.'<sup>82</sup> In part the confusion arises from the different sources of rights. Some of the rights of indigenous peoples discussed in this paper stem from legislation, such as Canada's Indian Act. Others stem from particular legally recognised doctrines, such as the doctrine of aboriginal rights; the principle that the customary rights of indigenous peoples in colonised territories are preserved until expressly extinguished by Parliament.<sup>83</sup> Other rights descend from instruments such as the Treaty of Waitangi concluded between specific peoples. Others rights have developed, or are developing within the context of international human rights instruments such as the United Nations Declaration of Human Rights and the Draft Declaration on the Rights of Indigenous Peoples. Even aside from these rights others exist, shadowy and yet to be defined properly, if at all.

---

Wendy Moss "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving conflicts between Collective and Individual Rights." 15 (1990) *Queens L Rev* 279, 295

<sup>82</sup> Adeno Addis "Individualism, Communitarianism and the Rights of Ethnic Minorities" 66, 1219 (1991) *Notre Dame L Rev* 615, 619



Looking at these different sources, it is possible to distinguish between legal and moral rights.<sup>84</sup> Legal rights accrue to an individual or a group on the basis that certain rules state that such rights are to be granted, such as tax rebates, or property rights. Moral rights use the language of 'should' and 'ought' and their existence is established by moral argument. Moral rights may or may not be reflected in rules. Moral rights are difficult to define exactly, unlike rules, and there is no limit to such rights that may be said to exist. Ultimately, moral rights are rights to certain types of freedom. They are not always absolute because rights conflict with each other, but the breach of a moral right requires much more moral justification than does the breach of a rule. In the case of individuals, moral rights constitute a freedom to act in a certain way. Similarly, collective rights define a domain of freedom of action for the collective.

Such rights are not necessarily permanent. As Ormsby points out, the rights contained in the Magna Carta were deemed to be important at the time of its signing, but only some have survived into present rights theory. Charles Taylor observes that the pre-occupation with concepts of identity is a modern phenomenon, and that rights to have identity recognised are recent rights that would have made little sense to our ancestors.<sup>85</sup>

The link between identity and the appropriate recognition of that identity has become very strong indeed. For indigenous peoples not to have their identity recognised, or even to have it misrecognised can 'inflict a grievous wound, saddling its victims with crippling self-hatred.' Indeed, according to Charles Taylor, due recognition of indigenous identity is not merely respectful, it fulfils a human need.<sup>86</sup> Such a need gives rise to a moral right to have one's own indigenous identity recognised. Identity is, however, negotiable.<sup>87</sup>

Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. [T]he development of an ideal of inwardly generated identity gives a new importance to recognition. My own identity crucially depends on my dialogical relations with others.

---

<sup>83</sup> Quentin-Baxter, Alison "The UN Draft Declaration on the Rights of Indigenous Peoples - the international and constitutional law contexts." 29 (1999) VUWLR 85, 103

<sup>84</sup> Much of this paragraph is based on Maurice Ormsby's discussion of the nature of rights. See M J Ormsby 'Individual and Collective Rights' (Unpublished paper prepared for the Ministry of Justice, 1997) 18-22

<sup>85</sup> Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, New Jersey 1992) 26ff.

<sup>86</sup> Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, New Jersey 1992) 26

<sup>87</sup> Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, New Jersey 1992) 34



But if determining identity cannot be an individual process alone, prescribed by an individual right, neither is it only a collective process prescribed only by a collective right in the contemporary world faced by indigenous peoples.

### ***B An Independent Individual Right***

My argument that an individual right must exist independently within the terms of Article 8 of the DDRIP is a moral one. The right itself is a pre-existing moral right predating the creation of the Draft Declaration or any other instrument. In other words, indigenous individuals 'should' have the fundamental freedom to determine their own indigenous identity. It appears however that the individual right expressed in Article 8 is only directed at determining group identity. It may not be possible to have an effective individual right to determine indigenous group identity if significant numbers of indigenous individuals are excluded from any collective entity in the first place. If a right does not exist that allows indigenous individuals to determine indigenous identity outside of a group entity, thousands, if not millions of indigenous people who have been estranged from indigenous groups through processes such as colonisation are denied the fundamental freedom to determine their cultural identity. This independent individual right should exist so that as many indigenous people as possible can have access to fundamental freedoms protected by indigenous rights.

#### *1. The relationship between the individual and collective right*

The position that the individual right needs to be recognised in order to access individual and collective protection could be accused of reflecting 'consequential individualism.' As discussed by Addis, this idea holds that collective rights can only be understood as individual rights in the first place.<sup>88</sup>

[I]t sees the concept of group rights in strategic and temporary terms. This concept is to be deployed, not because...because there is an intrinsic value in conferring rights on groups, but because that might be the only way to correct structural and institutional defects which are seen as impediments to treating people as individuals.

<sup>88</sup> Adeno Addis 'Individualism, Communitarianism and the Rights of Ethnic Minorities' 66. 1219, (1991) Notre Dame L Rev 615, 631



While Addis sees the individual right as ultimately undermining the collective right I see the existence of the independent individual right to determine indigenous identity as the method of fixing historical defects that exclude individuals from group membership. Groups are moral units that are capable of bearing rights. The individual right to determine indigenous identity ultimately supports the group unit by enabling more people eventually to access group identity. For individuals who have been estranged from their indigenous group, one way, perhaps the only way to become eligible for inclusion in that group is to develop their individual indigenous identity. Such individuals may only develop their individual indigenous identities if they have the right to determine their adherence to that identity in the first place. Once such individuals can become more confident in their indigenous identity they are far more likely to be eligible for membership in and recognition from the indigenous group. Thus the exercise of the independent individual right to determine indigenous identity can be seen as a right that ultimately strengthens indigenous group identity.

What is less clear is where this right will sit in the hierarchy of moral rights. This individual right, as with the concomitant collective right, has only recently been 'discovered' and exists in response to the specific conditions of indigenous peoples that has arisen over the past two or three centuries of conquest and colonisation. Such rights are yet to pass the test of time that other moral rights have had to undergo. The rights that are the strongest and most likely to be observed are the ones who have been acknowledged for the longest period.<sup>89</sup> The short life of the individual right to determine indigenous identity does not reflect on its present importance. Such a right is clearly of great importance to those for whom indigenous rights may well be inapplicable without it. That importance may not, however, be as strong in the next century, depending on the status and needs of the people who might need the right at that time.

### *C A Conflict Of Indigenous Rights*

Most discussion of the rights included in the DDRIP concentrates on the actual and potential conflict between states and indigenous peoples over the exercise of collective rights because such rights could threaten the political integrity of unitary states. As discussed by Maurice Ormsby, collective rights are certainly threatened by individuals or

---

<sup>89</sup> M J Ormsby 'Individual and Collective Rights' (Unpublished paper prepared for the Ministry of Justice, 1997) 24



groups, including governments, operating outside the sphere of the collective. However, the operation of collective rights is also threatened by those within the collective, or on the edges of the collective 'behaving in ways that [undermine] the group's collective purposes.'<sup>90</sup>

Some attention has been paid to cases such as *Thomas v Norris* which illustrate the conflict between indigenous individuals wishing to assert already-recognised individual human rights against groups wishing to assert collective rights.<sup>91</sup> Less attention has yet been paid within the discourse to the potential for conflict between indigenous individuals wishing to assert a right to indigenous identity and indigenous collectives wishing to exclude such individuals from that identity. Canadian case-law offers some instructive examples of such conflict.

Due to the federal Indian Act, Canada offers plenty of material for analysis of the conflict of individual and collective rights to determine identity. As will be shown, significant case law has developed around the Act that involves individuals attempting to have their status as band members recognised by specific bands. While the Canadian material focuses on conflict between people who want to assert the group indigenous identity, as opposed to an individual indigenous identity, the issues are very relevant for determining the extent of any indigenous right to determine indigenous identity.

### 1. *The Canadian Indian Act: Relevant Background*

For any discussion of Canadian case law, the contextual legislative framework must be briefly investigated to understand the conflicts that have arisen between groups and individuals attempting to assert indigenous Indian identity. The Indian Act of 1985 descends from the original 1876 legislation aiming to regulate the use of Indian Reserve land and establish a system of band (tribal) councils. This Federal Act also imposes definitions of who is and who is not an Indian for the purposes of the legislation.<sup>92</sup> The

<sup>90</sup> M J Ormsby 'Individual and Collective Rights' (Unpublished paper prepared for the Ministry of Justice, 1997) 42

<sup>91</sup> [1992] 2 CNLR 139. This case involved a conflict between the group rights of a British Columbian band to practice their cultural practice of 'spirit dancing' and the individual common law rights of Thomas against battery, assault and imprisonment. In that case, no right to the practice was found by the Court.

<sup>92</sup> Wendy Moss 'Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving conflicts between Collective and Individual Rights.' 15 (1990) *Queens L Rev* 279



legislation and its 1985 amendments (commonly known as Bill C-31) divide Indian people into four groups.<sup>93</sup>

1. Indians who are both registered and entitled to band membership
1. Indians who are registered but without an automatic right to band membership
2. Band members who cannot be registered
3. Indians without band membership, who are not entitled to registration.

Essentially 'Indians' are those with recognised band membership. Such people are known as 'status' or 'registered' Indians. These people are entitled to live on reserve lands and have been subject to tax exemptions and other special laws. People who are of mixed blood, without the requisite band membership, are 'non-status' and thus excluded from consideration under the Act. There are also registered band members who are 'non-status', and there are non-status, non-band members who are nonetheless still considered Indian, while still ineligible for the purpose of the Act.

One of the great injustices under the Act before the passage of Bill C-31 in 1985 was the old section 12(1) (b) which stripped Indian women of their status if they married non-Indian men. The children of such marriages were also denied status. While this section has been repealed the new s 6(2) employs the now notorious 'second generation cut off rule', whereby status is terminated for Indians with fewer than two Indian grandparents. Many commentators are deeply concerned about the long-term effects of this rule. While in the short term the amendments to the Indian Act reinstated about 100,000 Indians to their status, the cut-off rule is likely to have a more permanent deleterious effect. Intermarriage has, of course, continued, and fewer of the resulting children are able to claim two Indian grandparents. As Palmater notes, some of the smaller bands' numbers have already markedly reduced since the passage of the amendments, a phenomenon that is likely to continue.<sup>94</sup> Harry Daniels, former president of the Congress of Aboriginal

---

<sup>93</sup> See the web-site for the Congress of Aboriginal Peoples for concise explanations of the operation of the Act and its 1985 amendments. <http://www.abo-peoples.org/programs/c-31-1.html>. (Date of Last Access 19.08.01)

<sup>94</sup> Pamela Palmater 'An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians' 23 (2000) Dalhousie LJ 102, 118. She gives the extreme example of the Golden Lake First Nation the population of which is expected to shrink to just over one third of 1991 figures within a century.



Peoples notes the pressure Bill C-31 has placed on existing Aboriginal communities to adjust their membership according to the dictates of the legislation.<sup>95</sup>

The new rules obviously place tremendous pressure on existing status Indian communities to take steps to maintain the 'racial' purity of their community and to discourage unions with Non-Status partners. Given the long history of inter-marriage between Indian and European immigrants to the New World...such attempts are likely to prove futile in the long run, ethically controversial in the short run.

The unique Canadian legislation and the limited resources available to bands to develop and maintain their reservations ensure that there is noticeable conflict in the public arena between indigenous people as to who may be counted as indigenous and who may not. In this context we are able to see clearly the conflict between groups and individuals over the rights to determine indigenous identity.

## 2. *Cases illustrating a conflict of rights*

It is to be noted that this paper is arguing for the existence of an Article 8 independent indigenous right to determine indigenous identity, whether that identity is group or individual. This Canadian material focuses on conflict between people who want to assert the group identity rather than individual identity. Nevertheless this material is still useful for our purposes because it gives a few hints as to how to resolve tension between indigenous individuals and collectives over determining identity.

One of the most important tensions has arisen between Indian women and their bands. Under the Indian Act bands have the prima facie right to determine their own membership (unless over-ridden by Federal jurisdiction). On several occasions bands have excluded women who have married out of the band despite having their status returned to them after the passage of Bill C-31. These conflicts have seen Indian women asserting their individual human rights, as guaranteed by the Constitution Act 1982, against the group rights of the band, as granted by the Indian Act, to determine its own membership.

---

<sup>95</sup> Harry W Daniels 'Bill C-31: The Abocide Bill' Congress of Aboriginal Peoples (1998) <http://www.abo-peoples.org/programs/dnlsc-31.html> (Date of Last Access 19<sup>th</sup> of August 2001)



Two such cases are *Sawridge Band v Canada* and *Scrimbett v Sakimay Indian Band Council*.<sup>96</sup> Both cases were heard in the Federal Court of Canada, Trial Division. Both cases also involved the rights of women who had originally lost their Indian status by marrying non-Indians, but who been reinstated to their Indian status under Bill C-31. Such women claimed the right to be included in band membership, while the bands resisted such a right, citing that such a right would infringe the band's right to determine the membership of the band. At the bottom of the bands' concerns is a fear that band resources, already meagre, will be stretched too far to cope with any influx of returning members. While the cases concentrate on the legislative provisions of the Indian Act that allow the band the legal right to define their own membership, the deeper issue is the clash of the collective moral right to determine indigenous identity with the individual's moral right to determine indigenous identity.

The applicant band in the mammoth 79 day trial in the case of *Sawridge Band v Canada* attempted to persuade the Court that it had a customary right to determine its own membership. The Court held that the band in question had no such customary right, and that to plead the existence of such a right would constitute 'fictitious revisionism'.<sup>97</sup>

...this Court finds that there was no "Aboriginal" and certainly no treaty "right of members of the said bands under the irrespective [sic] customary laws, to determine membership in the bands and to veto the admission of any persons to membership in the said bands.

This judgement and accompanying comment is interesting because the supreme legal right to determine band membership is ultimately vested in the Canadian Government, regardless of mechanisms the bands put in place under the Indian Act. In *Sawridge* the band was held to have no legal right, no doctrinal aboriginal right and no treaty right to determine the membership of the band.<sup>98</sup> No reference was made to Article 8 of the DDRIP. The Court did not address the issue of whether the band had some other moral right to define its make-up. Indeed the Court seems to have assumed that there was in fact a moral duty to ensure that the band had no such right. On reflection, however, it was surely open to argue that an indigenous group should or ought to have a right to say who does and who does not belong. The Court has, in its analysis, jumped to the end result of

<sup>96</sup> [1995] 4 CNLR 121-230, [2000] 1 CNLR 205-232.

<sup>97</sup> [1995] 4 CNLR 121-230, 221

<sup>98</sup> [1995] 1 CNLR 205, 221



the possible unjust exclusion without investigating the moral worth and hierarchical weight of such a right in the first place.

In *Scrimbett v Sakimay Indian Band* the Sakimay Band also attempted to rely on the existence of a customary right to justify the exclusion of women who had married outside the band.<sup>99</sup> They attempted to argue that such a right was protected pursuant to ss35(1), 25 and 28 of Constitution Act 1982 which guarantees that rights and freedoms within the Charter shall not be construed so as to undermine any 'aboriginal, treaty or other right or freedoms that pertain to the aboriginal people of Canada.'<sup>100</sup> In reply, the Court again declined to directly deal with the legitimacy of a right to determine membership. Instead, the Court stated that the right the band was trying to claim was in fact the right to deny voting rights to band members. The Court held there could be no such right and that the applicant Mary Scrimbett had a right to equal protection and equal benefit of the law under s15(1) of the *Charter*. They held that the band had violated this right.

It seems in *Scrimbett* that the Court has perhaps deliberately sidestepped deeper waters by narrowing down the ambit of the right claimed by the band. By doing so the Court was able to avoid moral arguments as to whether a band has a right to determine its own membership that exists separately to treaty, charter and legislative rights. It was also able to avoid any discussion of the relative status of such a right in context with other rights.

#### ***D Limits on the Collective and Independent Individual rights to Determine Indigenous Identity.***

The Canadian Federal Courts 'resolved' the conflict between the individual and collective rights to determine indigenous identity by denying the existence of any right and certainly without reference to the Article 8 of the DDRIP. Instead resolution of the conflict was made by reference to the UN Declaration of Human Rights, and indigenous collective needs were undermined.

As these cases dealt with claims to indigenous group identity, it is possible that the conflict could have been resolved by reference to the existing Article 8. If it can be accepted that Article 8 of the DDRIP should be amended to reflect an expanded independent individual

---

<sup>99</sup> [2000] 1 CNLR 205

<sup>100</sup> [2000] 1 CNLR 205, 212, 227



right to determine indigenous identity, more future conflicts could be mediated with reference to Article 8 alone.

In order for Article 8 to be used in such a way there needs to be limits on the individual and collective rights.

### 1. *Limits on the Collective Right to Determine Indigenous Identity*

Despite the Canadian Courts' refusal to acknowledge or analyse the existence of a group right to determine group membership, indigenous peoples themselves argue that this right exists and is a natural and fundamental right that goes to the heart of minority or indigenous rights.<sup>101</sup> An indigenous person may claim the identity of an indigenous group, and the test will usually include the recognition and affirmation of that same group, as discussed by Woodhouse and Richardson JJ in the *King v Ansell* case.<sup>102</sup> Any test to determine collective group identity is applied by the collective on its own terms and cannot be ascertained objectively in all cases. There are also other limitations to such a group right. According to Palmater this fundamental group right to determine identity is accompanied by an equally fundamental duty.<sup>103</sup>

[T]his right carries with it a tremendous responsibility to ensure that all members of the community are included, protected and respected. [H]ow they identify as Aboriginal peoples is their right as human...which must be allowed to evolve over time to incorporate the modern realities of our social interaction and changing cultures.

The idea of a group owing itself such a duty was discussed in the case of *Scrimbett*. Mary Scrimbett alleged that the Sakimay band had owed her a fiduciary duty that arose from a position of trust between Council members and band members. While the Court held that there was no fiduciary duty, the band itself acknowledges the existence of a duty that presumably accompanied the claimed right to determine band membership. The band states however, that that any such duty is owed only to the band and not to individuals.<sup>104</sup>

If groups indeed do have the moral, if not legal right to determine their identity, the idea of a concomitant duty to respect, include and protect all members of the group may apply. If it may be said that a group owes such a duty to its own group, it may not be such a leap to

<sup>101</sup> Moss, W "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving conflicts between Collective and Individual Rights" (1990) 15 *Queens L Rev* 279, 288

<sup>102</sup> [1979] 2 *NZLR* 531

<sup>103</sup> Palmater, P "An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians" (2000) 23 *1 Dalhousie LJ* 102, 105



owe such a duty to those members on the edge of the group. Perhaps such a duty could even be owed to those indigenous individuals who have been excluded from functional group membership for all the reasons we have discussed so far in this paper. The question as to who is entitled to be called indigenous in the first place can be resolved with reference to the individual right to determine indigenous identity, as will be discussed shortly. A moral duty to include, protect and respect that could include marginalised members could help resolve conflict between the individual and collective indigenous rights to determine identity. The group right to determine identity would have the burden to discharge of demonstrating that it is including, protecting and respecting its own members, even while it attempts to exclude the individual in question. Discharging that burden may help make the decision as to which right should have precedence; the individual or the collective.

## 2. *Limits on the Individual Right to determine Indigenous Identity*

As discussed above, the collective right may be limited by specific group tests as well as the collective moral duty to include, protect and respects all indigenous members of a particular indigenous group, even marginalised members. There must also be a test to determine who can claim an individual right to determine group or individual indigenous identity.

Previous tests in determining identity have included closed notions, such as blood quantum and certified genealogies. In the New Zealand context McGuire suggests a return to 'say a minimum of fifty percent Māori blood, as the requirement for qualifying for membership of the group Māori.'<sup>105</sup> In the *Sawridge* case Muldoon J notes with frank distaste that certain bands were 'conjuring' with the practice of 'blood quantum' to determine band membership. He goes on to observe:<sup>106</sup>

One hopes that people who characterise themselves as generous, hospitable and living in tune with Mother Earth and all nature will not set out to turn some unfortunates among their number against their own grandparents.

<sup>104</sup> [2000] 1 CNLR 205. 217

<sup>105</sup> McGuire, Jeremy 'Reflections on the Formal Definitions of Māori' [1995] NZLJ 171. With commentators like McGuire suggesting his 'more sensitive gauge of...Maoriness', no wonder Māori, and indigenous peoples tend to hold to holistic notions of identity and collectivity.

<sup>106</sup>[1995] 1 CNLR 205. 226



Other supposedly fixed indices such as genealogical records are also problematic and very manipulable, as demonstrated amply in the minutes of the Māori land Court.

The criteria for group recognition is determined by the group. In the case of an amended Article 8 including an independent individual right to determine an *individual* indigenous identity, the test may seem a little different. Indigenous individuals can identify as such indigenous individuals because the people they love and who love them reflect that identity back to them. Such recognition may be given by select *individuals* rather than by collective entities. Again, the criteria for such recognition is determined severally by those who extend the recognition to the individual concerned. Indigenous people are able to assert individual indigenous identity because they are recognised by significant others in their lives as indigenous. As stated by Charles Taylor:<sup>107</sup>

It is not surprising that in the culture of authenticity, relationships are seen as the key loci of self-discovery and self-affirmation. Love relationships are...crucial because they are crucibles of inwardly generated identity.

In ascertaining the limits of such a test it would be reasonable to assume that at least some of the individuals and groups who extend recognition to another indigenous individual are themselves indigenous. This test need not therefore be an excuse for vexatious or bad faith claims to indigenous identity.

Perhaps an effective way to illustrate the operation of the test for someone to claim an independent indigenous right to determine indigenous identity is to show how it might work practically in my own family.

### *1. A brief personal illustration*

I am the youngest of three siblings from my father's first marriage. He was raised by his grandmother in the Far North community of Waihopo until the age of six, after which time he was taken to Auckland to live with his mother and his Pākehā stepfather. In Auckland, Dad found out he was different.<sup>108</sup>

I know now that one reason Dad was so driven to achieve success was to simply do better than the white man. His earliest memories seemed to revolve only around the

<sup>107</sup> Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University press, Princeton 1992) 36

<sup>108</sup> Tainui Stephens 'He iti taku iti' in *Growing Up Māori* (Tandem Press, Auckland, 1998) 271



shame of being Māori. On the Ōtāhuhu bus and in his Avondale school he was taunted by dimwits of the day, saying that he and his beloved Nana stank.

By the age of 15 due, in part, to appalling mistreatment by his step-father, my father had decided essentially to reject his Māori, Te Rarawa identity, and to seek his place in the Pākehā world well away from his tribal lands and the influence of Māori culture.

He has lived in Australia for 31 years, and only now is beginning to feel some sort of pride in his whakapapa and heritage. His six children, in the meantime, were raised with little or no direct contact with his culture, no Māori language and no 'internal sense of recognition' by which we could judge ourselves members of an ethnic group. While the children raised in New Zealand had our Pākehā mother try to instill some sense of pride in being Māori, we had no way of living what that actually meant. As a family, we certainly failed the test in *King-Ansell v. Police*. We had no characteristics to share with other Māori, and as Christchurch raised, Pākehā-looking children, we would certainly fail any objective test by disinterested observers Pākehā or Māori.<sup>109</sup> Certainly by traditional standards of defining descent-group membership we had also relinquished any rights which might have accrued to us by virtue of our descent from our hapū. We had no regular interaction with other members of our hapū, we resided on another island. We were part of the descent category, not the descent group. At least from our genealogy we would still qualify under *Te Waka Hī Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission* for membership of an iwi.

It is only in the last two decades that I and my siblings have individually and consciously decided to identify culturally as Māori and develop that cultural identity. On deciding on such paths, we had no group membership to easily slot into. As siblings, our journeys have been, initially at least, separate journeys. Almost all understanding I now have of Māori culture is a direct result of an independent, individual *conscious decision* in my late teens to pursue such knowledge. According to my mother when I was growing up, my father was a 'three-quarter caste' while I 'was between a one-third and half caste'. In such a category and being the great-grandchild of five Pākehā and three Māori, it was easily available to me to choose differently. Equally, it was possible for my father to choose to opt out of his ethnic group identity by essentially running away from our tribal area to start a new life.

---

<sup>109</sup> This issue is also discussed by Jeremy McGuire 'Reflections on the Formal Definitions of Māori' [1995] NZLJ 168-172.



My New Zealand-born brothers and I have chosen independently of each other to exercise an independent right to determine our own Māori identity. All three of us speak Māori to a greater or lesser extent. We identify publicly as Māori of Te Rarawa iwi and the Ngāti Moetonga and Te Rokekā hapū. We all identify with the Wainui and Te Ōhākī marae in Ahipara. We bury the placenta of the next generation in our whānau urupā, or cemetery, we occasionally attend hui, tangi and other gatherings in Ahipara. I would observe that these are learned behaviours we did not do or understand 25 years ago. It is also questionable what sort of identity it is that we have sought. Initially we sought merely to be generically 'Māori', whatever that meant. In our family, my older brother Tainui opened the way for the rest of us, when he was a student at Canterbury University in the 1970s.<sup>110</sup>

This instilled in me the desire to spend more and more time with the Māori community and I asked my lecturer...if it might be possible to spend the holidays with his iwi at Tokomaru bay...Bill agreed, but then asked me, 'Wouldn't it be better if you did this amongst your own iwi?' Good point Bill. But who the hell were my iwi?

For each of us, collective identity is what we ultimately seek, but we can't just produce it overnight. It takes work. Whakapapa gets us in the door; we have to do the rest voluntarily.<sup>111</sup>

It was time to find my iwi.

I made my way from Christchurch to the Far North – to the Hokianga. When I knocked on the door to my grandfather's house, I guess I had harboured visions of what he would be like – what *they* would be like – which, in retrospect, were too romantic to be real. When Bobby Roberts opened the door the romantic and the real came together in the old, very real, man standing there with an enquiring look on his face.

"Tēnā koe, I'm your grandson."

According to Michael McDonald's notion that membership of an ethnic group would be involuntary, we children fail to qualify. Even now it could be argued that we still have not activated our rights to be included in the traditional hapū descent group. Our contact is still too sporadic, and I, at least, sometimes feel a little like a tourist. Only consistency, presence and practical contribution to the hapū community over years to come will dilute that feeling.

---

<sup>110</sup> Stephens, above n 98, 276



Under Article 8 of the Draft Declaration, as it presently stands, I have not in the past been a functioning member of a 'people' to which the article refers. That article therefore gives me no right to claim any indigenous identity. However, under an amended Article 8 I could claim an independent individual right to determine an indigenous identity that is not necessarily collective. Until I can claim such a collective identity, I claim the right to be an indigenous individual. I pass the test of indigenesness not because of blood quantum, or even necessarily because of a certified bona fide whakapapa, although that can certainly be provided if necessary. I pass the test because my mother, my siblings, my father, my aunty residing in Ahipara, my Auckland cousins and my partner, among others, all recognise me as being indigenous. My Māori friends at university recognise me as indigenous. Some of these people are of Te Rarawa descent some are not. They treat me as indigenous, they speak of me to other people as indigenous. People who love me and who are significant others in my life recognise me as indigenous and of Te Rarawa, Ngāti Moetonga, Te Rokekā descent. Some of these people do not constitute a functioning collective, in some senses they are individuals but lightly linked to each other.

By virtue of our dislocated family history and my own tardiness in establishing myself as part of the hapū or iwi collective, the nature of the indigenous identity I have a right to claim is not necessarily true functioning collective identity. That will come. For now, I pass the test that would enable me to claim the independent individual right to determine indigenous identity.

#### *IV CONCLUSION*

In this paper I have argued for amending Article 8 of the Draft Declaration on the Rights of Indigenous Peoples to include an independent individual right to determine indigenous identity. Without this right, indigenous people who are as yet unable to claim functional group membership are excluded from the protections of the Draft Declaration. Instead, the document remains focused on collective rights and collective entities. This paper demonstrates that some of the assumptions underlying indigenous rights discourse may hinder rather than help the development of indigenous peoples. While it is clear that collectivity is extremely important to many indigenous communities, the application of group rights may not afford the fullest possible protections for indigenous heritage.

---

<sup>111</sup> Stephens, above n 98, 277



Certainly groups are units capable of holding rights, but without some recognition of concomitant individual indigenous rights, significant numbers of indigenous peoples are excluded from present indigenous rights discourse.

In New Zealand it is possible to see the heterogeneity of the Māori population that occurs as a result of colonisation, intermarriage and the gradual undermining of traditional group processes by non-Māori legislative procedures in areas such as land tenure. Many Māori groups other than hapū and iwi have great importance in terms of cultural identity, such as Urban Māori Authorities. New Zealand case law has had to respond to these changing circumstances and as a consequence, 'iwi' are now defined as broadly as possible, bearing little resemblance to traditional group formation processes. Many Māori see themselves now not as members of a group only, but also as cultural individuals, even if the prevailing rhetoric encourages us to envisage ourselves otherwise. Many thousands of Māori, including my own family have had to exercise individual choice to access and develop their indigenous identities. For many this will mean ultimate acceptance by a group from which we can receive cultural nourishment and protection. For others being part of a functioning group may remain an ideal that is never realised.

How, then can such people on the edges of indigenous communities be included and protected by indigenous rights as contained in the DDRIP? An independent individual right to determine indigenous identity in Article 8 of the draft declaration can alongside the collective and individual right to indigenous group identity. The independent right may well be rarely invoked. It does, however, offer a way in to the other protections in the document. If indigenous individuals can exercise a right to determine their own identity without having a group to belong to, many will choose to return to, or learn to identify with indigenous groups. Thereby they will be able eventually to access the fuller protections of the draft given to groups. In this way more effective protection can be offered to those who, in many ways, are in the most need of it.

Individual and collective rights to determine indigenous identity are bound to conflict. Indigenous identity is vulnerable to the whims of legislation, and scarcity of resources. An individual from the margins of a people claiming any indigenous identity is potentially a threat to the fragile resource and power base already in place. In the Canadian cases discussed in Part III, the Courts have intervened in some instances of such conflict and claimed a superior legal right to determine the membership of the bands in question. Such



cases have neatly avoided discussing the implications of the existence of a moral right to determine identity that is not dependent on treaty, legislation or a doctrine of legally recognised aboriginal rights.

There is no easy solution to this rights conflict. There must be limitations placed on the rights to determine indigenous identity. Such tests cannot be predicated on McGuire's outdated notion of blood quantum, and even genealogy cannot be a failsafe determinant of indigenous identity. One possible way to resolve it might be for indigenous groups to recognise that in order to have the collective right to determine indigenous identity they must also carry out the duty to include, respect and protect all those who may be considered part of that indigenous identity. This is a duty on indigenous peoples not only to themselves as a group, but also to indigenous individuals. In recognising and carrying out that duty the potential for conflict may well lessen. Similarly any individual right to determine indigenous identity that can be exercised *independently* of a group identity must also be limited. Were it not, any person with such a whim could conceivably identify as indigenous, thereby placing indigenous resources at further risk. Ultimately identity cannot be determined in isolation, and an individual identifying as part of an indigenous group must be recognised by significant others of that group. Indigenous individuals claiming the right to be indigenous individuals under a revised Article 8 must also be recognised by significant others at least some of who also hold that indigenous identity, some of whom may not. The recognition itself is the test, not the criteria. The criteria for recognition must be determined by those indigenous significant others, those 'love relationships' mentioned by Charles Taylor.

This paper suggests that the limitations placed on the amended Article 8 individual and collective rights to determine indigenous identity may be enough to help effectively resolve rights conflict when it occurs. Rather than look to other rights instruments and legislation that do not reflect indigenous experience, the Courts could look to an amended Article 8 of the Draft Declaration on the Rights of Indigenous Peoples. They could apply appropriate limitations of such rights, including the test of recognition for determining who may and may not claim indigenous identity. For those of us attempting to claim the individual and group indigenous identities that could be allowed us by an amended DDRIP, the journey ever continues.



## V **BIBLIOGRAPHY**

### A **Books**

Ballara, A *Iwi – The Dynamics of Māori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998)

Best, E *The Māori* 2 Vols (The Polynesian Society, Wellington, 1924)

Boast, R A Erueti, D McPhail and N F Smith *Māori Land Law* (Butterworths, Wellington, 1999)

Brookfield F. M *Waitangi & Indigenous Rights: revolution, law and legitimation* (Auckland University Press, Auckland 1999)

Daes, E A *Discrimination against indigenous populations : report of the Working Group on Indigenous Populations on its sixth session* United Nations, Economic and Social Council, 1988 Report on the Sixth Session of the Working Group on Indigenous Populations, Geneva, Switzerland, on 1-5 August, 1988.

Durie M *Te Mana, Te Kawanatanga The Politics of Māori Self-Determination* (Oxford University Press, Auckland 1998)

Firth, R *Economics of the New Zealand Māori* (Government Printer, Wellington, 1959)

Harrington L and J H. Liu 'Self-enhancement and attitudes towards high achievers: A Bicultural view of the independent and interdependent self' (Unpublished Paper, Department of Psychology, Victoria University of Wellington, 2001)

Mead, S. M *Customary concepts of the Maori : a source book for Maori Studies* (Victoria University of Wellington, 1984)



- Melbourne, H (ed) *Māori Sovereignty – The Māori Perspective* (Hodder, Moa, Beckett, Auckland, 1995)
- Metge, J *New Growth from Old – The Whānau in the Modern World* (Victoria University Press, Wellington, 1995)
- Ministry of Justice *He Hinatore ki te Ao Māori – A Glimpse into the Māori World – Māori Perspectives on Justice* (Ministry of Justice, Wellington, 2001)
- New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001)
- New Zealand Ministry of External Relations and Trade *Declaration on the Rights of Indigenous People: Consultation with the Tangata Whenua* (Wellington, 1990)
- New Zealand Ministry of Maori Development *The year that was: Te Tau Kua Hipa: 1993 the International Year of the Worlds Indigenous People* (Te Puni Kokiri, 1994)
- Ormsby, M J 'Individual and Collective Rights' (Unpublished paper prepared for the Ministry of Justice, 1997)
- Patterson, J *Exploring Māori Values* (The Dunmore Press, Palmerston North, 1992)
- Rata, E *A Political Economy of Neotribal Capital* (Lexington Books, Maryland, 2000)
- Salmond, A *Hui: A Study of Māori Ceremonial Gatherings* (2 ed, Reed Methuen, Auckland, 1976)
- Sharp, A *Justice and the Maori : Maori claims in New Zealand political argument in the 1980s* (Auckland, Oxford University Press, 1990)
- Taylor, C *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, New Jersey, 1992)



Webster, S *Patrons of Māori Culture – Power, Theory and Ideology in the Māori Renaissance* (University of Otago Press, Dunedin, 1998)

## **B**     *Articles*

Addis, A “Individualism, Communitarianism and the Rights of Ethnic Minorities” (1991) 66 1219 *Notre Dame Law Review* 615 -676

Boast, R “Treaty rights or aboriginal rights?” [1990] *New Zealand Law Journal* 32-36

Boast, R “F.O.V Acheson and Māori customary law” (1999) 30 *Victoria University of Wellington Law Review* 661-665

Buchanan, A “The role of collective rights in the theory of indigenous peoples' rights” (1993) 3 1 *Transnational Law & Contemporary Problems* 89-108

Chartand, L “Are We Métis or are we Indians? A Commentary on *R v Grumbo*” (2000) 31 2 *Ottawa Law Review/Revue de Droit d'Ottawa* 267-281

Clinton R N “The Rights of Indigenous Peoples as Collective Group Rights” (1990) 32 4 *Arizona Law Review* 739-747

Daniels, H W “Bill C-31: The Abocide Bill' Congress of Aboriginal Peoples” (1998) <http://www.abo-peoples.org/programs/dnlsc-31.html> (Date of Last Access 19<sup>th</sup> August 2001)

Davis, K “Self Determination and Constitutional Change” (2000) 9 *Auckland University Law Review* 235-247

Debeljak J “Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations” *Monash University Law Review* (2000) 26 159-194



Garrity, B "Conflict between Maori and Western Concepts of Intellectual Property" (1999) 8 Auckland University Law Review 1193-1210

Gilling, B D "Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts" (1993) 23 Victoria University of Wellington Law Review 17-20

Goldsmith, D J "Individual vs. Collective Rights: the Indian Child Welfare Act" (1990) 13 Harvard Women's Law Journal 1-12

Green, L "Two views of collective rights" (1991) 4 Canadian Journal of Law and Jurisprudence 315-327

Hartney, M "Some Confusions concerning Collective Rights" Canadian Journal of Law and Jurisprudence (1991) 4 2 293-314

Isaac, T "Individual versus collective rights: aboriginal people and the significance of *Thomas v. Norris*" (British Columbia) (1992) 21 3 Manitoba Law Journal 618-630

Isaac, T "Self-Government, Indian Women and their Rights of Reinstatement under the *Indian Act*: A Comment on *Sawridge Band v Canada*" (1995) 4 Canadian Native Law Reporter 1-13

Jackson, M "Criminality and the exclusion of Māori" (1990) 20 Victoria University law Review 29

Jacobs LA "Bridging the gap between individual and collective rights with the idea of integrity" (1991) 4 2 Canadian Journal of Law and Jurisprudence 375-386

Johnston, D M "Native rights as collective rights: a question of group self-preservation" (1989) 2 1 Canadian Journal of Law and Jurisprudence 19-34

McDonald, M "Should communities have rights? Reflections on liberal individualism." (1991) 4 2 Canadian Journal of Law and Jurisprudence 217-217



McGuire, J "Reflections on the Formal Definitions of Māori" [1995] *New Zealand Law Journal* 168-172

Moss, W "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving conflicts between Collective and Individual Rights" (1990) 15 *Queen's Law Review* 279-305

Naqvi, F H "People's Rights or Victim's Rights: Re-examining the Conceptualization of Indigenous Rights in International Law" (1996) 71 3 *Indiana Law Journal* 673-728

Narveson J "Collective rights?" (1991) 4 2 *Canadian Journal of Law and Jurisprudence* 329-345

Norman, Wayne J. "Individualism Versus Collectivism: The Concept of Collective Rights" (1995) 105 4 *Ethics* 974

Palmater, P "An Empty Shell of a Treaty Promise: *R v Marshall* and the Rights of Non-Status Indians" (2000) 23 1 *Dalhousie Law Journal* 102-142

Pestieau, J "Minority Rights: caught between Individual Rights and Peoples' Rights." (1991) 4 2 *Canadian Journal of Law and Jurisprudence* 361-373

Quentin-Baxter, A 'The UN Draft Declaration on the Rights of Indigenous Peoples - the international and constitutional law contexts.' (1999) 29 *Victoria University of Wellington Law Review* 85-110

Sanders, D 'Collective rights' (1991) 13 3 *Human Rights Quarterly* 368-386

Schnackenberg, C "Ethnic Origin Discrimination: A Place for Iwi in the Human Rights Act?" (1999) 8 14 *Auckland University Law Review* 1211-1229

Smith, L T "In Search of a Language and a Shareable Imaginative World" in *Feminist Thought in Aotearoa New Zealand* (1998 Oxford University Press, Auckland) 95-103



Tainui Stephens "He iti taku iti" in Ihimaera, W (ed) *Growing Up Māori* (Tandem Press, Auckland, 1998) 270-285

Tamihere, J "The Treaty of Waitangi and the Bill of Rights: a plea for recognition" [1987] *New Zealand Law Journal* 151-153

*C Other Sources*

E/CN.4/Sub.2/1994/2/Add.1

Draft United Nations Declaration on the Rights of Indigenous Peoples

E/CN.4/2000/WG.15/CRP.1-4

Draft Report of the Working Group established in accordance with Commission On Human Rights Resolution 1995/32, sixth session, Geneva, 30 November 2000

E/CN.4/2001/85

Report of The Working Group established in accordance with Commission On Human Rights Resolution 1995/32 of 6 February 2001 on its sixth session

E/CN.4/Sub.2/2001/2

Working paper on Discrimination against Indigenous Peoples submitted by Mrs Erica-Irene Daes in accordance with Sub-committee resolution 1999/20. 18 August 2001.

E/CN.4/Sub.2/2001/21

Indigenous peoples and their relationship to land. Final working paper prepared by the special rapporteur, Mrs. Erica-Irene Daesjjvh11 June 2001

E/CN.4/1998/WG.15/1 Report of The Working Group established in accordance with Commission On Human Rights Resolution 1995/32 on its fourth session

Interview with Timoti Karetu, with former Māori Language Commissioner (Tainui Stephens, January 2001) transcript provided by Pito-One Productions (Ngaruawahia).



AS741  
VTW  
AG  
S34  
2001

Interview with Te Miringa Hohaia, spokesperson, writer and historian for the Parihaka Pā (Māmari Stephens 17 November 2000) transcript provided by Pito-One Productions (Ngaruawahia).



e  
AS741  
VUW  
A66  
S834  
2001

**LAW LIBRARY**

A Fine According to Library  
Regulations is charged on  
Overdue Books

VICTORIA  
UNIVERSITY  
OF  
WELLINGTON

**LIBRARY**

Du	1379614
PLEASE RETURN BY	
- 5 JAN 2004	
TO W.U. INTERLOANS	

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00648403 2



e

AS741

VUW

A66

S834

2001



