Restoring Rangatiratanga: Theoretical Arguments for Constitutional Transformation

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The Independent Working Group on Constitutional Transformation, Matike Mai Aotearoa, conducted extensive consultation with Māori around the country on the issue of Aotearoa's constitutional arrangements. Their task was to develop and implement a model for a constitution based on Te Tiriti o Waitangi (The Treaty of Waitangi), He Whakaputunga o te Rangatiratanga o Niu Tireni (The Declaration of Independence) and other internationally recognised indigenous rights instruments. In their report, the Independent Working Group suggested that the Crown and Māori share political authority through three spheres of influence: the rangatiratanga sphere (where Māori make decisions for Māori), the kāwanatanga sphere (where the Crown makes decisions for its people) and the relational sphere (where joint decisions might be made). This article provides theoretical arguments in support of the reforms suggested by the report. It argues that Māori have a right to tino rangatiratanga that ought to be balanced with the interests of non-Māori. It does this in three parts. First, it claims that the Crown never legitimately acquired sovereignty from Māori, making its ongoing political authority illegitimate. Secondly, it contends that Māori have a right to self-determination based on their distinct, collective culture. Both of these arguments are framed as ongoing injustices in need of remission. Finally, it surveys three major objections: democratic equality, changing circumstances and ethnic separatism. In dealing with these objections, the article considers how the theoretical arguments based on historic sovereignty and self-determination might be balanced with the interests of non-Māori in a fair way.

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I INTRODUCTION

> The constitution, which should be the expression of popular sovereignty, is an imperial yoke, galling the necks of the culturally diverse citizenry, causing them to dissent and resist, and requiring constitutional amendment before they can consent.
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> — James Tully[1]

Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation, conducted 252 hui around the country between 2012 and 2015 to discuss a new form of constitutionalism for Aotearoa.[2] Unlike many similar efforts, they were not asked to fit He Whakaputanga o te Rangatiratanga o Niu Tireni (The Declaration of Independence) or Te Tiriti o Waitangi (The Treaty of Waitangi) into our current Westminster system. Instead, they were instructed to consult and advise on a new form of constitutionalism based on those two documents, as well as other indigenous human rights documents that enjoy widespread international recognition. In the words of the Matike Mai Aotearoa final report (the MMA Report):[3]

> … Te Tiriti envisaged the continuing exercise of rangatiratanga while granting a place for kāwanatanga. It provided for what the Waitangi Tribunal recently described as "different spheres of influence" which allowed for both the independent exercise of rangatiratanga and kāwanatanga and the expectation that there would also be an interdependent sphere where they might make joint decisions.

At the heart of the MMA Report is the concern that there is insufficient recognition of Māori rangatiratanga in Aotearoa's constitutional arrangements and that the historical grievance most commonly ignored is the transgression of mana.

The MMA Report proposed six indicative constitutional models for consideration. Each involved the recognition of Crown kāwanatanga, Māori rangatiratanga and the need for a relationship of cooperation between the two. For example, one model suggested the establishment of a tricameral system "consisting of an Iwi/Hapū assembly (the rangatiratanga sphere), the Crown in Parliament (the kāwanatanga sphere) and a joint deliberative body (the relational sphere)".[4] Obviously, any reform of such scale would require the negotiation of jurisdictional matters, formal decision-making processes and other procedural issues.[5] This article will provide theoretical arguments to support the type of reform called for by the Independent Working Group.

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1 James Tully *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge University Press, Cambridge, 1995) at 5.

2 *He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, January 2016) [*MMA Report*] at 7.

3 At 9.

4 At 10.

5 For example, issues relating to membership, voting and the allocation of funds.

The goal is not to stipulate administrative minutiae, but to focus on the moral imperatives for change.

The theoretical basis of my argument rests on the twin pillars of historic sovereignty and self-determination. Both pillars have their own unique history and rationale.[6] This article will draw on and combine the two streams of thought. Part II will address historic sovereignty and argue that, because the Crown did not legitimately acquire sovereignty from Māori, Māori are entitled to have political authority returned to them. Part III will argue that Māori have a right to self-determination that is not limited by the territorial integrity and political unity of the New Zealand State. Both these arguments regard the failure to recognise rangatiratanga as an ongoing wrong in need of remission. Part IV will consider three major objections to the proposed reform: democratic equality, circumstantial changes and ethnic separatism. In dealing with these objections, I also consider the nature of the competing interests of non-Māori.

A fair constitution must strike a balance between the interests of Māori and non-Māori. Māori have been denied their de jure right to sovereignty and their moral right to self-determination. However, non-Māori — by virtue of living in Aotearoa and laying down their roots and their culture — have acquired prescriptive rights that also require recognition. There are no tidy solutions when dealing with indigenous rights claims. Every adoptable position comes with conceptual and practical puzzles. Matike Mai's vision for power-sharing strikes a balance between these interests by providing for distinct spheres of authority and a cooperative sphere for relational matters.

II HISTORIC SOVEREIGNTY: ADDRESSING THE UNJUST ACQUISITION OF RANGATIRATANGA

The first premise of a historic sovereignty claim is the political authority Māori exercised prior to colonisation. The MMA Report takes this starting point as a given:[7]

> In the view of the Working Group history clearly indicates that … prior to 1840 Iwi and Hapū were vibrant and functional constitutional entities. That is, they had the right, capacity and authority to make politically binding decisions for the well-being of their people and their lands.

The nature of Māori legal and political organisation prior to colonisation is a matter of historical record, which attracts a range of academic commentary.[8]

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6 Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Intl Law & Pol 189. Kingsbury identifies five conceptual categories, each with its own internal logic and structure: human rights claims; minority claims; self-determination claims; historic sovereignty claims; and sui generis claims based on indigeneity.

7 At 8.

It suffices to say that Māori had a legal and political order spanning the whole of Aotearoa prior to colonisation.

The second premise of a claim based on historic sovereignty is that the Crown seized sovereignty from Māori illegitimately. The Waitangi Tribunal and innumerable scholars have weighed in on this question.[9] The assumption of this section, based on such scholarship, will be that the Crown had no legitimate grounds for the acquisition of sovereignty, even by colonial standards. These issues are deeply contentious in and of themselves — but are better dealt with elsewhere.

It is simple enough to assert that sovereignty was acquired illegitimately by the Crown. The identification of injustice does not simplify what is to be done to address it. Ordinarily, we use morality to identify just and unjust courses of action and then use those dictates as forward-looking prescriptions of and proscriptions on our behaviour. Looking back involves the complicated task of achieving fairness between all the affected parties. But how can we give back something that has been lost to the unsparing passing of time? In the next sections I want to explore two conceptual approaches identified by Jeremy Waldron as to how historical injustice ought to be remedied:[10] rectification of historic injustice; and remission of an ongoing wrong. My argument is that the latter is preferable.

To that end, a remission claim can be loosely mapped to Aotearoa as follows. Māori had a legal and political entitlement to control and exist within Aotearoa because they lived in a territory and built up a system of Tikanga in relation to it. The Crown, by claiming political authority without justification, stole what Māori were entitled to. From that acquisition onwards, the Crown continued to deny Māori their entitlement and continued to exercise authority that it was not entitled to. This formulation treats modern Crown sovereignty as an ongoing injustice in need of remission.[11]

The bare logic above leads to a stronger claim than is necessary to found reform aimed at power-sharing.[12] The MMA Report does not advocate exclusive Māori authority over Aotearoa. In the spirit of Te Tiriti, its aspiration is a form of power-sharing between the Crown and Māori. There are two ways to square this with the theoretical outline above. The first is

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8 See, for example, Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin, Auckland, 2004) at 55–62; FM Jock Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (2nd ed, Auckland University Press, Auckland, 2006) at 86–90; Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of New Zealand Jurisprudence 24; and David V Williams "*The Queen v Symonds* reconsidered" (1989) 19 VUWLR 385 at 394.

9 See, for example, Waitangi Tribunal *He Whakaputunga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014); Waitangi Tribunal *Motunui–Waitara Report* (Wai 6, 1983); Ned Fletcher *A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi* (PhD Thesis, University of Auckland, 2014); Walker, above n 8, at 91–96; and David V Williams "The Pre-History of the English Laws Act 1858: *McLiver v Macky* (1856)" (2010) 41 VUWLR 361. Contrast Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 187.

10 Jeremy Waldron "Superseding Historic Injustice" (1992) 103 Ethics 4 at 14.

11 Waldron, above n 10.

12 See Kingsbury, above n 6, at 237.

that Te Tiriti provides a moral justification for shared authority within Aotearoa. The second is that, sans Te Tiriti, the non-Māori majority population have a competing interest which — though shorter in time and later in priority than Māori — ought to be balanced with historic Māori sovereignty. This second approach will be discussed further in Part IV. In either case, if historic sovereignty is regarded as one moral claim to political authority, then it is possible for us, in the interests of justice, to balance other claims when deciding upon a constitutional structure.

Rectification of Historic Injustice: The Problem of Contingency

Reflections on colonisation often inspire the question *what would have happened if the British had not done it?* The intuitive response is that Māori would have retained political authority over Aotearoa and continued to live and develop as a society. That intuition is something of a moral imperative. But can it be acted on? Doing so would require a radical reconstruction of the present to mimic our best estimation of what Aotearoa would have looked like in the counterfactual. Brookfield points out in *Waitangi and Indigenous Rights* that if autonomous regions like Parihaka, the King Country and Te Urewera had been treated as "domestic, dependent nation[s]"[13] under s 71 of the New Zealand Constitutions Act 1852, it is possible they would have lasted long enough to result in "an essentially Maori New Zealand".[14] This is the type of counterfactual reasoning present in a rectification claim. With respect to historic sovereignty, the claim is this: but for the illegitimate acquisition of sovereignty, what would have happened?

The difficulties with this approach are numerous. Waldron has pointed out the problem of contingency that faces Nozickean approaches such as this one:[15] we do not know what would have happened in the counterfactual because it is populated with free human actors who could have done anything.[16] Even if it is probable that a certain historical trajectory would materialise, accepting that individuals are free to make decisions means accepting that they may make improbable decisions. For example, Māori, by virtue of their values in relation to mana and rangatiratanga, would probably not have given authority away in the counterfactual; but they *could* have done so, and we have to respect that possibility in order to respect the notion that people make free choices. In addition, it is unclear how to account for competing moral interests. The numerous non-Māori who now call Aotearoa home are part of the tainted historical timeline involving

13 Brookfield, above n 8, at 118.

14 Alan Ward *A Show of Justice: Racial "amalgamation" in nineteenth century New Zealand* (2nd ed, Auckland University Press, Auckland, 1995) at 61–62 as cited in Brookfield, above n 8, at 118. This conclusion, though radically different to the present we now find ourselves in, is still premised on the legitimate acquisition of sovereignty by the Crown.

15 Nozick's approach to historical injustice was to use subjunctive information to try to put the parties in the position they otherwise would have been in. See generally Robert Nozick *Anarchy, State, and Utopia* (Basil Blackwell, Oxford, 1974).

16 Waldron, above n 10, at 9–10.

the injustice. Their existence is repugnant to the counterfactual approach — along with all the circumstantial changes that followed colonisation. This reasoning leads to a claim that is too radical because it calls for us to ignore non-Māori when fashioning constitutional reform. On its own merits, this approach is indeterminate and speculative.

Another way to frame a rectification claim is to argue for the return to a status quo ante — to return to the state of affairs that existed immediately preceding the wrong. This approach sidesteps contingency because it does not require counterfactual reasoning. Again, though, it generates a very broad claim with little room to accommodate changes in circumstances (for example, migration or intermarriage between Māori and non-Māori).[17] It would require Māori to be given complete mana motuhake (self-rule or independent political authority) over Aotearoa as was the status quo prior to colonisation. It is helpful to consider the hypothetical application of this approach overseas. Would we wind back the clock in India past the British Raj, past also the Mughal Empire, to early Dravidian kingdoms? The answer is *no* on multiple levels. It would simply not be feasible because the social groups in question do not exist anymore. More importantly, it is unreasonable to contend that the Hindu descendants of Dravidian first peoples (if they were that) have a greater entitlement to political representation than descendants of each subsequent political revolution or the modern body politic.[18] An approach that rejects these concerns lacks the balance necessary to achieve fairness between Māori and non-Māori in Aotearoa.

Remission of an Ongoing Wrong

Moving to Waldron's second framework, I contend that treating the Crown's actions as an ongoing wrong in need of remission is a more useful way of achieving the redress due to Māori. Two criteria must be present to justify redistribution of power, without succumbing to the problems of rectification:

(1) The relevant entity against whom the injustice was committed must still exist today; and
(2) They must have an ongoing entitlement to what was illegitimately taken from them.

If these criteria are met, one can make a claim for the remission of an ongoing wrong. In the context of this article, the claim is that Māori (as a collective or as a clustering of hapū and iwi) are a continuous moral entity and have an ongoing entitlement to rangatiratanga which was illegitimately acquired by the British Crown.[19] Waldron describes this type of claim as analogous to someone whose car is stolen: they have an ongoing entitlement to their car that is being denied, and the thief is using a car to which he or

17 Kingsbury, above n 6, at 237.
18 For a fuller discussion of the rights emerging from first occupancy vis-à-vis prior occupancy, see Part IV: *Changing Circumstances*.
19 I use *moral entity* to mean an entity that can have rights and obligations.

she has no entitlement.[20] The rightful owner can, therefore, demand a remission of the ongoing wrong.

The first criterion is problematic for Māori, but ultimately surmountable. Sovereignty was wrongly taken from rangatira who represented hapū around the country. Following colonisation, mass urban migration has plainly altered the composition of tribes.[21] In addition, Crown policy in relation to Treaty settlements — dealing only with "large natural groupings" — has emphasised iwi over hapū as the units of Māori organisation.[22] Do these generational shifts mean that the relevant moral entity no longer exists to reclaim sovereignty? The answer depends on how one conceives of a moral entity. Obviously, in the car example, the entity is an individual who remains himself or herself over time (despite changes in personality). Collectives require different treatment. Janet McLean has argued that, for the purpose of Crown-Māori interactions, the Crown should be regarded as a continuous "abstract moral person" based on the assumptions of rangatira in dealing with the Queen and the Governor during colonisation.[23] Abstract moral continuity is a socially and politically constructed status. The same reasoning can be applied to Māori. The continuity of Māori group identity, if anything, has been solidified and entrenched by group-differentiated Crown engagement and internal dialogue.[24] Courtney Jung has persuasively argued that identities gain public and political significance through the way they are used to regulate access to power.[25] This means that oppression based on a set of shared characteristics can solidify collective identity based on those characteristics. This quality spans all of Māoridom, rather than being localised to particular hapū or iwi, and can be traced to pre-colonial Māori through the interconnectedness of tribes and the underpinning commonality between their Tikanga.[26] It would be plausible, therefore, to characterise the relevant moral entity as Māoridom as a whole.

Conversely, modern iwi and hapū that have clear lineage could equally be regarded as the entity in question. The trust deeds of iwi regularly include membership criteria based on lineal descent (whakapapa) that regulates the inclusion and exclusion of people today.[27] The dialectic

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20 Waldron, above n 10, at 14.

21 Walker, above n 8, at 197–198.

22 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future* (2002) at 39. See also Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259. See generally Kirsty Gover *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, New York, 2010) at ch 4.

23 Janet McLean "Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand" [2015] NZ L Rev 187 at 196–202 (emphasis in original).

24 Gover, above n 22, at 17–19.

25 Courtney Jung *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge University Press, New York, 2008) at ch 1.

26 Mikaere, above n 8.

27 Gover, above n 22, at 87–89. Not to mention the importance of whakapapa and whanaungatanga in Tikanga Māori. See Nin Tomas "Maori Concepts and Practices of *Rangatiratanga: 'Sovereignty'?*" in Julie Evans and others (eds) *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, Honolulu, 2013) 220 at 225–226 and 236–237.

between internal regulation and Crown policy has contributed to continuous Māori collectives spanning the period from before rangatiratanga was acquired to the present day. This view would exclude urban Māori who have passed out of their ancestral forms of tribal organisation. Including bodies such as Urban Māori Authorities is conceptually difficult because they lack the necessary continuity with pre-colonial Māori.

The MMA Report accounts for these complexities. One indicative constitutional model includes regional Māori assemblies (presumably to directly engage iwi and hapu), while another has a centralised, singular Māori assembly to reflect the entitlement belonging to Māoridom as a whole.[28] Other models include space for Urban Māori Authorities.[29] There is a conceptual tension between these models. On one hand, oppression has, without doubt, reified Māori identity above and beyond individual tribes. On the other hand, to defer to a pan-Māori body for that reason would ignore the unique forms of organisation that tribes have developed (albeit in a neo-colonial mould in response to Crown policies). It is possible to argue for a conceptual back door: that as the injustice was done to Māoridom as a whole, Māoridom as a whole should have sovereignty returned. This would enable Māori to internally organise as they wish.[30] However, given the historical reality of iwi and hapū as the primary pre-colonial mode of Māori organisation, a preferable approach may be to say that groups like Urban Māori Authorities deserve inclusion, not under a programme of historic sovereignty, but under a forward-looking concern for social justice. This is particularly so given that these groups cater to individuals who have fallen out of their ancestral forms of organisation.[31]

With Māoridom as a whole in mind, the second criterion requires Māori to have an ongoing entitlement to sovereignty. Prima facie, this criterion is fulfilled based on the persistence of the relevant moral entity. If it is true that sovereignty was illegitimately acquired by the Crown — and it is true that Māoridom was the entity from which it was acquired — then, assuming Māoridom as an entity continues to exist, Māori continue to be entitled to rangatiratanga. The complicated questions of, first, whether this entitlement has faded over time, and secondly, whether the operation of democracy legitimates the current regime, remain to be addressed in Part IV. In the absence of any morally salient interventions, the presumption is that Māori have retained their entitlement to sovereignty.

28 *MMA Report*, above n 3, at 10, 108 and 110.
29 At 10 and 107.
30 See *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), art 33(2). "Indigenous peoples have the right to determine the structures and select the membership of their institutions in accordance with their own procedures."
31 See the discussion of competing moral interests in Part IV: *Changing Circumstances*.

III SELF-DETERMINATION: PROTECTING SOCIETAL CULTURES

My argument in this section is that Māori have an ongoing right to self-determination. It is primarily based on a cultural justification. Matike Mai's proposals seek greater self-government rights for Māori *within* the current State. In doing so, they strike a balance between the rights of Māori and concern for the territorial integrity and political unity of Aotearoa. I will provide a more targeted response to these concerns in Part IV when dealing with ethnic separatism. This section will focus on the positive arguments for Māori having the right to self-determination. My intention is to provide a moral, rather than a legal, argument — one aimed at clarifying how best to achieve fairness between Māori and non-Māori. The arguments in this section bolster the historic sovereignty arguments in Part II and stand independent of them. For example, where the right to self-determination alone may not be considered sufficient to disrupt the territorial integrity and political unity of Aotearoa — although I contend that it is — the fact that the Crown's de jure right to govern is illegitimate may push the case for reform over that threshold.

Choice Theory

Before advancing to my argument from culture, I will review the prevailing alternative: a political or democratic argument,[32] also referred to as "choice theory".[33] The simple form of the argument is that, as an extension of the principle of self-rule, a group who has a plebiscite and decides to secede from a sovereign State should be allowed to do so as of right. In this form, the argument is irrelevant to Matike Mai's proposals as they do not demand secession for Māori. Adapted slightly, though, the argument is founded on the idea of consensual government and voluntariness. Under this approach, citizens should decide, not only substantive issues like policy and political representatives, but also secondary issues, such as what their institutions look like and the procedures underpinning the operation of democracy. I contend that the cultural approach is preferable for two reasons. First, in every permutation of self-government one is always going find oneself in the minority at some point on some set of key issues. Political morality cannot demand that we forever divide political units again and again until there is no disagreement.[34] A person's right to self-rule is not violated every time their preferences are not reflected in public decision-making provided a fair process has been followed.[35] Secondly, groups that demand self-rule, empirically, demand that right to self-rule as a result of non-consensual,

32 Yael Tamir "The Right to National Self-Determination" (1991) 58 Social Research 565 at 565.
33 Mark Bennett "'Indigeneity' as Self-Determination" (2005) 4 Indigenous LJ 71 at 94.
34 Even procedural issues can be democratically decided, often in referenda — for example, the switch to the Mixed Member Proportional voting system in Aotearoa.
35 Tamir, above n 32, at 583.

involuntary histories involving cultural difference, material disadvantage and oppression. The notion of voluntariness is something of an illusion in the context of political units who are constituted by forces outside their control.[36] Because of these two problems, a cultural approach to self-determination is more coherent.

Societal Cultures and Self-Determination

Self-determination is a right held by a group for the benefit of its individual members. Will Kymlicka speaks of this right belonging to "societal cultures" within "multination states".[37] Avishai Margalit and Joseph Raz describe the appropriate unit as "encompassing groups".[38] And Yael Tamir ascribes the right to "nations", which she defines as "cultural communities" rather than "sovereign States".[39] For each academic, the cultural unit which deserves the right to self-determination is one that encompasses a number of facets. These include common history, language, culture, religion, race and ethnicity. Tamir regards having "a national consciousness" as the paramount subjective criterion for a group to qualify for the right to self-determination.[40] Iris Marion Young, in an alternative approach, avoids granular criteria and opts to define the relevant groups by the degree of their distinctiveness from the majority.[41]

Māori are an ethnic group dispersed around Aotearoa who share a common history of oppression as well as (arguably) a common set of values informing "the way in which [they] practise [their] tikanga".[42] As I pointed out in Part II, the external treatment of Māori as a group by the government has only solidified their collective national consciousness. Under any of the various formulations above, Māori are a group who fit the purpose of the justifications for self-determination being given.

This section will largely follow the logic of Will Kymlicka's argument for group-differentiated rights. I will, therefore, continue to use the term *societal culture* for convenience. First, it will look at the value of culture to individual autonomy. Secondly, it will argue that equality between groups is necessary for equality between individuals.

36 Avishai Margalit and Joseph Raz "National Self-Determination" (1990) 87 The Journal of Philosophy 439 at 456.
37 Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995) at 76–80.
38 Margalit and Raz, above n 36, at 448.
39 Tamir, above n 32, at 566–572.
40 At 574.
41 Iris Marion Young "Self-Determination and Global Democracy: A Critique of Liberal Nationalism" in Ian Shapiro and Stephen Macedo (eds) *Designing Democratic Institutions* (New York University Press, New York, 2000) 147.
42 Mikaere, above n 8, at 24.

1 Individual Autonomy

Individual freedom — or autonomy — does not exist in a vacuum. We are born into a particular culture, speaking a particular language and surrounded by a particular community that gives us options in life and helps to supply the meaning behind those options.[43] Kymlicka's basic argument is that one's "societal culture" — broader than neighbourhood or immediate community — informs one's identity and, therefore, facilitates individual autonomy in an irreplaceable way. To fully embrace Kymlicka's analysis, two issues need to be addressed:

(a) Why it is a "societal culture" and not more particularised communities that have this effect; and

(b) Why it is only one's *own* culture that can serve this function.

The first issue concerns Kymlicka's argument that societal cultures facilitate individual autonomy, but local communities do not. The public goods that shape our identity and, therefore, facilitate our autonomy are broader than neighbourhoods. They include things like language, religion and public institutions. Our more immediate interactions with family and friends happen in a language — with reference to accepted social conventions — and against the backdrop of a cultural history longer than any one lifespan. Iris Marion Young points out that Kymlicka's analysis of this point can at times be circular.[44] If public symbols, traditions, languages and institutions have the constitutive effect on individual identity which gives rise to the justification for self-determination, then Kymlicka's justification for self-determination presupposes the exercise of the right. Māori fit into Kymlicka's idea of a societal culture partially because they *were* sovereign prior to colonisation and, therefore, developed public values and institutions.

Kymlicka's analysis withstands this attack. It is not true that these facets of a societal culture cannot develop without utilising the right to self-determination: plurality can often develop within sovereign States.[45] Additionally, while some theorists insist on providing a priori arguments for rights, a cultural account of the right to self-determination cannot be ahistorical.[46] As identified above, it is for contingent, historical reasons that groups form the way that they do. It is, therefore, the history of a group that will determine whether it fits within Kymlicka's idea of a societal culture or Margalit and Raz's idea of an encompassing group. If it is the former use of the right to self-determination that has made a group a societal culture, that does not undermine the rationale for present action.

The second issue, then, is why people must have access to their own culture. Much has been written about the cosmopolitan alternative, where

43 Kymlicka, above n 37, at 75–107.
44 Young, above n 41, at 154.
45 Tamir, above n 32, at 566–580.
46 See Bennett, above n 33, at 97–101.

individuals freely acquire options and values from different cultures.[47] Increasing globalisation is often the backdrop for these arguments. Sampling the cuisine or fashion of different cultures, though, is not the same as being deeply rooted in their way of life.[48] It is the pervasiveness of a culture that determines how it shapes individual identity.[49] The cosmopolitan outlook is better characterised as a cultural practice in itself rather than as an example of the ability to move between cultures.[50]

Kymlicka is perhaps assertive in stating that, by and large, people rarely abandon their own culture completely.[51] But there is a range of first-hand, experiential evidence to support his view. For example, immigrants around the world continue to speak of an affinity to their mother tongues.[52] There is a consciousness amongst immigrants tying them to their original societal culture even when they have, for all intents and purposes, permanently left their homeland.[53] For Māori and other indigenous peoples, a "national consciousness" has developed through shared oppression of *their* culture, reinforcing their attachment to it.[54] This is another illustration of why a historical approach to self-determination is helpful to enhance the justification for the right.[55]

The historical contingencies are what make this self-determination argument unique to indigenous peoples. They had a public life prior to colonisation that formed a societal culture. After immense disruption via colonial injustices, they had their identity reinforced by discrimination and oppression. This delineates them from other immigrant groups who might also demand similar rights. Kymlicka draws the line in *Multicultural Citizenship: A Liberal Theory of Minority Rights* by saying that immigrants voluntarily leave their societal culture when they immigrate, but national minorities (or indigenous populations) have been deprived by force.[56] Where your circumstances were coercive, you are entitled to demand the right to self-determination.

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47 See Jeremy Waldron "What is Cosmopolitan?" (2000) 8 The Journal of Political Philosophy 227; and Jeremy Waldron "Minority Cultures and the Cosmopolitan Alternative" (1992) 25 U Mich JL Reform 751.

48 Kymlicka, above n 37, at 85. Contrast Waldron "Minority Cultures and the Cosmopolitan Alternative", above n 47 at 762.

49 Margalit and Raz, above n 36, at 443–444.

50 Kymlicka, above n 37, at 85.

51 At 83.

52 See, for example, Kathleen Saint-Onge *Bilingual Being: My life as a Hyphen* (McGill-Queen's University Press, Montreal, 2013) at 5–19.

53 See, for example, James Wood "On Not Going Home" (2014) 36(4) London Review of Books 3.

54 This point is illustrated by, for example, the Māori Renaissance that started taking shape in the 1960s. Walker, above n 8, at ch 10. See also "Rectification of an Ongoing Wrong" in Part II above.

55 Kymlicka, above n 37. Kymlicka's account in many ways tries to mount an abstract argument for self-determination, even though it is contingent on historical facts that trigger the right through the formation of societal cultures.

56 At 95–100. An important exception that Kymlicka notes is refugees, who have been forced to relocate.

2 Individual Equality as Equality Between Groups

The second concern underpinning my justification for the right to self-determination is individual equality. Although it is for the benefit of individuals, my argument is that substantive equality can only be achieved by providing for equality between cultural groups.[57] Formal equality must be subordinated to this end. While my broader self-determination argument is under the rubric of *cultural self-determination*, my arguments from equality go beyond merely the protection of culture. They incorporate the practical bent of some minority rights claims, which are targeted at protecting the material well-being of minority communities.[58]

Where Kymlicka keeps his argument within the sphere of protecting access to culture,[59] Margalit and Raz argue that vesting encompassing groups with the right to self-determination should give them the ability to decide how to action it — the point being that they are best placed to know what is required for their community to flourish.[60]

To the extent that Kymlicka's argument for self-government is softer on this point (a matter that is somewhat ambiguous), I would opt for Margalit and Raz's slightly stronger formulation because it takes into account other instrumental benefits to the cultural group involved.[61]

Let us first deal with the cultural aspect of the claim. The status and treatment of the cultural group that one belongs to can deeply affect one's wellbeing. This is because of the important constitutive effect cultural membership has on individual identity. State institutions, such as education providers, the electoral system, the justice system and other arms of government, inevitably contain cultural biases. Language is the ever-present example. If, for example, the vast majority of education is provided in the language of the majority, this disadvantages the minority culture.[62] But it is not just this sort of disadvantage that matters. Self-determination is also about seeing aspects of your communal values, traditions and history in public institutions.[63] Kymlicka argues that a political majority can always threaten the public expression of a minority's cultural goods and, therefore, a measure of self-government is justified in protecting those goods.[64] It is only by recognising the status and rights of the cultural group that the benefit to individual members can be secured.

It is possible that these cultural claims could be satisfied by the State providing protections for culture without ceding any political power. I would reject softening the claim in this way. Margalit and Raz's stronger

57 See Part IV: *Democratic Equality*.
58 See Kingsbury, above n 6, at 202–216.
59 Kymlicka, above n 37, at 108–115.
60 Margalit and Raz, above n 36, at 457.
61 Kymlicka seems, at times, to allow the majority culture to decide if it has sufficiently protected the culture of the minority. Kymlicka, above n 37, at 110.
62 At 110–111.
63 Tamir, above n 32, at 582.
64 Kymlicka, above n 37, at 109. See also *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA); and Foreshore and Seabed Act 2004.

formulation is preferable. Political authority is required for the full panoply of benefits to be exercised by members of the minority culture. Identification with decision-making institutions is central to belonging within a polity and feeling equal in status to members of the majority culture. In addition, the group in question is better placed than the State to assess what is necessary for the perpetuation of its culture. The protection of culture is more stable as an ongoing right when coupled with political authority — so much so that it can be seen as a necessary precondition to it.

Taking this stronger view also stops a potential point of divergence between this argument and my argument in Part II. Māori de jure sovereignty would not be limited by the need to protect culture — it would only be limited by the fundamental rights of non-Māori to live and work in accordance with the expectations they have developed over time in Aotearoa.[65] Such as it is, the two arguments both call for a strong form of relational self-determination in which the Crown must respect the political authority of Māori; and Māori must respect the political authority of the Crown.

IV OBJECTIONS

This section will canvas three major objections to my justifications for restoring a qualified form of rangatiratanga to Māori. By canvassing these objections, I hope to draw out the appropriate balance to be struck between enhanced Māori rangatiratanga and the legitimate interests of non-Māori. Each objection speaks to a modern liberal intuition about democracy and multiculturalism. First, I will address the concern that special protections for Māori are anti-democratic and discriminate against non-Māori. Secondly, I will consider Jeremy Waldron's argument that circumstances have changed in Aotearoa to the extent that Māori entitlements no longer persist. Finally, I will examine the problem of ethnic separatism and the social instability it can generate. These are all important conceptual problems and commonly manifest as public concerns relating to reforms that will benefit Māori.

Democratic Equality

The founding principles of majoritarian democracy are *freedom* and *equality*. Every citizen is entitled to vote for whomever they wish and every vote is weighted equally. The ACT Party has promoted the idea that any law that derogates from this straightforward majoritarian principle, or treats one individual differently from another, is unfair. Don Brash's Orewa Speech — and his subsequent surge in popularity — is a prominent reminder of the political currency that the *one law for all* message holds.[66] Prima facie, any

65 See Part IV: *Changing Circumstances*.

66 Don Brash, Leader of the New Zealand National Party "Nationhood" (speech to the Orewa Rotary Club, Orewa, 27 January 2004).

of Matike Mai's indicative constitutional models would abrogate the equality that majoritarian democracy seeks to protect. They all give Māori greater political influence than the proportion of Māori in the population. Co-equal houses of Parliament, or some form of personal jurisdiction, would provide Māori rights that Pākehā citizens would not have access to.

The majoritarian principle has a rich philosophical pedigree that emanates from thinkers such as Jeremy Bentham and finds modern voice in scholars like Jeremy Waldron.[67] The underlying premise is that, in a society with plural voices and opinions, majority decision-making is the only fair way to structure a constitution. Not doing so undermines the fairness of a system because it regards one set of views — and, therefore, the people holding them — as more valuable or entitled than others. Entrenched constitutions, judge-made law and group-differentiated representation are, on this view, weak forms of autocracy. In addition, Waldron argues that questions about fundamental rights cannot be taken outside of the realm of politics because reasonable people can radically disagree about them.[68] Any institutional recognition of rights above and beyond an equal vote — whether it be an entrenched Bill of Rights or special representation — undermines equality between individuals.

The equality objection, though powerful, is misdirected when aimed at self-government rights. It is targeted at equal treatment before the law *within* a particular polity or democratic unit. It is ill-suited to deal with claims involving historic sovereignty and self-determination, which relate to which democratic unit is relevant in the first place.[69] International law, as the body of principle governing the interactions between political units, says that States are horizontally equal.[70] However, given that some countries have large populations and others have small populations, the necessary consequence is that individual equality is subordinate to equality between political units. Even within a State, an electoral system where different electorates have *varying population densities* but the *same number of seats* in Parliament means that individual equality is qualified by the importance of a community as a unit of organisation. Very few liberal theorists seem to want to adopt a world-government or open world borders completely — and this position undermines the pre-eminence of individual equality.[71] Citizenship is an inherently group-differentiated concept: rights within a State (for example, welfare) are reserved for some individuals (citizens) and not others based on their group membership.

The international norm, then, is to balance individual rights with the rights of political units (collectives). As I argued in Part II, that political unit in Aotearoa ought to be defined by de jure Māori sovereignty. Determining

67 See generally Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford, 1999). Contrast Ronald Dworkin *Law's Empire* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1986).

68 At 158–163.

69 See Margalit and Raz, above n 36, at 455. See also Kymlicka, above n 37, at 124–126.

70 Charter of the United Nations, art 2.

71 Kymlicka, above n 37, at 124.

whether Māori ceded sovereignty is necessary to answer the fundamental question of who is to be governed by which State.[72] If individual equality is generally limited by State boundaries, it cannot be used as an argument to maintain illegitimate State boundaries.

As I argued in Part III, the right to self-determination also relates to defining political units. Specifically, it prescribes which units ought to be recognised. The cultural justification provides particularly useful analysis on the point of democratic equality — why formal equality (equal treatment of individuals by the law) needs to be sacrificed so that substantive equality (equal dignity, status and opportunity for individuals) can be secured. Individuals who belong to the majority culture benefit from the State embodying and publicly reflecting their culture. Indigenous peoples, by contrast, are disadvantaged by the exclusion of their culture from institutional practices. A foreign legal and political order (parliamentary supremacy) was imposed upon Māori in Aotearoa, and this order takes little account of custom, cultural plurality, or competing forms of rangatiratanga.[73] Where cultural values are included, their protection is often politically unstable and subject to changes in public sentiment.[74] In this regard, insistence on formal equality within the State operates to undermine substantive equality.[75]

Politically, the balance needs to be struck through cooperation between Māori and the Crown. Since Māori are best placed to know how to protect their culture, they should be given sufficient power to control their own institutions. By limiting that power to issues directly affecting Māori and requiring some form of consensus or cooperation with the Crown on relational matters, the MMA Report appropriately strikes a balance that is consistent with principle. It reflects the moral entitlements demanded by the historical analysis in Part II, either through the true bargain struck by Te Tiriti, or by the balance of Māori de jure sovereignty and non-Māori prescriptive entitlements.[76]

To put this discussion into perspective, modern liberal democracies regularly depart from strictly majoritarian decision-making procedures. As Margalit and Raz put it: "[w]e match various democratic processes with various social and political problems."[77] Ronald Dworkin's rationale for entrenched constitutions in *Law's Empire* is particularly relevant.[78] Dworkin argues that the entrenchment of certain fundamental rights is required for true equality between individuals — and for equal participation in

72 See Kymlicka, above n 37, at 116.
73 See Claire Charters "Do Māori Rights Racially Discriminate Against Non Māori?" (2009) 40 VUWLR 649 at 651–662.
74 See Claire Charters "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases" [2006] NZ L Rev 621.
75 See Kymlicka, above n 37, at 108–115.
76 See Part IV: *Changing Circumstances* for further discussion of non-Māori prescriptive entitlements.
77 Margalit and Raz, above n 36, at 455.
78 Dworkin, above n 67, at ch 10.

democracy.[79] My justification for the right to self-determination serves much the same purpose: to enable minorities to fully participate in public life. Like Dworkin, my argument is that certain fundamental rights need to be insulated from political whimsy.

To conclude, the internal logic of historic sovereignty and self-determination provide two clear responses to the present objection: first, that individual equality is, arguably, subject to the de jure political authority of sovereign peoples; and, secondly, that inequality between cultural groups requires group-differentiated rights to be remedied. Only by implementing such a remedy can substantive equality be achieved.

Changing Circumstances

Te Tiriti was signed 176 years ago. The original British settlers have long since died and their descendants are fourth, fifth, sixth and seventh generation New Zealanders. Many of those descendants are of mixed heritage — part-Māori and part-Pākehā. Moreover, waves of immigration since colonisation have turned urban centres like Auckland and Wellington into multicultural rather than bicultural cities.

In this section I will deal with the objections that have emerged from the way circumstances have changed in Aotearoa since colonisation. The target of these objections is my Part II argument about historic sovereignty. They contend that circumstances have changed in such a fundamental way that historic sovereignty is no longer relevant — that the half-life of Te Tiriti is over and that the rights of current citizens (as equal individuals) should be prioritised over the grievances of historic communities. These concerns leave the self-determination arguments in Part III undisturbed.

1 Rebus Sic Stantibus: Frustration of Te Tiriti

For his 2005 FW Guest Memorial Lecture, Jeremy Waldron delivered a paper titled "The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*".[80] His purpose was to take Te Tiriti off the "sacred" island that New Zealand academics have placed it on and examine it through the lens we would apply to any other treaty or domestic contract.[81] To this end, Waldron marshalled the concept of *rebus sic stantibus*, a principle of international law that can relieve parties of their treaty obligations if there is a fundamental change of circumstances. The principle "can be seen as borrowing from contract law doctrines of frustration and impossibility".[82] Waldron's purpose is not to say that Te Tiriti is unimportant, but rather to force people to "think responsibly"

79 At 373–379.

80 Jeremy Waldron "FW Guest Memorial Lecture: August 22nd, 2005: The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*" (2006) 11 Otago L Rev 161.

81 At 181.

82 At 165 (footnotes omitted).

about its possible "obsolescence".[83] In response, I want to take up that mantle and think responsibly about the doctrines Waldron raises.[84]

Not all changes of circumstance will void treaty obligations in international law. The limitations of *rebus sic stantibus* — codified in the 1969 Vienna Convention on the Law of Treaties — are that the existence of certain circumstances must be fundamental to the consent of the parties, and that the change in circumstances must radically alter the obligations under the treaty.[85] The narrow scope serves to stop parties escaping obligations that have become merely inconvenient. The art of dispute resolution (in both contract and international law) lies in balancing the certainty that agreements provide with the unfairness of having obligations radically altered by circumstantial changes. However, it should be remembered that keeping agreements (*pacta sunt servanda*) is the international norm and escaping them (*rebus sic stantibus*) is merely an exception for outlying circumstances.[86]

What fundamental changes does Waldron consider to have occurred in Aotearoa? His primary attack on Te Tiriti concerns the way that changes in *governmentality* affect tino rangatiratanga (Article 2).[87] By *governmentality* he means changes in "the nature and theory of governance".[88] In addition, Waldron questions the ongoing relevance of iwi and hapū as organised political units who would exercise rangatiratanga if it was returned.[89] He appears concerned that Treaty-based reforms risk retribalising Māori and segregating them from other citizens.[90]

The problem with Waldron's approach is that he applies one isolated doctrine of international law and ignores a huge body of competing norms.[91] Nicole Roughan and Mark Bennett point out that if Waldron had considered "human rights law, self determination, minority rights, sovereignty, and indigenous peoples"[92] as alternative pathways in international law, he would probably reach a different conclusion.[93] His selectivity itself is reason to doubt the moral force of his argument. What Waldron *does* consider is international law's version of equity's *clean hands* doctrine in art 62(2)(b) of the Vienna Convention — that *rebus sic stantibus* does not apply where the fundamental change at hand is caused by a breach of the treaty by the party invoking the exception.

83 At 179.
84 See, for example, Mark Bennett and Nicole Roughan "*Rebus Sic Stantibus* and the Treaty of Waitangi" (2006) 37 VUWLR 505.
85 Vienna Convention on the Law of Treaties, 1155 UNTS 332 (opened for signature 23 May 1969, entered into force 27 January 1980), art 62.
86 Bennett and Roughan, above n 84, at 514.
87 Waldron, above n 80, at 172.
88 At 172.
89 At 172.
90 At 176.
91 Bennett and Roughan, above n 84, at 515.
92 At 515. These "conceptual approaches" are paraphrased from Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues" (2002) 52 U Toronto LJ 101.
93 Bennett and Roughan, above n 84, at 515.

The changes in governmentality in Aotearoa can, for the most part, be attributed to breaches of Te Tiriti by the Crown. Waldron expends little ink on this problem:[94]

> … although it might be said that it is *the Crown's fault* that we have had the sea-change in governmentality in New Zealand that I mentioned, I submit that we should not conclude that therefore New Zealanders cannot be allowed to take any notice of this change so far as the reconsideration of Waitangi in light of *rebus sic stantibus* is concerned.

No further argument is offered. Waldron is correct in saying that New Zealanders should be permitted to consider *rebus sic stantibus*, as we consider frustration with any contract. But one should not continue to consider inapplicable doctrines out of sheer whimsy. If the Crown has unclean hands, such that the salient changes in New Zealand society can be chalked up to Crown breaches of Te Tiriti, then *rebus sic stantibus* should be set aside as prescribed by international law.

Can we attribute the changes in Aotearoa to the Crown? Waldron argues that it was rangatira of hapū who signed Te Tiriti and that hapū are no longer the same kind of organisational unit they used to be. He states that they have changed their character: that descendants of those who signed Te Tiriti do not look to iwi and hapū for governance anymore.[95] However, it is untrue that iwi and hapū have ceased to be salient units of social and political organisation in the Māori world. These units created the political momentum that led to the Treaty settlements process, and Māori have continued to organise as tribes for the purpose of negotiating, receiving and administering their settlements. Furthermore, to the extent that tribal governmentality has changed or deteriorated, it has been because the Crown forcibly stripped tribes of their capacity to organise and govern.

In true testament to Māori resilience, tribes like Tūhoe have managed to maintain sufficient autonomy to negotiate service management plans in Treaty settlements — despite land confiscation, military aggression and other culturally assimilative policies.[96] For other tribes, the individuation of title by the Native Land Court decimated their collective ownership of property. Sir Hugh Kawharu described this process as an "engine of destruction for any tribe's tenure of land".[97]

Such tenure is a necessary element for a tribe to be a bedrock of communal life and provide services to its people. The Crown cannot strip tribes of all the authority, resources and property necessary to perform a governance function (in breach of Article 2 of Te Tiriti) and then claim that iwi and hapū are insufficiently governance-oriented to warrant performance of Article 2. These are but a few examples of Crown policy directly creating circumstantial changes upon which Waldron wants to rely — the irony being

94 At 179 (emphasis in original).
95 At 176.
96 Tūhoe Claims Settlement Act 2014.
97 IH Kawharu *Māori Land Tenure: Studies of a changing institution* (Oxford University Press, Oxford, 1977) at 15.

that, despite them, tribes continue to be important governance entities for Māori.[98]

Waldron's argument essentially ratifies Crown breaches of Te Tiriti by asserting that the obvious consequences of those breaches amounted to a "fundamental change in circumstances".[99] This is both morally unfair and contrary to art 62(2) of the Vienna Convention, which codifies the requirement of *good faith*. Waldron does not delve into providing alternative causes for the changes he observes in governmentality. To the extent that other social phenomena like immigration have altered the burden on the State, those changes were within the control of the State as a sovereign entity.[100] Any increased burden has been the result of government decisions that were made while operating in contravention of Article 2 of Te Tiriti.

The trouble with Waldron's insistence on forward-looking justifications for Aotearoa's current constitutional arrangements is that he sidesteps the problem of providing a basis for Crown legitimacy.[101] His approach is to take Crown sovereignty based on breaches of Te Tiriti as brute fact — something to be worked *from* rather than worked *on*. For the reasons set out in Parts II and III of this article, such fait accompli should be resisted.

The practical issue of retribalisation deserves one final comment. Given the prevalence of iwi, hapū and Urban Māori Authorities in the status quo, it is not totally clear what the concern over retribalisation is. If Māori, as the MMA Report suggests, can organise their own institutions as part of constitutional reform, they will not be shackled to some long-lost relic of pre-colonial organisation. They are likely to organise as they do currently: around the tribes that persisted through adversity and adapted to government initiatives like the Treaty settlements process. What will emerge through the separated rangatiratanga, kāwanatanga and relational spheres is, as Paul McHugh states, a "post-structural and relational approach" — something Waldron quotes with approbation.[102]

2 Supersession of Māori Entitlements

Waldron elsewhere contends that changing circumstances have caused Māori entitlements to property to fade.[103] Though concerned with property and not sovereignty, the underlying logic of this claim is applicable to Matike Mai's proposed reform. Read together with his argument in "Indigeneity? First Peoples and Last Occupancy" a broader principled

98 See, for example, Gover, above n 22, at 172–174.

99 Waldron, above n 80, at 167.

100 Charter of the United Nations, art 2.

101 See, for example, Jeremy Waldron "Indigeneity? First Peoples and Last Occupancy" (2003) 1 NZJPIL 55 at 61. "I … have always been intrigued by the way in which the concept of indigeneity is used to transform what would otherwise be a forward-looking discussion of social justice."

102 Paul McHugh "Aboriginal Identity and Relations in North America and Australasia" in Ken S Coates (ed) *Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 107 as cited in Waldron, above n 80, at 176.

103 Waldron, above n 10. See also Jeremy Waldron "Redressing Historic Injustice" (2002) 52 UTLJ 135.

critique of returning sovereignty to Māori emerges.[104] It is this broader concern for the legitimate expectations of *modern New Zealanders* that I want to address. It adds a genuine competing interest to be balanced with Māori claims for rangatiratanga.

Waldron takes pains to delineate two principles upon which historic claims for rangatiratanga are made: first occupancy and prior occupancy.[105] First occupancy, as the name suggests, derives from being the original inhabitants of a territory. Something about original occupancy is said to generate inalienable rights over territory. By contrast, prior occupancy derives from indigenous peoples having a social, legal and political order that was disrupted by colonisation. To be clear, my argument is not one based on first occupancy (and the oftentimes mystical ways that theorists like John Locke conjure up rights to territory). Neither is it strictly based on Waldron's formulation of the principle of prior occupancy.

As Waldron sees it, prior occupancy is a conservative principle: "[b]ased on the human interest in stability, security, certainty, and peace, it prohibits overturning existing arrangements."[106] In essence, Waldron's argument is that, although this principle was breached with respect to Māori in the past, the passing of centuries leads it to now operate in favour of preserving the status quo. Consequently, the passing of time has effected a sort of legitimation.[107]

The substance of Waldron's argument relates to *why* the passing of time has this effect. He says "[t]he point is not that time, by itself, washes away all crimes", but rather that "the passage of time can establish patterns of expectation".[108] There is a certain internal logic to this point. The reason British acquisition of sovereignty was unjust was because Māori had developed a civilisation — a societal framework — in which people had legitimate expectations. The protection of those expectations is the rationale underpinning the principle of prior occupancy. As such, just as Māori society should have had those expectations respected, the rationale for prior occupancy demands that some respect be given to the stability of the status quo and the expectations of non-Māori that have developed.

My response to this objection is not to deny that the modern status quo deserves some deference. Current ways of life ought to be respected. But I contend that Māori expectations and entitlements have not faded. A balance must be struck. Surely stability is not so valuable that we would refrain from acting where there are clear moral imperatives to do so? We reform welfare systems when they inadequately serve the vulnerable and adjust electoral systems to improve proportionality. If the concern is the disruption of legitimate expectations, then the scale of the disruption needs to be weighed against the moral case for change. One would be wise to

104 Waldron, above n 10.
105 At 62–65.
106 At 73.
107 At 74. See Brookfield, above n 8, at ch 2 on the grounds for partial legitimation of Crown sovereignty by prescription.
108 Waldron, above n 101, at 74.

consider the asymmetry between the disruption faced by Māori from 1840 onwards and the disruption facing New Zealand citizens under Matike Mai's reform. Māori had their entire way of life — their laws, languages and political structures — decimated by colonisation. Non-Māori would retain most of the facets of their culture and lives in Aotearoa under Matike Mai's constitutional transformation.

So: why have Māori entitlements not faded despite the passing of time and the establishment of a new social order? The best approach is to consider the inverse: why does Waldron think Māori entitlements *have* faded? If a person or group holds an entitlement, the presumption must be that they continue to hold it unless some intervening event or circumstance upsets that presumption. Waldron's supersession thesis argues that justice is relative to circumstances, and draws heavily on a thought experiment involving watering holes in the savannah.[109]

A rough sketch of his thesis is as follows. If there is one watering hole in the savannah and person X is the only inhabitant, X is justified in monopolising the watering hole and using it exclusively. However, if Y subsequently arrives, X has a moral obligation to share the watering hole with Y, diminishing X's initial entitlement. Compare this with the following scenario. There are two watering holes. X and Y each have their own. X unjustly demands access to Y's watering hole as well as X's own (historic injustice). But X's watering hole subsequently dries up. As a result, X's shared entitlement to Y's watering hole, though unjustly acquired, is ratified by the change in circumstances. Waldron's analogy attempts to demonstrate that an illegitimate acquisition can be rendered legitimate by a change in circumstances.

By using an example based on scarce resources, Waldron stirs our intuitive response to people being deprived of their fundamental right to life. He pegs his change in circumstance to this emotionally powerful threat. However, less is at stake with constitutional reform. Unlike life, your political status within a country or a community is not binary. It is intersected by your wealth, education and — most importantly — your membership in a societal culture. As argued in Part III, rights to political equality are informed by how cultural groups are treated by the State — and it is political equality that is seemingly at stake in relation to constitutional transformation. Waldron is not wrong to point out that citizens have a genuine concern about the effect of reform on their rights, especially as political equality unlocks other rights like access to resources. But given that the measure of equality is not as simple as the right to life (it is not binary) or distillable to the idea of *one person, one vote* (formal equality between individuals), we need not speak of entitlements being entirely "superseded".[110] Competing interests can exist and be balanced.

109 Waldron, above n 10, at 24.
110 At 24.

Waldron makes an additional argument to demonstrate why property entitlements fade.[111] It ties into the logic of his argument on prior occupancy. He argues that property entitlements are created by people taking possession of an object, working on it, altering it and building a life around it.[112] It follows that, when property is unjustly taken, the wrong is founded in the loss of an object at the centre of one's way of life (or at least forming some part of it).[113] Over many years, one stops relying on the object in the way one once did. Much like his conception of *expectation* in relation to the principle of prior occupancy, this argument is based on the ongoing reliance on an entitlement. Waldron notes that laws around adverse possession and prescriptive title mirror this approach.[114] Importantly, though, he accepts that entitlements do not always fade in this way: sites or artefacts that have religious importance often persist at the centre of people's lives even if they are dispossessed of them.[115]

Māori entitlements to rangatiratanga should not be regarded as fading in this way. Waldron overstates the case for prescriptive rights over de jure entitlements. Consider the following property analogy. When it comes to adverse possession, squatters can only avail themselves of prescriptive title if the rightful owners of property ignore them and their occupation completely.[116] As soon as the de jure owners reassert their ownership, the adverse possession comes to an end. This is because the integrity of Aotearoa's system of property rights relies on a degree of deference to de jure ownership. People would not go through the trouble of following legitimate processes if de jure entitlements meant nothing. If we take this analogy and apply it to rangatiratanga, it provides a strong case for the persistence of Māori entitlements. Māori, unlike the absentee property owner who is ignorant of squatters, have continuously asserted their right to tino rangatiratanga. They have continuously fought to retain their land and their traditional resources.[117] And they have sought to avail themselves of their de jure rights but had them forcibly swept aside.

The law has often been manipulated to deny legal recognition of their entitlements.[118] If Māori were a landowner with squatters claiming title, they could be said to have lodged many a caveat with the Registrar trying to stop that process. Waldron claims that a "campaign for … restoration" is insufficient to maintain an entitlement because it is not what "[t]he original entitlement is based on".[119] But that assumes prescription is the only basis

111 At 19.
112 At 18.
113 At 19.
114 At 15.
115 At 19.
116 See Limitation Act 2010, ss 21(1) and 27. See also Land Transfer Amendment Act 1963, ss 3 and 8. A certificate of title can be applied for after 20 years of continuous adverse possession. However, the rightful owner can lodge a caveat and stop that process at any time.
117 Consider, for example, the Ngāti Whātua Ōrākei's historic protests at Bastion Point or the 1975 land march led by Whina Cooper.
118 See, for example, the Foreshore and Seabed Act 2004, following *Attorney-General v Ngāti Apa*, above n 64, which denied Māori customary rights that were explicitly recognised by the courts.
119 Waldron, above n 10, at 19.

for these rights. It is true that Māori first acquired rights by usage, but de jure grounds for entitlement were created by then developing a social order and legal system.

Matike Mai's approach does not cast aside the legitimate expectations of non-Māori New Zealand citizens. It balances their legitimate expectations, which have developed by prescription, with the de jure entitlement which Māori have long been trying to avail themselves of. A strong form of the historic sovereignty argument set out in Part II could lead one to regard Māori as entitled to total sovereignty. However, the pragmatic path is to pursue a qualified claim based on historic sovereignty and a relational claim based on self-determination. Doing so gives appropriate weight to the changes in Aotearoa's general composition. Waldron's *change of circumstances* objections refuse to extend the same courtesy: they ignore the significance of de jure rights entirely; and end up asserting, despite Waldron's protestations, that "time, by itself, washes away all crimes".[120]

Ethnic Separatism

While neither my Part II argument on historic sovereignty, nor my Part III argument on self-determination, is explicitly based on the normative status of Māori as an ethnic group, the consequence of constitutional transformation would be to divide political representation in Aotearoa along ethnic lines. Participation in a Māori assembly would inevitably be based on some form of lineal descent (whakapapa). Therefore, while my conceptual arguments do not themselves give ethnicity any normative status, the resulting reforms would nonetheless have that effect.[121] History warns us to tread carefully with such matters. The spectre of former Yugoslavia haunts national political projects based on ethnicity.[122] It is a cautionary tale that illustrates the uniquely destabilising effect that immutable traits can have on a society when they are reified. What is to be the basis of social cohesion and unity if people treat their ethnic affiliations as sacrosanct?[123] When people no longer see themselves as belonging to the same political community, what are the ties that bind? Social unity has far broader effects than just the prevention of ethnic violence. It affects the prevalence of discrimination; the willingness of people to make civic sacrifices for people they share little other commonality with; and, ultimately, the extent of political cooperation.

The kind of separatism that could set in following Matike Mai's proposed reforms is not as systemic as the separatism that could result if

120 Waldron, above n 101, at 74.

121 Though *race* and *ethnicity* are distinct concepts in the social sciences, for the purpose of this objection the two will be used interchangeably.

122 See, for example, Michael Ignateiff *Blood and Belonging: Journeys into the New Nationalism* (Vintage, London, 1994). Ignateiff provides an incisive journalistic account of the interface between civic and ethnic nationalism.

123 Patrick Macklem notes this problem in relation to the uncertainty involved with implementing internal self-determination for indigenous groups or minorities. See Patrick Macklem *The Sovereignty of Human Rights* (Oxford University Press, New York, 2015) at 178.

Māori were to secede from Aotearoa. There is no prospect of geographic segregation — people will still mingle, in shops and sports' clubs and community organisations. Freedom of movement and association will persist between political communities in Aotearoa, unlike between independent sovereign States. But reform will open the way for differentiated public services and institutions.[124] For example, Māori may wish to provide greater access to education in Te Reo. This could be achieved through separate language immersion schools, but also through compulsory Te Reo in existing schools. This type of trade-off could be present in all areas, including criminal justice and welfare-provision. The flexibility of a relational approach to governance is that the harsher edges of separatism can be mitigated by pragmatic decision-making. Pursuant to my Part II and Part III arguments, Māori should be the ones who decide what level of integration versus separation they wish to pursue for their institutions. But they should do so with this concern in mind.

Where Māori do opt for separate institutional structures, one concern is the entrenchment of racial essentialism. Kwame Anthony Appiah explains this dangerous tendency as "the idea that human groups have core properties in common that explain not just their shared superficial appearances but also the deep tendencies of their moral and cultural lives".[125] Racial essentialism is the scientific myth (founded prior to Darwinism, but psychologically still pervasive today) that a person's race — in addition to and distinct from culture — in some way determines their moral character and other behavioural tendencies.[126] Such thinking has long been propped up by art and media that stereotype groups and propagate colonial myths.[127] Al Nisbet's cartoon on the New Zealand government's "breakfast in schools" programme from 2013 is one recent example of common racial stereotyping.[128] It portrays Māori parents as chronically obese and morally bankrupt, associating Māori identity with negative physical, moral and psychological traits. These narratives exist in Aotearoa and have existed for a long time.

Reform that reinforces essentialist thinking runs the risk of increasing discrimination against Māori, and, more broadly, causing Māori and Pākehā to see themselves as fundamentally different. It does this by virtue of the very arguments I made in Part III. Because ethnicity happens to be a filter through which Māori access their culture, separate institutions that operate to protect Māoritanga may conflate ethnicity with culture. The process of mental othering begins with the leap from thinking *their culture is different* to *they are different*. Difference alone is not the basis for instability. Rather, it is the feeling that difference is in some way insurmountable.

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124 Although Māori may not necessarily opt for separation in all areas.

125 Kwame Anthony Appiah "Race in the Modern World: The Problem of the Color Line" (2015) 94 Foreign Aff 1 at 4.

126 Appiah, above n 125, at 2.

127 See Kwame Anthony Appiah "Race" in Frank Lentricchia and Thomas McLaughlin (eds) *Critical Terms for Literary Study* (2nd ed, University of Chicago Press, Chicago, 1995) 274.

128 See Joelle Dally and Michael Daly "'Racist' cartoon slammed" *The Press* (online ed, Christchurch, 30 May 2013).

Many liberal theorists argue that participation in common institutions and the fostering of civic nationalism is one way for people to transcend their differences and live in harmony.[129] Constitutional transformation has the potential to reduce the extent to which Māori and non-Māori have this relationship — a relationship that emphasises their common political project rather than their immutable differences. The more autonomous that Māori governance becomes, whether through personal jurisdiction or separate service provision, the more acute this problem will be. As Kymlicka points out, improving indigenous rights *within* a State maintains the necessity of cooperation and working together, whereas self-government rights create a more conditional existence for the larger political community.[130] Where differences can be transcended in a *traditional* liberal democracy by participation in common social and political institutions, increased Māori autonomy undercuts this stabilising force.

My responses to this objection will be along two lines. First, doing nothing can have equally destabilising effects. Secondly, the objection overstates the extent of the change in interaction between Māori and non-Māori. These responses do not detract from the fact that we should think carefully about the way in which greater rangatiratanga is implemented.

First, on social cohesion in the status quo: the MMA Report gives voice to immense anger and frustration among Māori on the treatment of Te Tiriti, Tikanga and their communities.[131] This anger comes, in large part, from the way nation-building policies have been used to impose the English language and European culture on the rest of the population following the Crown's acquisition of sovereignty.[132] The centralisation of political power, standardised education — focused on the dominant group's history, literature and language — and Eurocentric State symbols and holidays have all contributed to the lack of respect Māori feel their culture has been given.[133] To say that *common institutions* have fostered unity between Māori and non-Māori is to ignore the reality of these policies. It is for this reason that Kymlicka says that "refusing demands for self-government rights will simply aggravate alienation among national minorities".[134] The presence of common institutions does not eliminate the strength of other identities, especially when those identities are reinforced by oppression by the State.

A constitutional arrangement that recognises Māoritanga and gives Māori the power to protect, control and adapt their culture is likely to improve social cohesion and reduce the sense of alienation that Māori feel. But it is also likely to have instrumental effects on their wellbeing. Many essentialist narratives are fuelled by the overrepresentation of minorities in

129 See, for example, Kymlicka, above n 37, at 181–184; and Ignatieff, above n 122, at 3–6.
130 Kymlicka, above n 37, at 181.
131 See, for example, the comments from interviewees and kaumatua quoted in the introduction. *MMA Report*, above n 3, at 22–29.
132 Will Kymlicka *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, Oxford, 2007) at 62–63; and Charters, above n 73, at 651–657.
133 See Kymlicka, above n 132, at 62–63. Kymlicka discusses assimilationist nation-building policies.
134 Kymlicka, above n 37, at 183.

negative social statistics. Al Nisbet can defend his cartoon by pointing to the percentage of Māori prisoners or welfare beneficiaries (and ignore the State policies that contribute to these statistics).[135] However, if my instrumental argument for self-determination in Part III is convincing, reform that protects encompassing groups can contribute to the prosperity of people within those groups. This is by no means a catch-all response to the concerns around separatism. But it is one small way that reform can indirectly combat it.

My second response relates to the extent of the change under the Matike Mai proposals. In many ways, Matike Mai's proposals strike a balance between maintaining common institutions and protecting Māori culture. Political cooperation between a Māori and a Crown legislative assembly will always be necessary — indeed, it will be mutually beneficial. It is for this reason that Matike Mai was explicit in carving out a *relational sphere* in their indicative models. Unlike more aggressive secessionist proposals, constitutional power-sharing does not make the existence of the broader political community *conditional*. For a Māori assembly to achieve its goals, it will have to cooperate with Parliament. And, for the first time, for Parliament to achieve its goals, it will have to cooperate with the Māori assembly. Undoubtedly, there will be a political backlash to this type of reform, but the ongoing interaction that underpins the rationale for common institutions will persist. In addition, there is a greater hope of fostering Kymlicka's adopted ideal of "deep diversity".[136] By this, Kymlicka means a society dedicated to having diverse forms of cultural and political membership. Mutual solidarity is fostered by the people having a strong sense of identity and promoting others to have the same. Matike Mai's constitutional reform sends exactly this message. It says that the distinct identities of cultural and political groups are meaningful and should be promoted. But it also says that recognition of those differences is a necessary step towards political cooperation rather than separatism. Perhaps the balance will never be perfect. But it is significantly better than the alternative.

V CONCLUSION

I have argued in this article that historic sovereignty and self-determination provide moral grounds for constitutional transformation. Māori had their political structures and societal culture overrun by settlers. In sustained acts of resistance and protest, they adapted their modes of organisation and sought to reassert their rights. Organised Māori collectives have persisted through adversity: they continue to promote Māoritanga and fight for

135 See, for example, "New Zealand Official Yearbook 2012: New Zealand's prison population" (4 July 2013) Stats NZ <www.stats.govt.nz>.

136 Charles Taylor "Shares and Divergent Values" in Ronald Watts and D Brown (eds) *Options for a New Canada* (University of Toronto Press, Toronto, 2001) at 76 as cited in Kymlicka, above n 37, at 191.

rangatiratanga. This history underpins both of my key arguments for Crown power-sharing with Māori — remission of an ongoing wrong and self-determination justified by Māori societal culture.

The fundamental message of this article is a call for balance: between the de jure sovereignty of Māori and the rights of non-Māori who now call Aotearoa home; and between the moral imperative of Māori self-determination and forces like separatism that generate social instability. This article has sought to justify balance at a theoretical level as a way to achieve true equality and justice. These aspirational principles will never be reached if we unthinkingly apply them without attention to our history — to the fact that our institutions were imported and imposed on Māori without their consent. Currently, our constitutional structure tilts the scales considerably in one direction and makes very little attempt to accommodate Māori constitutionalism. The valuable contribution Matike Mai has made to this country's constitutional debate should not be ignored. A form of flourishing legal pluralism should be sought and careful consideration should be given to how such a model will be implemented.