Waikato Law Review

Taumauri

VOLUME 32, 2025–2026



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Allocating Liability for Cyberattacks on Maritime Autonomous Surface Ships (MASS)
Sebastiano Gianino

THE UNIVERSITY OF WAIKATO
Te Whare Wānanga o Waikato

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Cover Photograph: Te Matariki

The sculpture, Te Matariki, was commissioned by the Law School in 1994, using funds donated by Dame Catherine Tizard when the Law School was first established. The sculpture was designed and constructed by Brett Graham.

Te Matariki is star-shaped with seven points. It is based on Matariki (the Pleiades Group), a star cluster significant to Māori that appeared on the flag of King Tūheitia, Pōtatau Te Wherowhero VII. Matariki was venerated by Māori; its arrival in June marked the start of the New Year. The seven points symbolise the seven stars in the group and also the seven attributes: he mana, he tika, he aroha, he mohio, he kaha, he pai and he oranga.

The Waikato Law Review cherishes the goal of biculturalism, which carries with it a commitment to advancing and encouraging the Māori dimension in the legal system. The Māori title of the Review, Taumauri, means “to think with care and caution, to deliberate on matters constructively and analytically”. This title both encapsulates and symbolises the values and goals of the Review.

Waikato Law Review

Taumauri

VOLUME 32, 2025–2026

Co-Editors in Chief: Dr Dara Dimitrov
Dr Alberto Alvarez-Jimenez

Student Editors: Maree Rarity-Steel
Seamus Lohrey
Gemma Vranjes
Monish Khan

First published in 1993, *Taumauri* – the Waikato Law Review provides authoritative and critical analysis on a broad range of legal issues. The journal is hosted by *Te Piringa* Faculty of Law at the University of Waikato and reflects the Faculty's founding objectives of biculturalism, the study of law in context, and professionalism.

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Submissions
Articles, case notes, and book reviews should be emailed (as Microsoft Word attachments) to the Co-Editors in Chief by **May 15, 2027**.

Submissions should comply with either the New Zealand Law Style Guide (3rd Edition) or OSCOLA (4th Edition), and should conform with the general layout of articles, case notes, and book reviews published in previous issues of the Waikato Law Review. Articles should be within the range of 8,000 to 12,000 words (maximum) including footnotes, and other submissions should be within the range of 4,000 to 8,000 words.

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Sebastiano Gianino

Editorial

Taumauri – the Waikato Law Review was first published in 1993 and has been published annually since. It has always aimed to emphasise contemporary developments across all branches of law, reflecting Te Piringa's commitment to teaching law in context. Moreover, Waikato Law Review publishes its content page and its editorial in Te Reo Māori, which also reflects Te Piringa's bicultural commitment. Thus, in this edition, we are delighted to feature our first fully Te Reo Māori article, along with a tranche of articles from international and national judges, practitioners, academics, and policymakers. This issue features 17 articles.

This year, the University of Waikato hosted an unprecedented gathering of indigenous judges from across the globe at the International Indigenous Judges Conference, so it is only fitting that this edition of the Waikato Law Review includes a strong indigenous focus. This edition begins with the opening address by New Zealand's Chief Justice Dame Helen Winkelmann at the International Indigenous Judges Conference and is followed by the address made at the Norris Ward McKinnon Lecture by Honourable Michelle O'Bonsawin, the first indigenous Canadian to serve as a Supreme Court Justice in Canada. Te Piringa's Professor Valmaine Toki, a member of the United Nations Expert Mechanism on the Rights of Indigenous Peoples, offers insights into it in an interview with the Journal, while Judge Alana Thomas comments on bilingualism in the Courts of New Zealand. Judge Thomas's article is also our first full Te Reo Māori article.

Horiana Irwin-Easthope discusses the challenges of being Indigenous amid a changing environment, biodiversity loss, and climate change, while Ruby Oriwia Rumanako Sadlier Spooner follows on with her argument about whether a marine co-governance model can embed Treaty partnership. Lucy Vellenoweth's article critically analyses the continuing issue of landlocked land and what that means for Māori landowners.

Our founding dean and emeritus professor, the Honourable Margaret Wilson, writes again for this edition on what can be described as both topical and currently relevant: the legal and constitutional arrangements that support and protect New Zealand's judiciary and its rule of law. We were also privileged to receive an article from Professor Fui Asofou So'o, a former Vice-Chancellor of the National University of Sāmoa and visiting academic at Te Piringa Faculty of Law. His article discusses 63 years of Sāmoa's independence, the constitutional tests it has faced and the response from Sāmoa's judiciary. We are also pleased to publish the first in-depth analysis of the India New Zealand Free Trade Agreement by the University of Auckland's Emeritus Professor Jane Kelsey.

Siew Mei Ou Yang and Justin Lee take a historical viewpoint of the Chinese Tax and its implications for colonial Chinese immigrants. Navneel Sharma and Catherine Mahima Singh's seminal commentary on Lynda Tabuya's expulsion from Fiji's Parliament prompts scrutiny of both women's representation in politics and constitutional matters.

Laura Swears undertakes a critical analysis of New Zealand's sanctions in the Russia-Ukraine War, while Jasmine McTavish writes about the structural limitations of New Zealand's returning offenders' regime and the impact on Mental Health.

The University of Waikato's Tauranga campus held a half-day virtual roundtable on Shipping, Digitalisation and Law on 30 July 2026. The papers in this issue by Jennifer Campion on renewable

energy and Sebastiano Gianino on allocating liability for cyberattacks on maritime autonomous surface ships reflect the problems that arise both within national jurisdiction and internationally.

Finally, this edition includes a review of Paul Lynch's novel *Prophet Song* by Associate Professor Patrick Barrett. Lynch shows us the variety of impacts that authoritarian regimes have on the families of victims, and how these families attempt to carry on with their shattered lives. While it is a work of fiction, the novel resonates with the Pacific communities affected by the Dawn Raids in Aotearoa, as Louisa Westerlund notes in her contribution to this edition responding to the novel.

Finally, we thank the Dean of Law, Leilani Tuala-Warren, for her invaluable contribution to this edition, and we acknowledge the dedication of our student editors Maree Rarity-Steel, Seamus Lohrey, Gemma Vranjes, and Monish Khan. We are also grateful to Harkness Henry for its generous support.

Pānui Ētita

Nō te tau 1993 i whakaputaina tuatahitia ai Taumauri - te Arotake Ture o Waikato, ā, nō taua wā tonu kua whakaputaina i ia tau, i ia tau. Mai rā anō ko tōna whāinga ko te whakanui i ngā whanaketanga o nāianei puta noa i ngā peka katoa o te ture, e whakaata ana i te ngākau nui o Te Piringa ki te whakaako i te ture i roto i ngā horopaki e hāngai ana. Ka mutu, ka whakaputaina e te Arotake Ture o Waikato tōna whārangi ihirangi me tōna pānui ētita i te reo Māori, e whakaata anō ana i te ngākau nui o Te Piringa ki te kaupapa ahurea rua. Nā reira, i tēnei putanga, hari koa katoa ana mātou ki te whakaputa i tā mātou tuhinga tuatahi i tuhia katoatia i te reo Māori, ki te taha o tētahi kohinga tuhinga nā ngā kaiwhakawā, ngā kaiwhakamahi ture, ngā māngai o te ao mātauranga, me ngā kaihanga kaupapa-here nō tāwāhi, nō Aotearoa anō hoki. Tekau mā whitu ngā tuhinga kei roto i tēnei putanga.

I tēnei tau, i manaakitia e Te Whare Wānanga o Waikato tētahi huihuinga o ngā kaiwhakawā iwi taketake nō ngā tōpito o te ao i te Huinga Kaiwhakawā Iwi Taketake ā-Ao, he tuatahitanga tēnei, nō reira e tika ana kia whai wāhi nui mai te aronga iwi taketake ki tēnei putanga o te Arotake Ture o Waikato. Ka tīmata tēnei putanga ki te kōrero whakataki a te Kaiwhakawā Matua o Aotearoa, a Dame Helen Winkelmann, i te Huinga Kaiwhakawā Iwi Taketake ā-Ao. Ka whai mai ko te kauhau a te Hōnore Michelle O'Bonsawin i whakapuakina i te Kauhau Norris Ward McKinnon, arā, ko te tangata iwi taketake tuatahi o Kānata kia tohua hei Kaiwhakawā o te Kōti Mana Nui o Kānata. I roto i tētahi uiuinga ki te Hautaka, ka whakapuaki a Ahorangi Valmaine Toki o Te Piringa, he mema nō te Rōpū Mātanga o Te Kotahitanga o Ngā Whenua o te Ao mō ngā Motika o ngā Iwi Taketake, i ōna whakaaro mō taua kaupapa. Ka whakaputa whakaaro anō hoki a Kaiwhakawā Alana Thomas mō te reoruatanga i roto i ngā Kōti o Aotearoa. Ko te tuhinga a Kaiwhakawā Thomas hoki tā mātou tuhinga tuatahi i tuhia katoatia i te reo Māori.

Ka matapaki a Horiana Irwin-Easthope i ngā wero o te noho hei tangata whenua i roto i te taiao hurihuri, te ngaronga o te kanorau koiora, me te panonitanga āhuarangi. Ka whai mai ko Ruby Oriwia Rumanako Sadlier Spooner me tana tautohetohe mō te pātai mehemea ka taea e tētahi tauira kāwanatanga ngātahi ā-moana te tāmau i te pātuinga o Te Tiriti. Ka tātarihia e te tuhinga o Lucy Vellenoweth te take hurihuri tonu nei o te whenua aukati me te tikanga o tēnei ki ngā kaipupuri whenua Māori.

Kua tuhi anō tō mātou manutaki whakapūmau, ahorangi o mua hoki, te Hōnore Margaret Wilson, i tēnei putanga mō tētahi kaupapa e hāngai pū ana ki ngā take o te wā: ko ngā whakaritenga ā-ture me ngā whakaritenga kaupapa ture e pou here ana, e whakamaru ana hoki i te mana motuhake ā-whakawā o Aotearoa me tōna mana ture. Nō mātou anō te hōnore ki te whiwhi i tētahi tuhinga nā Ahorangi Fui Asofou So'o, te Tumuaki-Tuarua o mua o te Whare Wānanga ā-Motu o Hāmoa, he pūkenga mātauranga e toro mai ana hoki ki Te Piringa Faculty of Law. Ka matapakina e tana tuhinga ngā tau e 63 o te mana motuhake o Hāmoa, ngā whakamātautau kaupapa ture kua pā ki taua whenua, me te urupare a te rāngai whakawā o Hāmoa ki aua take. E harikoa ana hoki mātou ki te whakaputa i te tātari hōhonu tuatahi o te Whakaaetanga Tauhokohoko Herekore i waenganui i Aotearoa me Īnia nā te Ahorangi o mua o Te Whare Wānanga o Tāmaki Makaurau, nā Jane Kelsey.

Ka tirohia e Siew Mei Ou Yang rāua ko Justin Lee te Tāke Haini mai i te tirohanga o mua, me ngā pānga o taua tāke ki ngā manene Haini taipūwhenua. Ko tā Navneel Sharma rāua ko Catherine Mahima Singh tātaringa whakahirahira mō te pananga o Lynda Tabuya i te Pāremata o Whītī he

whakahihiko i te āta titiro ki ngā take e pā ana ki te kanohi kitea o ngā wāhine i te ao tōrangapū me ngā take kaupapa ture.

Ka whakatakoto a Laura Swears i tētahi tātaringa kaikini o ngā aukati a Aotearoa i te Pakanga o Rūhia-Ukaraina, ko tā Jasmine McTavish anō hoki he tuhi mō ngā herenga ā-rauhanga o te pūnaha whakahaere i ngā tāngata hara ka hoki mai ki Aotearoa me ngā pānga o taua pūnaha ki te Hauora Hinengaro.

I tū tētahi huinga kōrero tuihono haurua rā e te pūtahi o Tauranga o Te Whare Wānanga o Waikato i te 30 o Hōngongoi 2026 mō ngā kaupapa o te Mahi a te Kaipuke, te Matihikotanga me te Ture. Ko ngā tuhinga a Jennifer Campion mō te pūngao whakahou me Sebastiano Gianino mō te tohatoha taunahatanga mō ngā whakaeke ipurangi ki ngā waka moana motuhake i tēnei putanga e whakaata ana i ngā raruraru ka ara ake i ngā horopaki mana whakahaere ā-motu, ā-ao anō hoki.

Hei whakakapi, kei roto anō i tēnei putanga tētahi arotake a Ahorangi Tuarua Patrick Barrett i te pūrākau roa a Paul Lynch, Te Waiata Poropiti. Kua whakaatuhia mai e Lynch ngā momo pānga o ngā tikanga whakatuanui ki ngā whānau o te hunga kua pāngia kinotia, me te pakanga tonu a aua whānau kia whai huarahi whakamua ahakoa kua marara ngā toenga o ō rātou ao. Ahakoa he mahi paki noa iho taua pūrākau, e hāngai pū ana ōna kaupapa ki ngā hapori Moananui-a-Kiwa i pāngia e ngā Huakitanga Ata Hāpara i Aotearoa, e ai ki ngā kōrero taipitopito a Louisa Westerlund i tana takoha ki tēnei putanga hei urupare ki taua pūrākau.

Hei whakakapi, ka tuku mihi atu mātou ki te Tumuaki o Te Piringa Faculty of Law, ki a Leilani Tuala-Warren, mō tana kohakoha kāmehameha ki tēnei putanga, ā, ka āhukahuka hoki mātou i te ngākau nui o ā mātou ētita ākonga, arā, a Maree Rarity-Steel, a Seamus Lohrey, a Gemma Vranjes, me Monish Khan. E tuku mihi ana hoki mātou ki a Harkness Henry me tana tautoko nui mai.

International Indigenous Judges Conference
Huinga Kaiwhakawā Iwi Taketake Ā-Ao

Dame Helen Winkelmann, Chief Justice of New Zealand*

Me mihi ka tika, ki te kaikawe i ngā kupu karakia ki te mea ngaro,
E te pou-amorangi, tēnā koe.
E ngā mate o te motu, haere, haere, haere atu rā.
Ki a koe, e Te Arikinui, Ngā wai hono i te po, me te Kahui Ariki, ngā mihi maioha, ngā mihi mahana ki a koe, ki a koutou.
Ki a koutou, ngā kaiwhakarite ē manaaki nei i tēnei kaupapa, tēnā koutou katoa.
E ngā mana, e ngā reo, koutou, kua whakarauika mai, ki te whakanui i te wānanga tuatahi o te hunga kaiwhakawā o ngā iwi Taketake,
Nau mai, haere mai whakatau mai.
Ko Helen Winkelmann tōku ingoa, ko ahau te Tumu Whakawā o Aotearoa.
Nō reira, tēnā tātou katoa.

On behalf of the judiciary of Aotearoa New Zealand, I welcome you to our country and to Kirikiriroa. I acknowledge Te Arikinui, Ngā Wai hono i te pō. We are honoured by your presence. I acknowledge also judges and visitors who have travelled from other countries, all the way to this nation in the South Pacific.

Over the last two days you have been welcomed to this area, the Waikato, and told a little of its history and its role in New Zealand's broader story. But today and tomorrow in this conference the focus shifts to the law, exploring the place of Indigenous perspectives and the Indigenous judicial voice in each of our communities.

This is a meeting of judges and academics gathered here from the four winds. We each bring with us our own kōrero — our own stories — of how the law has shaped lives and indeed history in our jurisdictions. These stories include accounts of when the law has ignored injustice or has even caused it. But they also include accounts of when the law has lived up to its expressed ideals, truly serving the interests of justice.

As a New Zealand judge, the stories that I carry with me about our law touch on these themes. At times in Aotearoa New Zealand, the law has failed to respond to Māori pleas for justice. At times, it has been an engine of injustice.

But I also carry stories of the persistence of Māori in the pursuit of justice through the law, and of that justice being done. And stories of the resilience of Māori systems of knowledge and law, and the contribution they have made, and continue to make, to the delivery of justice in Aotearoa New Zealand.

As I stand here today, I am conscious that the story of the search for justice by Indigenous

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* Opening remarks delivered at the opening of the International Indigenous Judges Conference, University of Waikato, Saturday 25 October 2025.

peoples remains a work in progress, and that, as judges, we will play a role in how it is written. I am told that the programme is intended to explore the potential of the law to respond to Indigenous legal issues. It seems to me that an equal theme is the potential within Indigenous systems of thought and justice to contribute to the development of the law.

In Aotearoa New Zealand's history, the law has always loomed large. This is a nation formed by the signing of a legal document in which promises were exchanged between the British Queen and Māori rangatira, or chiefs. That document is Te Tiriti o Waitangi.

For generations, the law failed to provide meaningful redress for breaches of the promises made by the Crown in that document. Yesterday, you heard about the history of this area, and about the Kīngitanga. This movement of Māori tribes united behind a Māori King to preserve their lands and to secure the justice and the protections they had been promised by the British Queen, but which remained elusive.

For most of our history, Māori have fought for protection through the law. This belief in the law is evidenced in many waiata or traditional songs, and in whakataukī or customary proverbs. Not far from here, in 1858, Pōtatau Te Wherowhero was raised up as the first Māori King.[1] At his coronation or koroneihana, he told his people:[2]

> *I muri, kia mau ki te whakapono, kia mau ki te aroha, ki te ture. Hei aha te aha, hei aha te aha.*
>
> After me, hold fast to faith, hold fast to love, hold fast to the law.

Towards the end of the nineteenth century, the prophetic leader and founder of the Ringatū faith, Te Kooti Arikirangi Te Tūruki, told his followers:[3]

> *Ka kuhu au ki te ture, hei matua mō te pani.*
>
> I seek refuge in the law for it is a parent to the oppressed.

Before then, Te Kooti and his kin had been imprisoned without trial for over two years for their alleged acts of "rebellion", despite pleading to be brought before courts of justice. Te Kooti's experience of the law was, therefore, mixed. Despite that, before he died, he exhorted his followers to pursue their rights and grievances by legal means rather than through violence.

Many of you will also have historical figures like Kīngi Pōtatau and Te Kooti in your narratives, who sought to protect Indigenous ways of life and who continue to inspire present generations of Indigenous students, lawyers and judges.

I am going to use this time to sketch out some of that history, and something of the path that Indigenous legal issues have travelled in our law. I do this to provide some context — the New Zealand context — for your discussions over the next few days. This account is by no means

1 See Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, revised ed, Auckland, 2004) at 112–113.

2 "Pōtatau Te Wherowhero" Manatū Taonga | Ministry for Culture and Heritage <https://nzhistory.govt.nz/politics/the-maori-king-movement/potatau-te-wherowhero>; see also James Cowan *The New Zealand Wars: A History of the Māori Campaigns and the Pioneering Period (Vol 1: 1845–64)* (R E Owen, Wellington, 1955) at 154.

3 See Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Bridget Williams Books, Wellington, 2016) at 337; Joseph Williams "Ka kuhu au ki te ture, hei matua mō te pani" (2018) Māori Law Review <https://maorilawreview.co.nz/2018/11/ka-kuhu-au-ki-te-ture-hei-matua-mo-te-pani-hon-justice-joseph-williams/>; Heemi Taumaunu "Mai Te Pō Ki Te Ao Mārama: From the darkness to the enlightened world" (Norris Ward McKinnon Annual Lecture delivered at the University of Waikato, 11 November 2020); and Jayden Houghton *Tikanga Māori and State Law* (Thomson Reuters, Wellington, 2025) at [10.2].

neat and tidy; progress has come in fits and starts. But there is nevertheless a discernible current in the law, flowing faster now than ever.

I. Te Tiriti o Waitangi

Important context, and an appropriate place to start, is Te Tiriti o Waitangi, the Treaty that I mentioned earlier, which was signed in 1840 between the British Crown and Māori rangatira of various hapū or subtribes.

The Treaty was first signed at Waitangi, a beautiful promontory of land in the northern Bay of Islands which had become the centre of early dealings between European settlers and Māori. The British Queen's representative, Captain Hobson, drafted the Treaty in English within a few days of his arrival in Aotearoa New Zealand. He then sought the assistance of Anglican missionaries to create a version in te reo Māori — the version we now refer to as Te Tiriti.

In its form, the Treaty was an exchange of solemn promises between two peoples. But its meaning was, and still is, hotly contested. Indeed, there is dispute in some circles over whether Te Tiriti itself is the compact and the English version simply a translation.[4]

The English text recorded that Māori ceded to the British Queen all rights of sovereignty which they possessed and granted rights of pre-emption to their lands — that is, the Crown would have the exclusive right to purchase land from iwi and hapū.[5] In return, Māori were guaranteed "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties" and the rights and privileges of British subjects.[6]

But the document written in te reo Māori used different concepts. It guaranteed to Māori tino rangatiratanga (unqualified chieftainship) over their lands, villages, and their taonga.[7] It ceded to the British kāwanatanga, which could be construed as governorship — the word "Kāwana" being a transliteration of "Governor".[8]

Much has been made of a clash of meanings — even though the document signed by the vast majority of chiefs was in te reo Māori, and even though both versions guaranteed to Māori full and exclusive use of their lands, estates, forests, fisheries and properties, and the protection of the law.

It is now a matter of historical record, and it is documented in our statute books, that those promises made to Māori in the Treaty were broken throughout the length and breadth of this country.[9] The Crown bought land from Māori at an undervaluation and resold it to fund its colonial administration.

That history strikes close to home for the judiciary. In Auckland, the site of the High Court was part of the first land sale by Ngāti Whātua to the Crown following the signing of Te Tiriti.[10] The sale in question was of 3,000 acres, for which the Crown paid about £341 — made up of £50 in cash but

4 See, for example, Ani Mikaere *Colonising Myths, Māori Realities: He Rukuruku Whakaaro* (Huia, Wellington, 2024) at 129.

5 Treaty of Waitangi 1840, arts 1–2.

6 Treaty of Waitangi 1840, arts 2–3.

7 Te Tiriti o Waitangi 1840, preamble and art 2.

8 Te Tiriti o Waitangi 1840, art 3; see Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand, Wellington, 2004) at 106.

9 See, for example, Waikato Raupatu Claims Settlement Act 1995, preamble; Ngāi Tahu Claims Settlement Act 1998, preamble; and Whakatōhea Claims Settlement Act 2024, s 8.

10 Ngāti Whātua Ōrākei and Ngāti Whātua Ōrākei Trustee Limited and the Crown "Deed of Settlement of Historical Claims" (5 November 2011) at [2.20].

mainly comprising trade goods such as blankets, pots and clothing.[11] Within six months, 44 acres of that land had been resold by the Crown for £24,000.[12]

Land transactions and land confiscations (raupatu) played a formative part in the history of Aotearoa New Zealand. During the period of the New Zealand Wars, the New Zealand Settlements Act 1863 enabled the outright confiscation of land from Māori accused of rebellion against the Crown. Waikato iwi were affected on a vast scale; some 1.2 million acres of flat and fertile Waikato lands were seized.[13]

The courts themselves played a significant role in the dispossession of Māori from their lands and resources. Lands that were not confiscated by the Crown became subject to the activities of the Native Land Court, a court premised on the alienation of land through the individualisation of interests. Aptly, it was sometimes called Te Kooti Tango Whenua — the Land-Taking Court.[14]

Notwithstanding the communal nature of Māori interests, which operate on the basis that land is held for the entire hapū, the Court imposed a "ten-owner" rule when converting land from customary to freehold title. Those who made it on to the title were enabled and encouraged to sell their land to settlers. In some cases, the land was simply exchanged for goods. A law change in 1873 did enable the listing of every member of the hapū on the title.[15] Although this may have been a well-meaning attempt to rectify the injustice of the ten-owner rule, it has led to the present-day problems of fragmentation.[16]

Because the Native Land Court made surveying a mandatory prerequisite for establishing legal title, many Māori were forced into debt to surveyors, bankers and land agents. Iwi and hapū frequently paid for land surveying by surrendering significant portions of the surveyed land itself. Indeed, the Native Lands Act 1865 allowed surveyors to work on credit, placing a lien (or legal charge) on the land.

A striking example of how focused colonial governments were on Māori land and the necessity of its acquisition from Māori communities is seen in the Native Land Act 1909, which consolidated more than 100 statutes that impacted upon Māori land.

Other figures illustrate the burden borne by iwi and hapū in their pursuit of justice. One historian has described a "merry-go-round of debt" incurred by claimants who sought redress through appeals.[17] The *Makauri* case, for instance, which came before the courts eight times in the span of 15 years, was said to have cost the Māori owners £18,000 in legal expenses.[18] In many cases, in a devastating twist, the sale of remnant or recovered lands was required in order to settle solicitors' accounts.

Thus, many Māori were not given undisturbed possession of their properties, as had been

11 Ngāti Whātua Ōrākei and Ngāti Whātua Ōrākei Trustee Limited and the Crown "Deed of Settlement of Historical Claims" (5 November 2011) at [2.20]–[2.21].

12 "The Founding of Auckland" Waitangi Tribunal <https://www.waitangitribunal.govt.nz/en/publications/education/orakei/new-section-page-3>.

13 See Waikato Raupatu Claims Settlement Act 1995.

14 See David V Williams *"Te Kooti Tango Whenua": The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

15 Native Land Act 1873.

16 See MPK Sorrenson *Ko Te Whenua Te Utu | Land is the Price: Essays on Māori History, Land and Politics* (Auckland University Press, Auckland, 2014) at 98.

17 MPK Sorrenson *Ko Te Whenua Te Utu | Land is the Price: Essays on Māori History, Land and Politics* (Auckland University Press, Auckland, 2014) at 94.

18 MPK Sorrenson *Ko Te Whenua Te Utu | Land is the Price: Essays on Māori History, Land and Politics* (Auckland University Press, Auckland, 2014) at 94.

promised in Te Tiriti. But attempts to invoke rights under Te Tiriti were unsuccessful. The 1877 decision of the Supreme Court (now the High Court) in *Wi Parata v Bishop of Wellington* held that the Treaty was a "simple nullity" on the basis that there existed, in 1840, "[n]o body politic … capable of making cession of sovereignty".[19]

That decision stands in its historical time — in the aftermath of armed conflict, when the settler population had come to outnumber Māori, and against a continuing background of settler pressure for land as a tradeable resource.

The language of legal nullity is no longer used. Even so, the 1941 decision of *Te Heuheu Tūkino v Aotea District Māori Land Board* remains authority for the proposition that Te Tiriti is not directly enforceable in New Zealand courts unless incorporated into domestic law by statute.[20]

In the twentieth century, iwi and hapū persisted in bringing customary title claims to our courts. But because the Māori Land Court had been so effective in converting customary title to statutebased title, the number of Māori claims concerning title to land outside of the processes of that Court was small. By the second half of the twentieth century, such claims tended to focus on coastal areas and waterways.

In a landmark 1963 decision in *Re the Ninety-Mile Beach*, the Court of Appeal held that Māori could not hold customary title to the foreshore — that is, the area between high and low water marks.[21] The Court found that prior investigations by the Māori Land Court into adjacent lands had converted the marine and coastal area to freehold title and extinguished customary rights in the contiguous foreshore.

In the period up until the 1980s, at least in part because of these court rulings, the Treaty and the undertakings given under it played little role in ensuring that the protection of the law was indeed extended to Māori. In that same time period, Māori experienced the impacts of colonisation, often with disastrous effects on land, language, culture and autonomy.

The loss of land saw a mass migration of Māori to the cities after World War II. With that loss of land and increasing urbanisation came the loss of traditional social structures and the cohesion they once provided. The causal connection between this mass migration and the rapid growth in Māori representation in negative social statistics, including crime and imprisonment, is now beyond debate. Inevitably, the courts played their part in administering the justice that contributed to these negative statistics.

The 1970s were a critical turning point in this narrative. Māori protest movements, which had existed from the moment of colonisation, gained fresh momentum. There were land occupations and land marches (hīkoi) protesting current and historical treatment of Māori. There was also a petition to Parliament on the need to preserve and protect te reo Māori. These protest movements generated political pressure and, beginning in the 1970s, a change in approach from successive Parliaments.

The first sign of this shift was the passage of the Treaty of Waitangi Act in 1975, establishing the Waitangi Tribunal as a permanent commission of inquiry. The Tribunal was created to hear claims related to Crown breaches of the principles of the Treaty of Waitangi.[22]

Initially, the Tribunal was only empowered to investigate contemporary breaches, but its jurisdiction was extended in 1985 to include the power to investigate historical breaches dating back

19 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78.
20 *Te Heuheu Tūkino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).
21 *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA).
22 Treaty of Waitangi Act 1975, ss 4–6.

to 6 February 1840. This historical jurisdiction has been integral to the Crown-Māori settlement process. In turn, that settlement process has been integral to reconstituting hapū and iwi so that they have the means to play a role in the lives of their people.

The role of the Native Land Court (now the Māori Land Court) changed with the passing of Te Ture Whenua Māori Act 1993. The Court was transformed from an engine of land dispossession into a court which supported the dual principles set out in the Act of retention and utilisation of Māori lands.[23]

The Treaty of Waitangi Act also provided the phrase "the principles of the Treaty".[24] Although there are no principles, as such, recorded in the Treaty, it seems that the concept of "principles" was used to step around the difficulty created by arguments over the meaning of the English and Māori versions of the Treaty. Over time, the phrase "the principles of the Treaty" was incorporated into other legislation, with Parliament providing that public institutions and officers must comply with those principles.[25]

The first significant engagement by the courts with this concept came in 1987 with the decision in the *Lands* case.[26] The Court of Appeal found that a provision in the State-Owned Enterprises Act 1986 prohibiting action "inconsistent with the principles of the Treaty" required the Crown to act consistently with Treaty principles when transferring state assets to state-owned enterprises.[27] The Court held that the Treaty created an enduring relationship of partnership with responsibilities akin to fiduciary duties, with each party accepting a positive duty to act in good faith, fairly, reasonably and honourably toward each other.[28]

As signalled above, since 1987, Parliament has frequently legislated to require decision makers under an Act to have regard to the principles of the Treaty, or to act consistently with them. Those provisions have, in turn, led to a steady flow of judicial review proceedings in which the principles of the Treaty are invoked to challenge executive decision-making.[29]

Even where the principles are not mentioned expressly in legislation, the courts have recognised their relevance to the task of statutory interpretation. The Treaty has been described as "part of the fabric of New Zealand society".[30] For that reason, it forms part of the context in which legislation which impinges upon its principles is to be interpreted. In 2021, in the case of *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, the Supreme Court considered it settled that "[t]he courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question".[31]

23 Te Ture Whenua Māori Act 1993, s 17.

24 Treaty of Waitangi Act 1975, long title, preamble, ss 6 and 8.

25 For example, the Environment Act 1986, long title; State-Owned Enterprises Act 1986, s 9; Conservation Act 1987, s 4; Resource Management Act 1991, s 8; and Crown Minerals Act 1991, ss 4 and 14(1)(b).

26 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

27 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 666 per Cooke P.

28 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 673 per Richardson J.

29 For an overview see Jack Oliver-Hood "Ko Ngā Take Ture Māori — Our Significantly Indigenous Administrative Law: The Treaty and Judicial Review" (2013) 19 Auckland U L Rev 53.

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

31 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151] per William Young and Ellen France JJ. See also at [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

II. Recognition of Tikanga

The other thread to this story is the place of New Zealand's first law — tikanga Māori or customary law — in the law as applied by our courts.

In Aotearoa New Zealand, the courts have always needed to engage with customary law because Māori have continued to regulate their lives in accordance with tikanga. After 1840, customary law was frequently employed by the courts to facilitate the formal recording of native title preparatory to its extinguishment. Under the Native Lands Acts of 1862 and 1865, the Native Land Court was charged with investigating and resolving claims to land "according to Native custom".[32]

Historical research continues to recover decisions of the nineteenth and twentieth centuries in which mainstream courts have given effect to tikanga concepts in the common law, or within broad statutory frameworks.[33]

Nevertheless, it would be true to say that for the first half of the twentieth century, tikanga was marginalised in the operating of the common law and statute. In the 1877 case which I referred to earlier, *Wi Parata*, Prendergast CJ famously denied the existence of a body of Māori customary law. That denial occurred even though customary law and its concepts were referred to, and indeed used, in the Native Rights Act 1865 — a statute bearing on the dispute. The Chief Justice opined that "a phrase in a statute cannot call what is non-existent into being".[34]

In the last 50 years, there has been increasing legislative recognition that tikanga-based interests, social relations and values should be weighed by judges and public officials in their decision-making. Tikanga concepts have begun to appear across our statute books, in legislation governing natural resources, the well-being of children, and intellectual property.[35] The pervasive relevance of tikanga to lawyers and judges led to the 2021 decision by the Council of Legal Education that tikanga should be taught as a compulsory subject in all law schools.[36]

Decisions of the New Zealand courts have attempted to articulate the place of tikanga in the common law. In 2012 in *Takamore v Clarke*, the Supreme Court held that tikanga was a source of law which could inform the common law in Aotearoa New Zealand, and that our courts must consider tikanga values where these are relevant.[37]

In *Ellis v R (Continuance)*, the Supreme Court was unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa New Zealand.[38] The majority held that the relationship between tikanga and the common law should evolve contextually and as required on a case-by-case basis. But they warned that the courts must not exceed their

32 Native Lands Act 1862, ss 4 and 7; and Native Lands Act 1865, s 23.

33 See, for example, Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts, 1840–1852* (Auckland University Press, Auckland, 2017); and Antonia Smith and Geoff McLay "Hiding in plain sight: The lost tikanga authorities" (2025) 56 VUWLR 79.

34 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 79.

35 See, for example, Resource Management Act 1991, ss 2, 6(e) and 7(a); Oranga Tamariki Act 1989, ss 2 and 4–5; Trade Marks Act 2002, ss 3–4, 17 and 178–179; and Patents Act 2013, ss 3, 5 and 225–228.

36 Professional Examinations in Law Regulations 2008, regs 1(3) and 3(1)(b) (as amended by the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022).

37 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

38 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19], [108]–[109] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

function when engaging with tikanga, and that care must be taken not to impair its operation as a system of law and custom in its own right.[39]

Earlier this year, the New Zealand Law Society released a practice briefing on the relevance of tikanga to lawyers' ethical obligations, identifying knowledge of te ao Māori, and of tikanga-based legal developments, as important aspects of professional competence.[40]

III. The Role of the Courts

The strands of the story that I have been outlining could be seen to converge in a landmark 2003 decision whose impacts and aftermath are still unfolding.[41] In *Attorney-General v Ngāti Apa*, the Court of Appeal overturned *Re the Ninety-Mile Beach*. The Court held that the Crown had not automatically become the underlying owner of all land when it assumed sovereignty over Aotearoa New Zealand;[42] that tikanga-based rights continue and are a burden on the Crown until lawfully extinguished;[43] and that the term "title", as used in the expression "Māori customary title", should not necessarily be equated with the concepts and incidents of title as known to English common law.[44]

The Court also held that while legislation was the primary mechanism for limiting recognition of enforceable tikangabased rights at common law, such rights could not be extinguished by the "side wind" of a change of status to adjacent land.[45]

Ngāti Apa drew upon the overseas decisions in *Delgamuukw v British Columbia*[46] and *Mabo v Queensland (No 2)*,[47] and has been described as the pivotal moment in "the reawakening of native title" in Aotearoa New Zealand.[48] The judgment catalysed legislative, political and social responses which have changed the legal landscape in Aotearoa New Zealand and continue to generate new claims.[49] An account of these responses and their effects is beyond the scope of this sketch.

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39 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.

40 New Zealand Law Society | Te Kāhui Ture o Aotearoa *Practice Briefing: Tikanga Māori and Rules 3, 3.1, and 3.9 of the Rules of Conduct and Client Care* (July 2025).

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

42 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [30]–[34] and [101] per Elias CJ and at [183] per Tipping J.

43 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [146]–[149] per Gault and Anderson JJ.

44 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [184] per Tipping J.

45 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [13] per Elias CJ and at [154] per Tipping J; see also Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 136.

46 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [31] and [87]; see also *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

47 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [30]; see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, (1992) 107 ALR 1.

48 Natalie Coates "The rise of tikanga Māori and Te Tiriti o Waitangi jurisprudence" in John Burrows and Jeremy Finn *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 72–74.

49 Legislative responses to date include the Foreshore and Seabed Act 2004; Marine and Coastal Area (Takutai Moana) Act 2011; and Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Act 2025. Significant case law in connection with the resulting legislative framework includes *Re Tipene* [2016] NZHC 3199; *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025; *Re Edwards Whakatōhea* [2023] NZCA 504, [2023] 3 NZLR 252; *Whakatōhea Kotahitanga Waka (Edwards)* [2024] NZSC 164; and *Whakatōhea Kotahitanga Waka (Edwards) (Judgment No 2)* [2025] NZSC 104.

IV. Looking Ahead

This takes me back to my opening remarks. I said that the story of the search for justice by Indigenous peoples is only partly written, and that, as judges, we will play a role in how it is written. It is in this context that I acknowledge the significance of this gathering and the importance of the conversations you have already started and will be continuing over the next two days.

In this morning's sessions you will be tackling some important metaphysical questions: what does it mean to judge "Indigenously"? What is the unique lens or framework that Indigenous judges bring to bear on their work? What does it mean for Indigenous laws to be applied in our mainstream courts? And are we protecting Indigenous laws in doing so, or do we risk impairing their integrity as independent systems of laws?

This afternoon's sessions then provide an opportunity to explore the political and constitutional dimensions of these issues. I anticipate that a topic of discussion will be the tendency for legal issues to become swept up in polarising narratives.

Throughout the day tomorrow you will have the opportunity to hear from international judges about how they approach their roles in the areas of criminal justice, environment and biodiversity, economic development and family law, and the role they see for Indigenous voices within them.

This is the start of an important series of conversations for Indigenous judges and their communities. No doubt these conversations will continue after this conference has concluded. No doubt they will continue to transcend international boundaries. This simply underscores both the commonality of the challenges that Indigenous judges face, and the opportunities for exchanges and dialogue to explore pathways to a more certain future — now, and in the days yet to come.

Nō reira, tēnā koutou, tēnā koutou, tēnā tātou katoa.

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The Norris Ward McKinnon Lecture 2025

Sentencing Principles for Canadian Indigenous Accused: Do They Really Work? Should They Be Used in the Forensic Mental Health System?

Te Kauhau Norris Ward McKinnon 2025

Ngā Mātāpono Whiu mō te Hunga Whakapaetia o ngā Iwi Taketake o Kānata: E Mahi Pai Ana Kāore Rānei? E Tika Ana Kia Whakamahia i te Pūnaha Hauora Hinengaro Tātari-Ture?

Hon Michelle O'Bonsawin

I. Introduction

Indigenous people in Canada are vastly over-represented in the criminal justice system, similar to here in New Zealand.[1] As of 2021, Indigenous adults in Canada made up approximately 33 per cent of admissions to federal custodial institutions, despite only representing about five per cent of the Canadian adult population.[2] This over-representation is even more pronounced for Indigenous women, who represent over 40 per cent of admissions.[3] Sadly, this is a number that continues to increase.[4] Similar to New Zealand and Australia,[5] the impacts of colonialism and racial discrimination have been key drivers in the over-incarceration of Indigenous people in Canada.[6] Colonial policies like Indian residential schools disrupted legal traditions and conflict resolution

1 Julian V Roberts and Andrew A Reid "Aboriginal Incarceration in Canada Since 1978: Every Picture Tells the Same Story" (2017) 59(3) Canadian Journal of Criminology and Criminal Justice 313 at 316 and 322.

2 Statistics Canada *Adult and youth correctional statistics, 2020/2021* (Catalogue No 11-001-X, 20 April 2022) at 4.

3 Statistics Canada *Adult and youth correctional statistics, 2020/2021* (Catalogue No 11-001-X, 20 April 2022) at 4.

4 See Julian V Roberts and Andrew A Reid "Aboriginal Incarceration in Canada Since 1978: Every Picture Tells the Same Story" (2017) 59(3) Canadian Journal of Criminology and Criminal Justice 313 at 322.

5 Jessica Martin "White cultural imperialism and the New Zealand criminal justice system: Importance of insider voices" (2023) 38(2) New Zealand Sociology 50−61; Tanya Mitchell "A dilemma at the heart of the criminal law: The summary jurisdiction, family violence, and over-incarceration of Aboriginal and Torres Strait Islander people" (2019) 45(2) Univ of Western Australia LR 136.

6 Paula Maurutto and Kelly Hannah-Moffat "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31(3) CJLS 451 at 452.

practices,[7] while perpetuating social determinants of crime like unstable housing, family violence, and substance abuse.[8]

In this lecture, I will review how Canadian sentencing law has responded to the over-representation of Indigenous people in the criminal justice system. This includes a discussion of the statutory responses unique to Canada, but also developments in the case law that contextualise Indigenous offenders' moral culpability in light of colonial policies like the residential school system. These developments in Canada are useful for understanding the relevancy of colonial practices to sentencing practices across countries like Canada, New Zealand, and Australia.

Finally, I will end this discussion by considering how Indigenous Sentencing Principles can be applied in the context of the forensic mental health system. While there are no specific statutory requirements in Canada to consider Indigenous Sentencing Principles in the forensic mental health system, I will explain why Indigenous Sentencing Principles are especially relevant to accused people facing mental health challenges.

II. Legislative and Judicial Responses to the Over-Incarceration of Indigenous People in Canada

As discussed earlier, Indigenous people in Canada are vastly over-represented in the criminal justice system.[9] As of 2021, there was an average of 42.6 Indigenous people in provincial custody per 10,000 people, compared to only 4 per 10,000 for non-Indigenous people.[10] Indigenous people are incarcerated at a rate approximately 10 times higher than non-Indigenous people.[11] This over-representation is even more pronounced for Indigenous women, who are incarcerated at a rate 15.4 times higher than non-Indigenous women.[12] Not only are Indigenous people in Canada over-represented in correctional facilities, but Indigenous inmates are over-represented in maximum security institutions, structured intervention units (or what was formerly known as segregation units), and are more likely to return to prison due to the suspension or revocation of parole.[13]

The over-incarceration of Indigenous people in Canada is not a novel phenomenon. Beginning in 1965, a series of commissions and reports were launched to investigate the over-incarceration of Indigenous people.[14] These commissions consistently found that community-oriented reforms were necessary to combat the systemic discrimination faced by Indigenous people in the criminal justice system. These commissions found:

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7 Val Napoleon "Thinking About Indigenous Legal Orders" (Research Paper for the National Centre for First Nations Governance, June 2007) at 12.

8 Deborah Chansonneuve *Reclaiming Connections: Understanding Residential School Trauma Among Aboriginal People* (Aboriginal Healing Foundation, 2005) at 46.

9 Statistics Canada *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021* (Component of Catalogue No 11-001-X, 12 July 2023).

10 Statistics Canada *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021* (Component of Catalogue No 11-001-X, 12 July 2023).

11 Statistics Canada *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021* (Component of Catalogue No 11-001-X, 12 July 2023).

12 Statistics Canada *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021* (Component of Catalogue No 11-001-X, 12 July 2023).

13 See Office of the Correctional Investigator *Annual Report 2021−2022* (Catalogue No PS100E-PDF, 30 June 2022) at 96.

14 Canadian Committee on Corrections *Toward Unity: Criminal Justice and Corrections* (Queen's Printer, 1969) at 1.

- that treatment in Indigenous communities is frequently a more effective alternative to sentencing solutions outside Indigenous communities;[15]
- that community sanctions and Indigenous peacemakers have a greater ability to protect and restore kinship networks within an Indigenous community than colonial sentencing methods;[16] and
- that there should be diversion programming and Indigenous sentencing courts which can dispense justice in a manner that is sensitive to Indigenous cultures, history and languages.[17]

The Government of Canada responded to these commissions' findings in 1995 by introducing Bill C-41 to include provisions on the sentencing of Indigenous people.[18] More specifically, Bill C-41 introduced s 718.2 of the Criminal Code, which provides that:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,
>
> […]
>
> (e) *all available sanctions, other than imprisonment, that are available in the circumstances* and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*. (Emphasis added)

With the introduction of s 718.2(e), Parliament intended to "increase opportunities for creative individualized responses" for Indigenous offenders.[19] While s 718.2(e) was introduced in 1995, and came into force in 1996, the Supreme Court did not turn to interpreting and applying s 718.2(e) until 1999 in *R v Gladue*,[20] a case involving a young Indigenous woman accused of manslaughter. *Gladue* would ultimately become the seminal case on the application of Indigenous Sentencing Principles in Canada.

Ms Gladue is an Indigenous person of mixed Cree and Métis ethnicity. Ms Gladue had just turned 19 years old at the time of the offence. She had been living with her fiancé since the age of 17 and they had a daughter. Ms Gladue was pregnant at the time of the offence. On the day in question, she held a party to celebrate her birthday at her townhouse complex where she and her fiancé were living together with members of her family. She had previously voiced her concerns that her fiancé was engaging in sexual activities with her older sister. Ms Gladue confronted her fiancé shortly after witnessing her fiancé and sister leaving her sister's suite together. Her fiancé responded by making derogatory and insulting comments about Ms Gladue's physical appearance and weight. Ms Gladue then proceeded to stab her fiancé in the chest with a knife, killing him. At the time of the stabbing, she had bruises on her arm and collarbone indicative of a physical

15 Canadian Committee on Corrections *Toward Unity: Criminal Justice and Corrections* (Queen's Printer, 1969) at 187.

16 Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (Minister of Supply and Services Canada, 1987) at 393.

17 Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations (McCurdy's Printing and Typesetting, Nova Scotia, 1989) at 11, and 27−29.

18 Bill C-41 *An Act to Amend the Criminal Code (Sentencing) and other Acts in consequence thereof* 1st Sess, 35th Parl, 1995 (assented on 13 July 1995), SC 1995 c 22.

19 Benjamin A Ralston *The Gladue Principles: A Guide to the Jurisprudence* (University of Saskatchewan Indigenous Law Centre, Saskatoon, 2021) at 54−55; see also House of Commons Standing Committee on Justice and Legal Affairs *Minutes of Proceedings and Evidence* no 62 (17 November 1994).

20 *R v Gladue* [1999] 1 SCR 688.

altercation. Her fiancé had been convicted of assaulting her while she was pregnant with their first child. Ms Gladue pleaded guilty to manslaughter,[21] and she was ultimately sentenced to three years' imprisonment.[22]

On appeal at the Supreme Court, Ms Gladue argued that the sentencing judge had failed to properly consider her circumstances as an Indigenous person under s 718.2(e). The majority ultimately allowed the appeal, explaining that their decision was the beginning of "the process of articulating the rules and principles that should govern the practical application of s. 718.2(e)".[23] The Court ultimately provided a two-step reasoning process for sentencing decisions involving Indigenous people. First, sentencing judges must consider the unique systemic and background factors which may have played a part in bringing an Indigenous offender before the court.[24] The sentencing judge must then consider what type of procedures and sanctions may be appropriate in consideration of the offender's Indigenous background. These are the principles that would later come to be known, at least in part, as Indigenous Sentencing Principles.[25]

III. Applying Indigenous Sentencing Principles

A. Conventional Approach to Sentencing in Canada

To understand how Indigenous Sentencing Principles apply, it is first useful to consider the conventional framework for sentencing criminal offenders in Canada. In Canada, all sentencing begins with the prime objective that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[26] This principle of "proportionality" is foundational to Canadian sentencing law and has since been enshrined in s 718.1 of the Criminal Code. The review for proportionate sentences is dependent on the specific circumstances of every case, which informs the gravity of the offence and the offender's degree of moral responsibility in any given case.

Parity is a similarly critical element of the sentencing analysis. Parity demands that "similar offenders who commit similar offences in similar circumstances should receive similar sentences".[27] Parity and proportionality work in tandem together. Proportionate and fitting sentences simply cannot be determined from first principles in every single case.[28] Without the ability to anchor

21 *R v Gladue* [1999] 1 SCR 688 at [7] and [10].
22 *R v Gladue* [1999] 1 SCR 688 at [13].
23 *R v Gladue* [1999] 1 SCR 688 at [24].
24 *R v Gladue* [1999] 1 SCR 688 at [66].
25 While it is typical in sentencing nomenclature to refer to these principles as "Gladue Principles", I will refer to these principles as Indigenous Sentencing Principles. This change of terminology is necessary to respect the Gladue family's wishes, but it is also important to broadening the discussion around sentencing principles, customary Indigenous legal principles, and Indigenous people in the criminal justice system. As this article explains, there are factors relevant to sentencing Indigenous people which were not explored in the initial *Gladue* case, including traditional sentencing principles based on customary legal systems. Further, this shift in dialogue is important to emphasise self-determination and a shift to reconciliation. While *Gladue* was focused on a problem-oriented narrative, the use of Indigenous Sentencing Principles includes a revitalisation of Indigenous legal traditions. Given that, the term Indigenous Sentencing Principles more accurately reflects the holistic approach necessary to address Indigenous over-incarceration in Canada.
26 *R v Friesen* 2020 SCC 9 at [30].
27 *R v Friesen* 2020 SCC 9 at [31].
28 *R v Friesen* 2020 SCC 9 at [33].

a sentencing analysis in the reflection of prior judicial perspectives on similar cases, sentencing decisions risk assigning dramatically different sentences for offences and offenders that are similar in nature.[29] This approach would fail to appreciate the need for consistency and proportionality in sentencing jurisprudence. Rather, individual sentences are calculated and determined based on referencing sentencing ranges based on "similar circumstances" to determine what the appropriate sentence would be.[30]

Practically speaking, sentencing ranges provide a guideline of possible sentences available to a sentencing judge in any given case.[31] These ranges also provide a category of offences that share common factors to be judged alongside each other by the same rubric.[32] Once these sentencing ranges are established for any given offence, sentencing judges then consider the relevant mitigating and aggravating factors in any given case to move a sentence along a sentencing range.

Canadian sentencing jurisprudence prescribes a number of aggravating factors, including: whether the offence was motivated by bias, prejudice, or hate based on race, sexual orientation, or gender;[33] whether the offender abused their intimate partner or a member of their family;[34] whether the offender abused a person under the age of 18 years;[35] whether the offence was committed for the benefit of, or at the direction of, a criminal organisation;[36] and, whether the offender abused a position of trust or authority in order to commit a crime upon those who relied upon that trust.[37]

The case law has also established a series of mitigating factors, including: whether the offender has expressed remorse or acceptance of responsibility for the offence,[38] including where the offender voluntarily seeks to make reparations;[39] whether the offender honestly but mistakenly believed the lawfulness of their actions;[40] whether the offender shows promising prospects of rehabilitation,[41] including whether the offender is able to work and reintegrate themselves into the community;[42] whether the offender pleaded guilty;[43] and, the personal circumstances of the offender, including whether an offender has a mental disability or substance use disorder that imposes cognitive limitations.[44]

These mitigating factors reflect a recognition that such circumstances may diminish an offender's level of moral blameworthiness for an offence.[45] Importantly, the distinctions relevant to mitigating factors must be relevant to the degree of moral responsibility in any specific case.[46] This does not mean, however, that an offender needs to show a "causal link" between the mitigating

29 *R v LM* 2008 SCC 31 at [36]−[37].
30 *R v Friesen* 2020 SCC 9 at [33].
31 *R v Wright* (2006) 83 OR (3d) 427 (CA) at [16].
32 *R v Friesen* 2020 SCC 9 at [33].
33 *Criminal Code* RSC 1985 c C-46, s 718.2(a)(i).
34 *Criminal Code* RSC 1985 c C-46, s 718.2(a)(ii).
35 *Criminal Code* RSC 1985 c C-46, s 718.2(a)(ii.1).
36 *Criminal Code* RSC 1985 c C-46, s 718.2(a)(iv).
37 *R v MB* 2013 ONCA 493; *R v Dredger* (2014) 261 CCC (3d) 304 (BCCA).
38 *R v Proulx* 2000 SCC 5 at [148].
39 *R v Arcand* 2010 ABCA 363 at [293].
40 *R v Suter* 2018 SCC 34 at [64].
41 *R v Parranto* 2021 SCC 46 at [242].
42 *R v Morrisey* 2000 SCC 39 at [39].
43 *R v Bertrand Marchand* 2023 SCC 26 at [73].
44 *R v Bertrand Marchand* 2023 SCC 26 at [73].
45 *R v Jackson* (2002) 163 CCC (3d) 451 (Ont CA); see also *R v Scott* 2015 ABCA 451 at [13].
46 *R v Gerbrandt* 2021 ABCA 346 at [85].

factor, such as mental health issues, and the offence.[47] To summarise, this is a case-by-case analysis of factors which either diminishes or exacerbates the gravity of the offence or moral culpability of the offender, which in turn informs a sentencing judge's determination of a fit and proportionate sentence based on similar cases.

Moral culpability, the gravity of the offence, and the principles of proportionality and parity are not the only critical factors to consider in sentencing. Sentencing judges must also consider several statutory objectives in crafting a fit and appropriate sentence, including the principles of deterrence and denunciation.[48] Deterrence and denunciation take on an even greater role in sentencing offences such as murder,[49] violence against children,[50] and sexual assault.[51]

Denunciation is aimed at communicating society's condemnation of the offender's conduct.[52] As the Supreme Court explained in *R v M (CA)*, a sentence's denunciatory element communicates a symbolic, collective statement that the offender's conduct should be punished for encroaching on society's basic code of values.[53]

The goal underlying the principle of deterrence, by contrast, is to communicate that criminal behaviour will result in punishment. Deterrence works in one of two ways: (1) sentences target society broadly, including potential offenders, in an attempt to demonstrate the severe consequences of committing the offence in question (this is typically referred to as "general deterrence"); or (2) deterrent sentences may target individual offenders in an attempt to discourage them from repeat offending by demonstrating the consequences of their criminal behaviour (this is typically referred to as "specific deterrence").[54] The conventional approach to general deterrence is that "fear of punishment is a significant modifier of criminal behavior".[55] Said otherwise, potential future offenders will avoid engaging in criminal activity because of the example provided by the punishment of other offenders.[56] Specific deterrence, by contrast, is aimed at deterring the same offender in any given sentencing decision from re-offending.[57]

As discussed earlier, however, the over-representation of Indigenous people in custody only continues to climb, notwithstanding the conventional application of principles of deterrence and denunciation. This suggests that the conventional sentencing approach has had only limited, if any, success in stemming this over-representation. Given that, I now propose a discussion of how Indigenous Sentencing Principles may be best applied as a way of addressing this over-representation.

B. Indigenous Sentencing Principles Applied

As the Court explained in *Gladue*, Indigenous Sentencing Principles are applied in a two-step process. A sentencing judge must first consider: (1) the unique systemic and background factors which may have played a part in bringing a particular Indigenous offender before the criminal

47 *R v Forner* 2020 BCCA 103 at [28].
48 *Criminal Code* RSC 1985 c C-46, ss 718(a) and 718(b).
49 *R v Abdulle* 2023 ONCA 32; *R v Ranhotra* 2022 ONCA 548.
50 *R v Allen* 2012 BCCA 377; *R v Branton* 2013 NLCA 61.
51 *R v Leroux* 2015 SKCA 48; *R v TJ* 2021 ONCA 392.
52 *R v M (CA)* [1996] 1 SCR 500.
53 *R v M (CA)* [1996] 1 SCR 500 at [81].
54 Clayton C Ruby *Sentencing* (10th ed, LexisNexis, Toronto, 2020) at [1.27].
55 Clayton C Ruby *Sentencing* (10th ed, LexisNexis, Toronto, 2020) at [1.27].
56 *R v P (BW)*; *R v N (BV)* [2006] 1 SCR 941 at [2].
57 Clayton C Ruby *Sentencing* (10th ed, LexisNexis, Toronto, 2020) at [1.39].

justice system; and (2) the type of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their Indigenous background.[58]

1. Stage 1: Considering unique and systemic factors

The unique and systemic factors at the first stage of the analysis bears on the moral blameworthiness of an Indigenous offender.[59] This is because such factors, including substance abuse and poverty, diminish an offender's moral culpability given the overwhelming circumstances that contribute to some Indigenous offenders coming before the courts.[60] This step of the analysis therefore requires sentencing judges to take judicial notice of how colonial policies like residential schools have created the conditions leading many Indigenous people to come before the criminal justice system. These factors include:

- substance abuse (including personal and familial use);
- poverty (either personally as the offender, or the impact of poverty on the offender's family and/or community);
- racism (including systemic and overt racism);
- sexual, physical, or spiritual abuse;
- unemployment or low income; and
- dislocation from their Indigenous community, including the impact of foster care or adoption on an offender.[61]

It is important to highlight that Indigenous Sentencing Principles do not apply as an automatic anchor or "discount" on Indigenous offenders' sentences.[62] This is not a "get out of jail free" card. This stage of the Indigenous Sentencing Principles analysis requires a sentencing judge to assess the factors contributing to the offence in any particular case.[63] Only in some cases will contextual and case-specific factors justify such a departure from an otherwise fit sentence. This is because Indigenous Sentencing Principles allow a court to properly consider an Indigenous offender's moral culpability in light of systemic and background factors, like past residential school experience, when those factors are relevant and present. This in turn informs the proportionality analysis.[64] The proportionality analysis will not change, however, where those same factors are not present.

It is important to note that the fundamental principle of sentencing is that all sentences must be proportionate to the offender's moral culpability or responsibility and the gravity of the offence.[65] Similarly, parity requires that similar sentences are given to "similar offenders who commit similar offences in similar circumstances".[66] It could be a mistake, then, to sentence an Indigenous offender with intergenerational trauma and substance abuse issues to the same sentence as an offender without those same experiences. Indigenous Sentencing Principles therefore require us to remember that Indigenous offenders are not always committing offences in "similar circumstances"

58 *R v Gladue* [1999] 1 SCR 688 at [93].
59 *R v Ipeelee* 2012 SCC 13 at [73].
60 *R v Ipeelee* 2012 SCC 13 at [73].
61 Paula Maurutto and Kelly Hannah-Moffat "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31(3) CJLS 451 at 452.
62 *R v Gladue* [1999] 1 SCR 688 at [88].
63 *R v Ipeelee* 2012 SCC 13 at [75].
64 Marie-Ève Sylvestre "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461 at 471−480.
65 *R v Bertrand Marchand* 2023 SCC 26 at [27].
66 *R v Friesen* 2020 SCC 9 at [31], [33] and [37].

to non-Indigenous offenders, given the extreme impact of colonialism and systemic discrimination. Indigenous Sentencing Principles are complementary, in this sense, to achieving the objectives of proportionality and parity in sentencing law.

2. Stage 2: Fashioning appropriate sentencing procedures and sanctions based on Indigenous Sentencing Principles

The second stage of the Indigenous Sentencing Principles analysis requires sentencing judges to consider the offender's Indigeneity in determining an appropriate sentencing procedure or sanctions, including opportunities for restorative justice.[67] This stage of the analysis recognises that Indigenous people have distinct conceptions of sentencing that are "often far removed" from the conventional approach to sentencing.[68] It is important to emphasise that culturally appropriate and alternative sentencing procedures and sanctions are critical to satisfying key sentencing principles such as deterrence and denunciation, as discussed earlier.

For example, alternative procedures such as sentencing circles enable victims and community members to communicate the degree to which offending damages an Indigenous community and kinship network. In doing so, Indigenous Sentencing Principles and alternatives to the conventional sentencing approach enable an Indigenous community to condemn an offence, but they also allow a community to communicate the disorder and harm caused by the offending. This culturally informed approach can more effectively achieve deterrence and denunciation by enabling community members to engage with the offender in a culturally safe manner.[69] This stage of the analysis requires sentencing judges to consider several different factors in order to apply Indigenous Sentencing Principles properly, including: (a) what are the different conceptions of sentencing held by the Indigenous offender's community; and (b) what sanctions or procedures are available within that Indigenous community.

In order to effectively tailor a culturally relevant and responsive sanction to offences, it is necessary to consider and recognise the distinct perspectives on sentencing relevant to each Indigenous Nation. That said, the jurisprudence has developed some broad or general distinctions between Indigenous Sentencing Principles and conventional sentencing principles. Restorative justice principles are one general distinction between Indigenous Sentencing Principles and the conventional approach to sentencing. As the Supreme Court observed in *Gladue,* many Indigenous Nations "place a primary emphasis upon the ideals of restorative justice", and this takes on an extremely important role in the analysis under s 718.2(e).[70] More broadly, restorative justice is a form of sentencing which requires some form of restitution and reintegration into the community.[71] It requires offenders to take responsibility for their actions and make some effort to provide amends for any harmful actions.[72]

However, again, more specific conceptions of justice will depend on and change with every Indigenous Nation. Indeed, as the Supreme Court cautioned in *Wells*, sentencing judges should "appreciate relevant cultural differences" between Indigenous Nations.[73] This analysis therefore

67 *R v Gladue* [1999] 1 SCR 688 at [66]−[69]; *R v Ipeelee* 2012 SCC 13 at [61].
68 *R v Gladue* [1999] 1 SCR 688 at [70].
69 Consider T Clark "Sentencing Indigenous Offenders" (2014) 20 Auckland U Rev 245 at 247.
70 *R v Gladue* [1999] 1 SCR 688 at [70].
71 Daniel Kwochka "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask L Rev 153 at 165.
72 Daniel Kwochka "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask L Rev 153 at 165.
73 *R v Wells* 2000 SCC 10 at [49].

requires sentencing judges to consider the perspective of the Indigenous Nation.[74] In practical terms, this may require sentencing judges to consider an Indigenous Nation's policy to address criminal offences with restorative justice approaches.[75]

After having considered these objectives, sentencing judges should also consider what sanctions are available within an Indigenous Nation. The jurisprudence has recognised several forms of sentencing which may be available and relied upon in such cases, including: sentencing circles, relying upon the input of Elders, temporary community banishment, healing lodges, or Indigenous specific addictions treatment programming. I will briefly consider those alternatives now.

3. Sentencing or healing circles

Sentencing and healing circles are a key way Indigenous Sentencing Principles are implemented.[76] Healing circles have been in use by Indigenous Nations since "time immemorial".[77] Healing circles are used to facilitate conflict resolution between community or family members in a wide range of circumstances, not just sentencing or criminal disputes. Indeed, such circles are used in resolving governance disputes, child and family service disputes, and even labour issues.[78] Sentencing circles, by contrast, have been described as a modification of the ordinary sentencing process to adopt or accommodate traditional healing circles.[79] Sentencing circles provide a forum for community members to provide their input on the offence and the appropriate sanction necessary to address the harm caused in any given case.[80]

Participants to a sentencing circle typically include Elders or community leaders,[81] and participants drawn from a community who understand the offenders' background, culture, strengths and weaknesses.[82] The circles typically include a guided discussion between community members, Elders, the offender themselves, and even the victims of the offender's crime. These sentencing circles may then provide some advice or a recommendation to a sentencing judge on the appropriate sentences available within an Indigenous community.

This discussion process can provide an insight into the underlying offence and family dynamics which perpetuate offending and assist community leaders in deterring other offences.[83] The sentencing circle can provide a decision maker with insight into how much support an individual might have within their community if they were to seek treatment within the community.[84] Further, sentencing circles assist in allowing decision makers to overcome cultural barriers which may ostracise Indigenous offenders within the criminal justice system.[85] Finally, sentencing circles provide a forum for the Indigenous Nation and community members to feel heard in the criminal

74 *R v Wells* 2000 SCC 10 at [39].
75 *R v Wells* 2000 SCC 10 at [50].
76 See examples *R v Manyfingers* (1996) 191 AR 342 (Prov Ct); *R v Paul* (1998) 203 NBR (2d) 243 (Prov Ct).
77 *R v Morin* [1995] 4 CNLR 37 (Sask CA) at 66.
78 *DDL v SRLP* 2001 SKQB 370 at [22]−[23]; *LD v Dilico Anishinabek Family Care* 2009 CFSRB 75 at [63]; *Chief Gayle Strikes with a Gun v Piikani First Nation* 2014 FC 908 at [97]−[98].
79 Benjamin A Ralston *The Gladue Principles: A Guide to the Jurisprudence* (University of Saskatchewan Indigenous Law Centre, Saskatoon, 2021) at 205.
80 *R v Webb* [1993] 1 CNLR 148 (Yukon Terr Ct) at 153; *R v Gregoire* 2009 NLTD 21 at [43] and [46]; *R v McNabb* 2014 MBPC 10 at [15]−[16] and [21]; *R v MI* 2018 NSPC 56 at [5].
81 *R v Joseyounen* [1996] 1 CNLR 182 (Sask Prov Ct).
82 *R v Joseyounen* [1996] 1 CNLR 182 (Sask Prov Ct) at [20].
83 See *R v Naappaluk* [1994] 2 CNLR 143 at 155 (QC CQ); *R v VK* 2006 SKPC 79 at [62] and [66]; *R v McNabb* 2014 MBPC 10 at [30] and [64]; *R v McGill* 2016 ONCJ 138 at [20]−[22]; *R v Francis-Simms* 2017 ONCJ 402 at [19]−[30].
84 *McNabb* 2014 MBPC 10 at [13], [16] and [29].
85 *R v Naappaluk* [1994] 2 CNLR 143 at 153.

justice system. In doing so, sentencing circles allow for a "purge of feelings, and a reconciliation between the offender" and those they have hurt.[86]

4. Justice Committees

Justice Committees are another mechanism through which Indigenous community members can inform sentencing judges about the perspectives, needs, and conditions of their community, as well as the Nation's perspectives on sentencing.[87] These committees typically include a full-time coordinator and a group of community members who assist a sentencing judge in making their determination.[88] Justice Committees may maintain a number of different roles in the sentencing process, including providing recommendations or advice to a sentencing judge, initiating healing or sentencing circles, or facilitating and supervising alternative measures for diversion and conditional release orders, such as community work programmes.[89] In performing these roles, Justice Committees bridge the cultural gap between the judiciary and Indigenous Nations, while providing alternatives that better reflect Indigenous perspectives and legal traditions.[90]

5. Elder Panels and participation

The involvement of Elders in the sentencing process is critical to the application of Indigenous Sentencing Principles. Elders are at the heart of Indigenous communities. They are essential in transmitting traditional knowledge and affirming a Nation's cultural identity through intergenerational story-telling.[91] In the sentencing context, the involvement of Elders can be vital to informing the courts about each community and their needs,[92] proposing alternative measures to custodial sentences based on their traditional knowledge,[93] or to give their views on the personal circumstances or rehabilitation prospects of the accused or their views on an appropriate disposition.[94] Elders may be involved in sentencing determinations in several different ways. In Attawapiskat and Sandy Lake First Nation, for example, Elder Councils were created to sit alongside sentencing judges.[95]

6. Community Service Orders

Community Service Orders are another mechanism through which sentencing judges have satisfied the application of Indigenous Sentencing Principles. This community service may be framed

86 *R v Taylor* [1998] 2 CNLR 140 at [70].

87 Benjamin A Ralston *The Gladue Principles: A Guide to the Jurisprudence* (University of Saskatchewan Indigenous Law Centre, Saskatoon, 2021) at 202.

88 Advisory Committee on the Administration of Justice in Aboriginal Communities *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Quebec, 1995) at 44 and 50−51.

89 Advisory Committee on the Administration of Justice in Aboriginal Communities *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Quebec, 1995) at 44 and 50−51; see also *R v Charlish* 2020 QCCQ 2438 at [25(1)].

90 *R v Ippak* 2018 NUCA 3 at [92].

91 Chantal Viscogliosi and others "Importance of Indigenous elders' contributions to individual and community wellness: results from a scoping review on social participation and intergenerational solidarity" (2020) 111 Canadian Journal of Public Health at 667−681.

92 *R v BT* 2007 NUCA 3 at [10] and [12]−[15].

93 *R v Willocks* [1994] 1 CNLR 167 (Ont Ct Prov Div); aff'd (1995) 37 CR (4th) 131 (Ont CA).

94 *R v Roper* 2016 BCSC 977 at [114]; *R v SA* 2016 ONSC 5355 at [19]−[22] and [45]; *R v LLJ* 1999 CanLII 15162 (BCSC) at [9].

95 Benjamin A Ralston *The Gladue Principles: A Guide to the Jurisprudence* (University of Saskatchewan Indigenous Law Centre, Saskatoon, 2021) at 215.

around culturally relevant activities, such as harvesting or assisting with cultural projects or ceremonies in the community.[96] These orders may also facilitate community reintegration through having Community Service Orders supervised by a community representative or Elder.[97] Such Community Service Orders may also be helpful in pursuing restorative purposes, such as through counselling young people on the harms associated with substance abuse,[98] or speaking to a group about their experiences in residential schools.[99]

These Indigenous Sentencing Principles are not solely applicable to sentencing decisions, as I will explain.

IV. Extending Indigenous Sentencing Principles to Other Contexts: The Forensic Mental Health System

In recent decades, the Supreme Court has confirmed that Indigenous Sentencing Principles apply outside of the conventional sentencing framework.[100] For example, the jurisprudence has confirmed that Indigenous Sentencing Principles apply in the context of dangerous offender applications;[101] extradition applications;[102] long-term supervision orders;[103] civil contempt hearings;[104] parole eligibility;[105] and, dispositions under the forensic mental health system.[106] As a case study on the broader applicability of Indigenous Sentencing Principles, I would like to discuss the application of Indigenous Sentencing Principles in the forensic mental health system. This discussion of the forensic mental health system and Indigenous people is particularly pressing given the stigma, prejudice and marginalisation of those with acute mental health problems. These concerns merit an intersectional approach and consideration of Indigenous Sentencing Principles.

The forensic mental health system includes those services and service providers who support and treat those with mental illness. This system is distinct from the correctional system, with service providers aiming to treat and improve patients' mental health and support their reintegration into the community.[107]

A fundamental principle of criminal law is that accused people cannot be found guilty of offences if they are incapable of appreciating the nature and quality of their actions.[108] Fitness to stand trial for lack of such capacity can be raised either by a party to the proceeding or the court on its own motion.[109] A court may then order an assessment of the accused person once the issue

96 *R v Felix* 2017 SKCA 16 at [39]; *R v Hester* 2017 QCCS 5622 at [99]; aff'd 2019 QCCA 858.
97 *R v C(K)* 2011 ONCJ 364 at [65(10)].
98 *R v Logan* 1999 CanLII 927 (Ont CA); *R v WJN* 2012 ONSC 5917 at [54(h)].
99 *R v PBK* 2013 ONSC 427 at [74(10)].
100 *R v Ipeelee* 2012 SCC 13 at [93]; *R v Boutilier* 2017 SCC 64 at [54]; see also Manasvin Goswami "Gladue beyond Sentencing" (2024) 14 Crown's Newsletter 17.
101 *R v Boutilier* 2017 SCC 64.
102 *United States of America v Leonard* 2012 ONCA 622 at [85], leave to appeal refused SCC 35086, 7 March 2013.
103 Jonathan Rudin "Aboriginal Over-Representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR 687 at 699.
104 *Frontenac Ventures Corp v Ardoch Algonquin First Nation* 2008 ONCA 534 at [55]−[59], leave to appeal refused SCC 32764, 4 December 2008.
105 *R v Jensen* (2005) 74 OR (3d) 561 (CA); *Twins v Canada (AG)* 2016 FC 537.
106 *R v Sim* (2005) 78 OR (3d) 183 (CA).
107 *Criminal Code* RSC 1985 c C-46, pt XX.1.
108 *Criminal Code* RSC 1985 c C-46, s 16.
109 *Criminal Code* RSC 1985 c C-46, s 672.23.

has been raised.[110] A court may then, following a confirmatory assessment, render a verdict of not criminally responsible on account of mental disorder (NCR).[111]

An accused person falls under the jurisdiction of provincial/territorial review boards once they are found NCR by virtue of a mental disorder.[112] These review boards are made up of at least five members, including one licensed psychiatrist.[113] Once under the jurisdiction of a provincial/territorial review board, the board can make a disposition, including either discharging the NCR person or detaining them subject to conditions.[114] A provincial/territorial review board must consider several factors in making a decision, including: (1) public safety; (2) the mental conditions of the accused; (3) the reintegration of the accused into society; and (4) the other needs of the accused when making a decision.[115]

The plight of Indigenous accused in the forensic mental health system is particularly acute. Indigenous accused remain under the jurisdiction of review boards significantly longer than non-Indigenous accused.[116] For example, a study on review boards across Canada confirmed that 70 per cent of Indigenous accused were still being held in the forensic mental health system after 10 years.[117] By contrast, only 22 per cent of non-Indigenous accused were still in the system after 10 years.[118] Given these statistics, it is crucial for review panels to consider the use of Indigenous Sentencing Principles in making decisions about Indigenous accused.

The Court of Appeal for Ontario confirmed that review boards must consider Indigenous Sentencing Principles in *R v Sim*.[119] As the Court of Appeal explained, the review board's duty to search out evidence pertaining to its disposition includes an obligation to obtain adequate information about an accused's Indigenous background.[120] More specifically, the Court of Appeal held that the Ontario Review Board (ORB), must always consider the "unique circumstances" of Indigenous NCR accused when assessing the integration of the accused back into society.[121]

Again, recall the role and application of Indigenous Sentencing Principles. Elder participation, for example, may enable review boards to understand an offender's community and cultural supports available in those communities.[122] Elders may also provide their views on the accused's rehabilitation prospects within the community.[123] These are critical cultural bridges into Indigenous communities which may otherwise be unavailable to review boards. Without these cultural bridges, and the application of Indigenous Sentencing Principles, review boards are unable to fully understand the Indigenous community to which they seek to reintegrate the Indigenous NCR

110 *Criminal Code* RSC 1985 c C-46, s 672.11(a).
111 *Criminal Code* RSC 1985 c C-46, s 672.34.
112 *Criminal Code* RSC 1985 c C-46, s 672.38(1).
113 *Criminal Code* RSC 1985 c C-46, ss 672.38(1) and 672.39.
114 *Criminal Code* RSC 1985 c C-46, s 672.54.
115 *Criminal Code* RSC 1985 c C-46, s 672.54.
116 Jeff Latimer and Austin Lawrence *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, 2006) at 14.
117 Jeff Latimer and Austin Lawrence *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, 2006) at 34.
118 Jeff Latimer and Austin Lawrence *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, 2006) at 34.
119 *R v Sim* (2005) 78 OR (3d) 183 (CA).
120 *R v Sim* (2005) 78 OR (3d) 183 (CA) at [27] and [29].
121 *R v Sim* (2005) 78 OR (3d) 183 (CA).
122 *R v BT* 2007 NUCA 3.
123 *R v Roper* 2016 BCSC 977 at [114].

accused. Sadly, Indigenous Sentencing Principles are underutilised in review board hearings and the forensic mental health system in Canada.[124]

There are a number of issues which limit the efficacy of Indigenous Sentencing Principles in review board hearings. In Ontario, one issue is that Aboriginal Legal Services, that is the main supplier of Indigenous sentencing reports in the province, receives limited requests for reports or input from ORB.[125] Even in those cases where the ORB can access such a report, it is not necessarily guaranteed that ORB will apply Indigenous Sentencing Principles properly. For example, when ORB does consider Indigenous Sentencing Principles, it is usually in regard to disposition terms to allow an Indigenous accused to travel to attend cultural events.[126] Such ORB decisions fail to fully address or apply Indigenous Sentencing Principles.

Indigenous Sentencing Principles require review boards to go further in the forensic mental health system. These boards have a duty to inquire into Indigenous Sentencing Principles and proactively seek to inform themselves about an Indigenous accused's background so that they can better understand treatment options and the appropriate disposition. Even where a report maybe unavailable, the review boards still have an obligation to fill in these gaps pursuant to their inquisitorial mandate.[127] The failure to do so will only continue to perpetuate the challenges facing Indigenous accused in the forensic mental health system.

V. Conclusion

In conclusion, the statistics continue to show that Indigenous people in Canada are over-represented in the criminal justice system, including the forensic mental health system. As I have discussed earlier, there have been legislative and judicial attempts to address these issues over the past decades. Despite these efforts, however, the statistics show that the proportion of Indigenous people in correctional facilities has only continued to grow over the past three decades.[128]

The conventional approach to sentencing Indigenous people has failed to address this issue. As I have explained, principles like deterrence and denunciation will continue to have muted effects on crime in Indigenous communities if sentencing judges fail to take a culturally sensitive and culturally informed approach to sentencing. Indigenous Sentencing Principles provide a framework for sentencing judges and review boards to consider background and systemic factors in each Indigenous person's case, consider the relevant laws and supports available in each Indigenous community, and tailor a sentence that responds to those factors which contributed to any specific Indigenous person coming before the criminal justice system.

Crafting an appropriate sentence requires considering those offences committed in similar circumstances. Sentencing judges must bear in mind, however, that many Indigenous offenders are not committing offences in "similar circumstances" to their non-Indigenous counterparts. Factors like intergenerational trauma, cultural dislocation, and other factors associated with colonial policies continue to impact Indigenous people directly and indirectly. Given that, it is imperative

124 Jonathan Rudin "The Application of Gladue Principles to Ontario Review Board Hearings in Theory and Practice" (2012) 33(3) For the Defence 31.

125 Jonathan Rudin "The Application of Gladue Principles to Ontario Review Board Hearings in Theory and Practice" (2012) 33(3) For the Defence 31.

126 *Kokopenance (Re)* [2018] ORBD No 91; *Pitawankakwat (Re)* [2013] ORBD No 948.

127 Consider *George (Re)* [2024] ORBD No 105 at [16].

128 Office of the Correctional Investigator *Annual Report 2016-2017* (Catalogue No PS100, 29 June 2017) at 48.

for sentencing judges to consider how these systemic factors impact an Indigenous offender's moral blameworthiness.

Even more important is the need to consider alternative sentencing procedures and sanctions in both the criminal justice and forensic mental health system. Indigenous Sentencing Principles require sentencing judges to consider how an offender's Indigenous heritage alters what the appropriate sanction or sentencing procedure will be.[129] This is because Indigenous people had and maintain distinct customary laws that governed the application of sentencing in Indigenous communities.

I recognise that the application of Indigenous Sentencing Principles has not always been straightforward or easy, however. I would offer a few final remarks on that difficulty. Sentencing judges are not left alone with common law tools to resolve these issues. Indigenous laws provide rich and effective responses to sentencing and reintegrating Indigenous offenders. Review boards and sentencing judges must have a degree of humility in approaching Indigenous law and Indigenous Sentencing Principles, however. This is because the ultimate experts in Indigenous Sentencing Principles, and the Indigenous laws relevant to those principles, are Elders, knowledge keepers, and communities themselves. And it is to those experts, our Elders and knowledge keepers, that we must collectively be willing to listen to if we are to address the over-incarceration of Indigenous people and embrace Indigenous Sentencing Principles.

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129 *R v Gladue* [1999] 1 SCR 688 at [60]−[69]; *R v Ipeelee* 2012 SCC 13 at [61].

Reoruatanga me ngā Kōti o Aotearoa

Bilingualism and the Courts of New Zealand

Judge Alana Thomas

E mihi ana ki ngā mate huhua, ki ngā mate tuatini kua huri tuara mai nei rātou ki a tātou, haere koutou ngā mate, haere, haere mai, haere. He rāngai mamao kua taka ki tua o Nukutaurua e kore ā muri e hōkia, ko rātou ēnā kua riro atu i te ringa kaha o aituā moe mai, moe mai, moe mai rā. Tauārai o te pō ki a rātou, titoko o te ao mārama ki a tātou, tīhei mauriora.

Tuia te rangi e tū nei, tuia te papa e takoto nei, tuia te muka tangata e rangitāmirohia nei, e whiria nei i roto i tō tātou whare, e ita ai te taukaea o te aroha kei roto i tēnā, i tēnā o tātou. E tika ana ko te reo te maiaorere i tuituia ai, i whakaritea ai e ō tātou tūpuna hei tāwharautanga mō ngā whakatupuranga oināianei, o haere ake nei kia mahana tonu ai tātou i roto i te ao hurihuri. Nō reira, kei ngā wawata o rātou mā, kei ngā manako nui mō ngā rangi kei te tū mai nei, kei ngā reo pāorooro o ngā pari kārangaranga puta i te motu, ao kau ana te pupuhi o haumihi e rere atu nei. Ngāti Rēhia mata momoe, Ngāti Rēhia mata kākā, ko Ngāti Rēhia tēnei e mihi atu nei, tēnā koutou katoa. Ā kāti, ka mātua i konei ngā kupu whakamiha.

I tērā wiki, i uia mai ai te pātai, "he aha koe e whakapau kaha nei kia ora mai te reo ki ngā Kōti me tō mōhio ake kāhore te nuinga o ngā tāngata i tae atu ki ngā Kōti i te mōhio ki te kōrero Māori, he moumou taima tērā". Tērā pea, e whakaaro ana ētahi o koutou, kua puku a Rae, kua wera a Manawa, kua tū katoa a Pihi i ērā kupu. I wāhi pērā engari mātāmua ake ko te whakaaro e tika ana me kōrero tonu ahau i ngā hua, i ngā pāinga o tēnei mea te reoruatanga kia whai wāhi ai ia ki ngā toronga katoa o tō tātou pūnaha ture, kia kore ai hoki ēnā kōreroe hoki mai ki a au. Kia ahatia, me whakapau kaha tonu ahau ka tika, e mara mā. Nā, koina te taitara o tēnei tuhinga, *Reoruatanga me ngā Kōti: He aha rā ngā hua?*

I mua i taku tahuri ki te rētōtanga o te kaupapa, e tika ana kia mihia te Waikato Law Review me ō rātou whakaaro kia tukuna mai tēnei hōnore me te mōhio ake, koinei te wā tuatahi e tuhia nei tētahi ātikara i te reo Māori anahe, me mihi rātou ka tika. Kia mōhio mai hoki koutou, ehara tēnei i te tuhinga rangahau, ko ēnei kōrero āku i hua ake ai i ōku ake wheako, nā runga i tāku i kite ai, nā runga hoki i tāku i rongo ai, nōku e rōia ana, nā, ināianei e noho whakawā ana.

Nā Te Wharehuia Milroy te kōrero, "He whare kōrero te reo Māori i rauhītia ai te awe o ōna kaikōrero"[1]. I a tātou e kōrero ana mō ngā hua o te tuku i te reo Māori, ka nui taku tautoko i ēnei kupu a te tohunga rā. Aini hoki mai ahau ki tēnei kōrero, ki tēnei tūāpapa pea o taku tuhinga me ōku ake whakaaro ki tōna whaitakenga ki te ao ture.

I. Te tāmate haere a te reo Māori me ngā āhuatanga reorua

E mārama ai te āhua o te reo Māori ki te ao ture i tēnei wā nei, me wāhi kōmuri te titiro ki ngā tau o mua, ki ngā tau e tata ana ki te hainatanga o te Tiriti o Waitangi. Āe, i ēnei tau nei he tika te kī, kua aua atu te wā ko te reo pākehā te karawhiu ki ngā Kōti, hunga Pākehā mai, hunga Māori mai anō

1 Nō tētahi tuhinga āna i homaingia ai ki a mātou, ki ngā tauira o Te Tohu Paerua ki te Reo Kairangi, 2024.

hoki. Kua muia pai ngā whare ture e te reo pākehā, e te reo o iwi kē atu, ka mutu, ko te reo Māori he reo mātāmuri i ngā whakahaerenga ture katoa, engari ehara i te mea i tino pērā rawa i ngā tau tīmata o te pūnaha ture o Aotearoa.

I tana tuhinga roa 2012, i mea atu a Ahu:[2]

> Te reo Māori was, historically, a functional legal language of the colonial state. The Treaty of Waitangi, land deeds between Māori and the Crown and wills were written in Māori. As such, the language initially had a high civic status.
>
> …
>
> The second stage, from 1865 to 1900, saw te reo Māori gain formal legitimation as a language of Parliament. From 1868, the Standing Orders of the House of Representatives (the House) required Bills and Acts to be translated into Māori. Although the Standing Orders of both Houses did not expressly permit addresses in Māori, the language itself was accommodated out of necessity.

He tika te kōrero a Ahu, i te tau 1858, i whakaputaina ai te Native Districts Regulation Act 1858 me te Native Circuit Courts Act 1858, whāia ko te Native Land Act 1862, Native Lands Act 1865, Native Schools Act 1867 me te Māori Representation Act 1867. I te tau 1868, i te kuhunga atu o ngā mema Māori e whā ki te Paremata, i whakaūngia ai me reorua ngā pire katoa e hāngai nei ki ngā take Māori.

Tae atu ki ngā tau tīmata o ngā 1900, kāhore e kaha kitea ana tēnei āhuatanga, ka mutu i mōhio pū ētahi o ngā rangatira o te motu, nā ngā aupēhitanga a te Karauna i roto i ngā kura, i roto hoki i ngā hapori, i timata ai te reo Māori ki te mimiti haere. Ki reira pea puāwai mai ai te whakaaro me whawhai tātou mō tō tātou reo Māori.

I te tau 1960, ka puta te *Rīpoata Hunn*.[3] Hei ko taua ripoata, i heke te ōrau o te reo Māori hei reo tuatahi ki te 25%. I te tau 1973 ki 1978 tā te kautetanga whānui i puta i a Rangahau Mātauranga o Aotearoa*,* tōna 70,000 (18−20%) te nama o te hunga Māori matatau ki te reo Māori, heoi anō, he kaumātua te nuinga. I te tau 1979 ka puta a Richard Benton tana ripoata *Who Speaks Māori in New Zealand*,[4] e whakatairanga nei i ngā raru e pā kino nei ki te reo Māori me tōna tokoiti kaikōrero. Ko te whakapae ia, he tokoiti iho i te 100 tamariki Māori i raro iho i te 5 tau te pakeke e matatau ana ki te reo Māori. Nō reira, i ngā tau 1970 – 1980 hāunga rā, e mau tonu ana ngā kaumātua me ngā kuia (me ētahi pakeke) i te reo Māori, ki te taha o ngā mātātahi kua timata te haere a te reo Māori ki te ao o te kākahi.

I te tau 1985, i heke te tokomaha o ngā kaikōrero Māori ki te 50,000; tōna 12% o te Māori. I te kautetanga o te tau 1996 ka noho te tangata kōrero Māori (tōna mōhio noa) ki te 25%. I te kautetanga o te tau 2001, ka noho ki te 25.2%, te tau 2006, ka noho ki te 23.7%. I te tau 2013, kua heke haere ki te 21.3%. I te tau 2013, ka whakaaturia e te pūrongo a *Te Kupenga*[5] ngā kautetanga. 50,000 (arā, 11 ōrau) te nama o ngā pakeke Māori e matatau ana rānei, e pai ana rānei ki te kōrero i te reo Māori; arā, e āhei ana rātou ki te kōrero mō ngā tini kaupapa, mō ngā kaupapa maha i te

2 Tai Ahu "Te Reo Māori as a Language of New Zealand Law: The Attainment of Civic Status" (LLM Dissertation, Victoria University of Wellington, 2012) at 7 and 11.

3 JK Hunn *Report on Department of Maori Affairs : with statistical supplement, 24 August 1960* (Government Printer, Wellington, 1961).

4 R Benton and New Zealand Council for Educational Research *Who speaks Māori in New Zealand?* (1979).

5 Stats NZ (2014). *Ka mārō te aho tapu, ka tau te korowai: Te reo Māori findings from Te Kupenga 2013* (2 October 2014) <www.stats.govt.nz>.

reo Māori. Nōnā i tū i mua i te Taraipiunara o Waitangi i te tau 2016,[6] i kī atu a Dr Richard Benton, "this is still indicative of a crisis situation for the long-term future of the language".

Nō reira, 10 tau noaiho ki muri, i te heke haere tonu tō tātou reo, kei te pari o te rua tonu te reo Māori. Kātahi te mea pouri ko tērā. Nō reira, i aha te iwi Māori i ēnei tau kua pahure nei?

II. Ngā tau o te porotēhi

I te wā ka kitea e te iwi Māori te tūāhua o tō tātou reo, ka timata rātou ki te whawhai, ki te tohe, ki te porotēhi, te aha atu, te aha atu. E kore e kapi i tēnei tuhinga te katoa o te whakapapa, te hitoria, te maha o ngā mahi i oti ai i a rātou mā, erangi, kua tango noa i tētahi wāhi kōrero kia noho hei horopaki mō aua tau porotēhi rā.

Nō reira, kia hoki kōmuri te titiro ki te āhua o ngā tau 1970 ā mohoa nei, ki ngā tau o te whakatutū i te pūehu, inā hoki i reira kitea ai te nui o te tohe i tohea rā e Ngāi Porotēhi, e Ngāi Whakarauora Reo. I whawhai rātou mō tō tātou reo, i whawhai hoki rātou ki te whakakotahi i te iwi Māori, ki te whakatō i te kākāno o awhero nui ki tō te iwi Māori whatumanawa, he kore nō rātou i hiahia kia kitea te iwi Māori me tōna ahurea kei te pari o te rua. Ahakoa te werohia ō rātou e te Karauna, e wai ake raini, i whawhai tonu rātou me kore noa e ora tonu te iwi Māori.

Ā kāti, me wāhi kōrero tātou mō taua whawhai, waihoki, te whawhai mō te reo ki ngā Kōti inā hoki ki a au, ehara i te mea kua mutu te whawhai, engari kua pokakē tōna mata. Kāhore e ōrite ana tā tātou whawhai i ēnei tau ki tā rātou i whawhai ai i ngā tau ki muri, kua pokake tōna mata. Me hoki anō ki ērā tau o te rautau whitu tekau ki te āhua o taua taima rā, me te āhua o taua whawhai. Ae, e tika ana kia mihia ngā rōpū pērā i Ngā Tamatoa, i Ngā Kaiwhakapūmau i te Reo, i Te Ataarangi, i ngā Wānanga Reo Māori, ko te hikoi o te whenua, ko te hikoi mō Te Reo Māori, Kohanga Reo, Kura Kaupapa Māori, aua kaupapa katoa he purapura i toro atu ki te tahuna kia whakaūngia, kia whakarauorahia tō tātou reo Māori.

I te tau 1972, i whakatakotohia te petihana mō te reo Māori ki te Whare Pāremata nā runga anō i te hiahia o Ngā Tamatoa me Ngā Kaiwhakapūmau i te Reo kia tīmatahia te ako o te reo Māori ki ngā kura puta noa i Aotearoa. Nō taua rā tonu, i whakamanahia te rā 14 o Hepetema hei rā whakanui i te reo Māori. E mea ana te kōrero mai i te hainatanga o Te Tiriti o Waitangi, kāhore ōna mana, kāhore ōna tūranga i roto i ngā ture o te Kāwanatanga, koni atu i te kotahi rau e rima tekau tau i takoto kau noa ai Te Tiriti o Waitangi ki rahaki, tē ara mai i roto i ngā ture me ngā kaupapa here a te Kāwanatanga, erangi tāria te wā, ka noho mai ko Te Tiriti o Waitangi te tūāpapa i whai mana ai te reo Māori ki te ao ture.

I te tau 1980, i whakawhirinaki atu a Te Ringakaha (Dunn) Mihaka ki a wehenga 77A(1) o te Māori Affairs Act 1953 hei hāpai i tana kōrero i te reo Māori nahe nei ki tana Kōtitanga. I mea atu taua wehenga:

> Official recognition is hereby given to the Māori language of New Zealand in its various dialects and idioms as the ancestral tongue of that portion of the population of New Zealand of Māori descent.

Hei tā Mihaka, nā tēnei ture i tuku te mōtika kia whakahaerehia tana Kōtitanga katoa ki roto i te reo Māori. Kāhore te Kōti i whakaae. I mea atu rātou, horekau he herenga ā-ture e meinga ana me hāpai ngā pekanga o te Kāwanatanga me ngā Koti i te reo Māori. I tautoko atu te Kōti Mana Nuii tā ngā Kōti o raro i kī ai, me tā Bisson J kōrero e pēnei nei:[7]

6 Evidence provided to the Waitangi Tribunal *Te Paparahi o te Raki Inquiry* (Wai 1040, #W1, 22 June 2016).

7 *Mihaka v Police* [1980] 1 NZLR 453 at 460.

> I am quite satisfied that English is the language of our Courts in New Zealand.
>
> …
>
> It is of interest to note that by the Welsh Courts Act 1942 it was enacted that the Welsh language may be used in any Court in Wales by any party or witness who considers that he would otherwise be at a disadvantage by reason of his natural language of communication being Welsh. There is no such similar provision in New Zealand in favour of Maori speaking persons to use the Maori language in the Courts. As the section states, such an option is only open to a Welsh speaking party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language being Welsh. The present appellant would not derive any satisfaction from such a similar statutory provision if it existed in New Zealand in favour of Maori speaking persons because he has quite frankly admitted that he is at no disadvantage by the proceedings being in English and has not contended his natural language of communication is Maori.
>
> …
>
> The official recognition given by that section to the Māori language of New Zealand as the ancestral tongue of that portion of the population of Māori descent in no way confers on a person of Māori descent any right to require Court proceedings to be conducted in that language.

Waihoki, i mea atu a Richardson J:[8]

> There is no provision to that effect in that section or elsewhere in our laws and any extension of the official use of the Māori language is a matter for the legislature, not for the Courts. English has been the customary language of the Courts in New Zealand from the earliest colonial days.

Nā wai rā, nā wai rā, i tau atu tēnei take ki ngā mana o te ture. I te tau 1987, i whakatakotohia e Huirangi Waikerepuru mā me Ngā Kaiwhakapūmau i te Reo tētahi kerēme mō te reo Māori ki mua i te aroaro o Te Rōpū Whakamana i te Tiriti o Waitangi. Ko tō rātou hiahia kia whai mana te reo Māori hei reo motuhake ki Aotearoa, hei reo ki te Whare Pāremata, ki ngā pekanga o te Kāwanatanga, ki ngā Kōti anō hoki. Nā te Rōpū Whakamana i te Tiriti o Waitangi i whakaae ki tā Waikerepuru mā i tohe ai. Mai i tērā whakatau i whakaae te Karauna ki roto i ngā pakirehua katoa o te motu, he taonga te reo Māori ki raro i te wāhanga tuarua o te Tiriti o Waitangi.

Nō reira, nā runga anō i ngā whakahekenga werawera o ngā rōpū pēnei i Ngā Tamatoa me Ngā Kaiwhakapūmau i te reo me ngā tāngata pērā i a Te Ringakaha Mihaka rātou ko Syd, ko Hana Jackson, i taua tau tonu, i te tau 1987, i whakaturehia te reo Māori hei reo whai mana ki Aotearoa, hei reo kawe hoki i ngā whakahaerenga ā-ture. Me whakanui tērā wā o tō tātou hitoria ka tika. Nō reira, koinā te āhua o te whawhai o aua taima, te whawhai mō te ora o te reo, me mihi ka tika ki a Ngai Whawhai mā.

Taka rawa mai ki te tau 2016, ka whakakorengia taua ture, kātahi ka whakakapingia tana tūranga e te Ture mō Te Reo Māori hou. Ko ngā hua o tēnei ture nei, ka pūmau tōnu te reo Māori ki tōna taumata hei reo mana mō Aotearoa, āpiti atu, i whakaūngia ētahi mātāpono, arā, ka noho ko te reo Māori hei taonga mō te iwi Māori, he reo e kaingākautia ana e te motu whānui, ko te reo taketake ake o Aotearoa, ka mutu, he reo whakahirahira te reo Māori i te ahurea whānui o te motu.

Me hoki anō ki ngā tatauranga mō te reo Māori. I te tau 2018, nā Te Kupenga i whakaputa ngā nama e mea ana, he wāhi mōhiotanga tō te 48% o te hunga Māori ki te kōrero Māori. Mō ngā iwi katoa o Aotearoa, he wāhi mōhiotanga tō te 24%, i piki taua nama ki te 30% i te tatauranga 2021. I te tatauranga 2021, i mea atu te 23% o te hunga Māori, ko te reo Māori tētahi o ō rātou reo tuatahi.

8 *Mihaka v Police* [1980] 1 NZLR 453 at 462.

Tae atu ki te tatauranga whakamutunga i te tau 2023, he 213,849 o ngā tāngata katoa o Aotearoa i mea atu, he kōrero Māori rātou. He pikinga 15% tērā mai i te tatauranga i te tau 2018. I mea atu te ripoata o Te Taura Whiri i te Reo Māori *State of Te Reo Māori Report 2025*:[9]

> E whakaatu ana tēnei pūrongo kei te kaha haere te reo Māori puta noa i Aotearoa – e tipu ana te tautoko tūmatanui, kei te nui haere ngā kaikōrero, me te nui ake o te whai wāhi ki te mātauranga (hāunga te mātauranga kōhungahunga), otirā mō ngā reanga tamariki ake. Engari, kei reira tonu ngā whakapātaritari. Kei te heke haere te matatau me te whakamahi i te reo i te kāinga i ētahi wāhi, ā, ehara i te mea kei te whakamahia, kei te akohia rānei te reo e te hunga tautoko i te reo. Kia koke haere tonu, me taunoa te reo Māori ki ngā āhuatanga o ia rā i ngā kāinga, ngā kura, ngā wāhi mahi, me ngā hapori.
>
> [This report shows that te reo Māori is gaining strength across Aotearoa – with growing public support, increasing numbers of speakers, and greater participation in education (except for ECE), especially among younger generations. However, challenges remain. Proficiency and home use are declining in some areas, and not everyone who supports the language is actively using or learning it. To maintain momentum, te reo Māori needs to become a normal part of everyday life in homes, schools, workplaces, and communities].

III. I ēnei wā nei

Nā ka tae mai ki te tau 2026 kua rima tekau mā whā tau nō te whakatakotoranga o te petihana ki mua i te Whare Pāremata, kua toru tekau mā iwa tau nō te whakaturetanga o te reo Māori hei reo kawe i roto i ngā whakahaerenga ā-ture, ko te urupounamu ka whiua; e kitea ana, e rangona ana te reo Māori ki ngā Kōti? Ka haere ngātahi te reo Māori me te reo pākeha? E kitea ana ngā āhuatanga o te reoruatanga kia tutuki ai ngā mātāpono e rārangitia nei ki Te Ture mō Te Reo Māori?

Mō te taha o ngā ture paremata, e rima noa iho ngā ture kua tuhia i te reo Ingarihi me te reo Māori, arā ko Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) i te tau 2013, Te Ture mō te Reo Māori i te tau 2016, Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana i te tau 2019, Te Ture Haeata ki Parihaka i te tau 2019 me Te Ture mō te Hararei Tūmatanui o te Kāhui o Matariki 2022. E tika ana kia mihia te whakaaro me reo rua ēnei ture ka mutu, he hirahira ake nei ēnei ture ki te iwi Māori whānui, engari e ai kī te kaituhi nei, he uaua kia kitea te aronga ā-ture i puta ake i te 1, 3 me te 4 o aua ture i te mea ko te kiko o aua ture, ko ngā whakapahātanga a te Karauna, ngā unu hara me ngā oatitanga a te Karauna ki tēnā iwi, ki tēnā hapū, ki tēnā whānau. Ko tā te kaituhi e taukumekume nei, ko te Ture mō te Reo Māori me Te Ture mō te Hararei Tūmatanui o te Kāhui o Matariki 2022 anahe ērā e tipatapata tonu nei, e waihotia ana āna tapuwae ki te papa o te ture.

Ahakoa i te wā o te whakairotanga o Te Ture mō te Reo Māori e tūruapōhia ana ka whai mana ōrite te reo Māori ki te reo pākeha, ka toko ake te pātai, kua whakatutuki rā āno tātou i tēnā whāinga i roto i ngā whakahaerenga o te pūnaha ture? E tuhia ana te nuinga o ā tātou ture i te reo pākehā anahe, e tuhia ana te nuinga o ngā whakataunga a te Kōti i te reo pākeha anahe, e tukuna ana te nuinga o ngā puka tono me ngā puka tauira a te Kōti i te reo pākehā anahe, nō reira mārakerake ana te kitea, e noho mātāmua tonu ana te reo pākehā.

Ka kī ake au i konei, i te tau 2022, i kite tātou i tētahi huringa tai, i tētahi pikinga taumata ki

9 Te Taura Whiri I Te Reo Māori *Te Pūrongo mō Te Āhua o Te Reo Māori 2025* <www.tetaurawhiri.govt.nz/state_of_te_reo_maori>.

roto i te ao o ngā Kōti. Nā te Kooti Whenua Māori te whakataunga reorua tuatahi i whakaputa.[10] He hirahira tēnei kēhi ki te hitoria o ngā āhuatanga reorua ki roto i ngā Kōti o Aotearoa, inā hoki i whakaae atu a Kaiwhakawā Warren kia whakahaerehia tana Kōti ki roto i te reo Māori, nā konā i kitea atu tana tautoko i te tuku i reo Māori; mai i ngā tuhinga whakatau tikanga i tana whakarite mai i ngā rauemi hāpai, i te tuku i te reo pōwhiri ki ngā kaiwhakawhiti reo, tae atu ki tana whakaputa i te whakataunga reorua tuatahi o ngā Kōti. Ki roto i ngā tau e whā i whai mai nei, kua whakaputaina e te Kooti Whenua Māori/Kooti Pīra Māori ngā whakataunga reorua e rua tekau. I te tau 2024, nā Kaiwhakawā Mullins me tana pānara te rīpoata reorua tuatahi o te Rōpū Whakamana i te Tiriti o Waitangi i tuku.[11] I roto i ngā tau e rua e whai nei, kua whakaputaina e te Rōpū Whakamana i te Tiriti o Waitangi ngā ripoata e rua kua tuhia i roto i te reo pākehā me te reo Māori. Nō reira, i ēnei tau tata nei, ka mutu, i tētahi wā poto pea, e kitea ana te whanaketanga haeretanga o te hiahia kia reorua ngā whakahaerenga ā-ture.

Nā, e mārama ana ahau ki te kōrero, me uaua ka rangona, ka kitea te tangata kōrero Māori i ngā Kōti. Engari māku e kōrero; ehara i te mea, kāhore ngā tāngata kōrero Māori e tae atu ana ki ngā Kōti. Ko reira rātou e ngana nei, e ngana nei kia tukua te reo, engari auare ake. I mahara ake ahau ki tētahi taima me te tū mai o tētahi o āku kiritaki. I timata ia ki te tuku i tana kōrero taunaki i te reo Māori. Engari kāhore te Kōti i whakarite i ngā ratonga me ngā rauemi whakawhiti reo e tika ana kia whakapākehātia tana kōrero. Ahakoa e meinga ana ngā Kōti kei te tautokohiate reo Māori, tukuna kia rere, tukuna kia ora – ki te kore ngā Kōti i te whakarite mai i te taha hāpai, waihoki kāhore te nuinga o ngā tāngata i taua Kōti rā i te mōhio ki te kōrero Māori, ka kōrero Māori ana te tangata, tē aro te Kōti ki te hohonu, ki te ātaahua, ki te hirahira, ki te mana anō hoki o tāna i kōrero ai. E tika ana, ko te tirohanga Māori, ko te whakaaro Māori anō hoki ētahi o ngā hua i puta ake i te rere o te reo (inā te nui o ngā hua). I te wā ka tahuri tātou ki te reo pākehā, tē taea e tātou te rongo i te ihi, i te wehi, i te wana, i te mana anō hoki o te kōrero. Nō reira e tika ana kia whakaritea ēnei rauemi, ēnei ratonga, ēnei hangaraue mārama ai te hunga reo Māori kore ki te kōreroe rere haere ana i ngā Kōti.

E tika ana te rīpoata Wai 262 a Te Taraipiunara o Waitangi, *Ko Aotearoa Tēnei:*[12]

> The Maori language Act as currently drafted does place obligations on courts and tribunals to facilitate the use of Māori in proceedings (section 4). The problem is there are practical barriers to exercising this right. Notice must be given, interpreters organised; indeed, to all intents and purposes, the use of Māori in proceedings operates on the same footing as the use of foreign languages. That is, the right is available but there are significant issues of practicability and convenience. since most speakers of Māori can also speak English, the incentives to use the dominant language in proceedings will generally outweigh personal preference. Even in the Māori land Court, where the parties are almost exclusively Māori, and te reo Māori is used often, there is no full-time infrastructure for simultaneous translation. If te reo Māori is not normalised even in this jurisdiction, we can only reflect on the scale of the impediments to its free use elsewhere.

I tēnei wā, e whakapūmautia ana e te nuinga o ngā Kōti puta noa i te motu ngā kupu Māori me ētahi whakatakotoranga Māori i ngā whārangi taupoki mō ngā whakataunga, wai hoki, i ētahi wā, ka kitea ngā pou kupu Māori ki te puku o ngā whakataunga. E tika ana kia mihia tēnei āhuatanga, he āhuatanga kihai i kitea i ngā tāu 10 nahe nei ki muri.

10 *Pokere v Bodger* − Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210).
11 Waitangi Tribunal, *Kei Ahotea te Aho Matua* (Wai 1718, 2025).
12 Waitangi Tribunal *Ko Aotearoa Tēnei: Te Taumata Tuatahi* (Wai 262, 2011) at 169.

IV. Tētahi huarahi ki te reoruatanga

Nō reira, ki te hiahia tātou kia hoki anō ki ngā āhuatanga reorua, he aha rā ētahi huarahi? He aha hoki ngā hua ka puta? Me wāhi hoki anō ki te Ture mō te Reo Māori. E whai huruhuru ai ngā mātāpono nō roto i taua ture rā, he āwhina nui kei roto i tō tātou tahuri ki ngā pūnaha ture kē atu. Kei te whenua o Kānata ētahi o ngā tauira, kei a rātou ētahi Kōmiti Tohutohu e tirotiro ana pena raini e whakaū ana ngā kaiwhakairo ture ki ngā reo e rua, wai hoki, e whakamahia ana, e whakatairangahia ana ngā reo e rua i ngā ture, i ngā whakataunga a te Kōti, i ngā whakapuakanga anō hoki. A kāti me hoki āno tātou ki Aotearoa.

He tika rā te kōrero, *ehara taku toa i te toa takitahi, he toa takitini kē.* Pena raini e whakapono ana ngā hunga pērā i a rātou e tuhi mai nei i ngā ture paremata, i te kāhui kaiwhakawā, i te hunga rōia me ngā whare wānanga ako i te ture i ngā hua ka puta i te reo Māori, ka mutu, i ngā āhuatanga reorua, e taea ana. Nō reira, e tika ana me whakawhānui ake te hunga kōrero Māori i roto i ēnei rōpū nei me ngā kaimahi o ngā Kōti. He tika hoki te kōrero, *mā te huruhuru ka rere te manu.* Ko ngā huruhuru tāku e kōrero nei, ko ngā rauemi, ko ngā ratonga ko ngā hangarau anō hoki kia pai ai ā aua tāngata tuku noa i te reo Māori ki ngā Kōti. E mahara ana ahau ki te kōrero a Mokomoko me tana kī, "*Tangohia mai te taura i taku kakī kia waiata au i taku waiata.* Nā runga i tērā, ka nui taku tautoko i te whakataunga a te Rōpū Whakamana i te Tiriti o Waitangi, te ripoata nā Te Rau o te Tika, me tā rātou ki:[13]

> We recommend that the Crown takes all necessary steps to ensure that the Waitangi Tribunal Unit provides for all evidence and submissions filed in Māori to be translated as of right; without cost or inconvenience to the claimant or the creator of the document; and, whenever possible, in accordance with the preferences as to mita of the creator of the document.

Ki a au nei, me pēnei tātou ki ngā Kōti katoa puta noa i te motu. I te mutunga iho, me whai tautoko te reo ki ngā Kōti kia pakari ai te haere o tētahi pūnaha ture reorua kia eke panuku, kia eke tangaroa me kore noa e rere māori nei tō tātou reo ki ngā toronga katoa o te ao ture. He tika tā Tai Ahu kī i tana tuhinga roa:[14]

> One consequence of providing rights to reo Māori is that adequate resources must be provided to sustain and protect the exercise of those rights. While te reo Māori has achieved official status … the absence of a set of principled legal rights to secure such use, and the provision of resources to accompany such use, has prevented te reo Māori from gaining civic status in New Zealand.

Hei whakakapi ake i konei, kāhore tātou i te rite kia huri hei pūnaha ture reorua i tēnei hekona nei, ka mutu, he roa pea te huarahi kei mua i a tātou ki te tae ki reira. E tika ana, ara noa atu ngā ārai me ngā taiapa ka mate tātou ki te kake: tae atu ki te hunga tokoiti e taea ana te whakapakari te taha Māori i te ao ture, te mahi uaua kia whakamāorihia ngā tikanga o te ture tuku iho, te tika me te tino hāngai o te mahi whakairo ture, wai hoki, ko te manakohanga o te iwi whānui kia noho ōrite te mana o te reo Māori ki te mana o te reo pākehā, heoi ehara ēnei i te raru ki tai. E taea ana e tātou pena koia rā te wawata. Ki te hoki anō tātou ki ngā whakamaunga kanohi, ki ngā tauira o te whakapau kaha mō te iwi Māori, ki a Waikerepuru mā, ki a Kahurangi Whina Cooper mā, kāhore rātou i kī, he uaua rawa tēnei mahi. Kāhore rātou i kī, me mutu te whawhai, mā te aha i tēnā.

13 Waitangi Tribunal *Whakatika ki Runga: A Mini-Inquiry Commencing Te Rau o te Tika: The Justice System Inquiry* (Wai 3060, 2023) at 138.

14 Tai Ahu "Te Reo Māori as a Language of New Zealand Law: The Attainment of Civic Status" (LLM Dissertation, Victoria University of Wellington, 2012).

Kāhore rātou i horokukū ki te whakatakoto i ngā wero, i ngā tohe hei painga mō te iwi Māori, mō ngā iwi katoa ahakoa ngā tini taimahatanga. Ki te whakaaro hūkore pērā rātou, kāhore i te pēnei te kaha mai o te ora o te reo Māori ki tēnei whenua.

V. Hei whakakapi

I tēnei whenua nei, ehara i te mea he āhuatanga hou te reoruatanga ki tō tātou pūnaha ture. Timata ana i te tau 1835 tae atu ki ngā tau o te 1910, he reo kōrero te reo Māori, he reo paremata, he reo Kōti, he reo ture te reo Māori. Wairuatoa, nā te matenga o te hunga kōrero Māori, i kite hoki tātou i te mimititanga haeretanga o te reo Māori me te reoruatanga ki ngā pekanga o te Kāwanatanga; nā kona, i timata te kōrero parahako e kīa nei horekau he take, horekau hoki he wāriu o te mau tonu ki tētahi reo e tata mate ana. Me te aha, kua kore te reo Māori i noho hei reo o te ture. Engari, taka rawa mai ki te tau 2026, kihai taua kōrero i whai take, kihai hoki i tika, me kaua hoki ia e whai wāhi mai ki te ngākau o tēnā, o tēnā o tātou e whai pānga nei ki ngā Kōti.

I te ao whānui nei, ehara i te mea he hou, he rerekē, he oa te māka raini tētahi pūnaha ture reo rua. Kua roa a whenua kē atu e pērā ana. Ki te tahuri tātou ki aua motu, ki aua whenua e kaha nei ki te whai i te reoruatanga i ngā Kōti, i ngā ture, i ngā āhuatanga o tō rātou ao ture, e kitea ana noki tō rātou hāpai i te mana o tō rātou reo taketake.

Nō reira, hāunga rā te tohe mō te tūranga o te reo Māori hei reo mana, mō ngā mōtika ā-ture ki tētahi reo, mō te tūranga anō hoki o te reo Māori hei reo taketake, hei reo tuatahi ki Aotearoa; e mārakerake ana te kitea kua piki haere te nama o te hunga kōrero Māori ki Aotearoa, mutu atu. Arā, ko te whāinga nui o Te Taura Whiri o te reo Māori kia tae atu a Aotearoa ki te kōtahi miriona kaikōrero Māori i mua i te tau 2040. He koata tērā o te tapeke o ngā tāngata ki Aotearoa. Pahure ake ana i te 50 tau kei mua i a tātou, e kore e kāhore, kua horapa te reo Māori ki tēnei whenua. Mā te ākinga ōna e ngā whānau ngākaunui ki te reo, e ngā hunga whakapono ki ōna hua, ka noho anō mai ia hei reo kōrero, hei reo paremata, hei reo Kōti, hei reo e haere ngātahi ana me te reo pākehā ki roto i tō tātou ao ture. Nō reira, me whiu kē ahau i te pātai, kei te rite tātou ki te huringa o taua tai?

I te mutunga iho, i a tātou e huahuatau ana ki tētahi pūnaha ture reo rua, e tika ana kia kōtahi o tātou whakaaro ki ngā hua ka tau ki runga i te pūnaha ture whānui, ki ngā Koti ā-rohe, ki ngā Kōti ā-whānau, ki ngā Kōti taiao, a wai atu, a wai atu. Nō reira, i a au e whakapau kaha ana kia hāpaitia te tuku i te reo Māori ki ngā Kōti katoa, ehara i te mea ko te ora o te reo tāku e tohe nei, kei te pai te ora o te reo. Ehara i te mea ko te mana o te reo Māori tāku e tohe nei, kei te pai te mana o te reo. E kōrero ana ahau mō tā tātou whai i te "justice", i tā tātou whai i te tika, i tā tātou whai i tētahi pūnaha ture e whakaatu mai ana i tōna ake hapori, i ōna ake iwi e kuhu atu ana ki ōna whare Kōti, māna hoki e tiaki – tōna tikanga.

A kāti, wāhi kōrero: ki te whakapono tātou ki taua whakaaro, ka mutu, ki ngā kupu a Tā Himi Henare, *"ko te reo te mauri o te mana Māori, ko te reo te kākahu o te whakaaro Māori, te huarahi ki te ao tūroa"*, he aha tātou e tuku nei i te tikanga hei ako ki ngā whare wānanga, he aha tātou e tuku nei i te tikanga ki ngā Kōti engari kāhore tātou e pēnā ana ki te taha o te reo Māori? E tino mārama ana tātou ki te hohonu o ēnei tikanga katoa ki te kore e mau i a tātou te reo Māori? Ko tāku, pena e tahuri ana tātou ki te take o te tikanga me haere ngātahi ia me te reo Māori.

Nō reira, me hoki anō ahau ki te kōrero a Te Wharehuia, "He whare kōrero te reo Māori i rauhītia ai te awe o ōna kaikōrero". Ehara i te mea he reo anahe te reo Māori, he manawa ora, horekau ōna kikinotanga. Ko tāku, mā te reo Māori e tuwhera mai ai tētahi huarahi e whai nei i te tika, i te pono, i tā te tangata noho haumaru. Ki te hāpai tātou i te tuku i te reo i ngā Kōti, ki te

tautoko tātou i te whakaaro o te reoruatanga, e hanga mai ana tātou i tētahi Kōti e manaaki nei i ana tāngata, e tautiaki nei i ana tikanga, e rauhi nei i te awe o ōna kaikōrero, Māori mai, Pākehā mai noki.

Hei whakakapinga māku, inā hoki rā i tīmatahia te tuhinga nei ki tētahi pātai, ki tētahi wero i tukuna rā ki a au, ka whakautua tōtikahia taua pātai rā e pēnei nei: kōmuri ana te hoki o mahara ki a Hana Jackson me ērā whakaihuwaka o te ao Māori i kōkiri nei i ngā kaupapa whakarauora reo Māori hei painga mō te āpōpō, mō ngā uri whakatupu. I pērā rātou ahatia kāhore te nuinga o rātou i te mōhio ki te kōrero Māori – engari i mārama rātou ki tōna whai hua, ki tōna hohonutanga. Mei kore ake rātou me te hunga i whakaaro nui, i whakapono nui ki te reo hei ara whakaora – hāunga rā te taumata o ō rātou mōhio ki taua reo. E pērā hoki ana ōku whakaaro ki te ao ture, ki ngā hunga e taetae ana ki ngā Kōti. Ahakoa pea he tangata kore mōhio ki ngā kupu o tōna reo Māori, ko tōna reo Māori tonu tērā e mōhio ana ki a ia, e tautiaki ana i a ia.

A kāti, koirā te Kōti e manako nei ahau kia māmā ai ā tātou tamariki, ā tātou mokopuna kōrero i ngā reo e rua, i te reo e hiahiatia nei e rātou, ka mutu ka maringi noa ā rātou kupu, tangatanga ana te rere. Heoi anō rā e mara mā, he aha rā ngā hua o te reoruatanga? He nui, he tini. Mā wai rā hei kawe tō tātou reo ki ngā Kōti, ki tō tātou pūnaha ture, ki te ao o te reoruatanga, ki tua raini o te awe mapara?

Kia kaha rā koutou ki te whai i tō tātou reo rangatira, ahatia ngā whakawai o tēnei ao. Ka nui pea i konei.

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The Concept of Judicial Independence: What Does It Mean within New Zealand's Constitutional Arrangement?

Te Ariā o te Motuhake ā-Whakawā: He Aha te Tikanga o Tēnei i roto i te Whakaritenga Kaupapa Ture o Aotearoa?

Hon Margaret Wilson

I. Introduction

This article will focus on one aspect of New Zealand's existing constitutional arrangements, namely the legal and constitutional supports and protections for independence of the judiciary and the rule of law. Because New Zealand has no formal written constitution there is no formal statement acknowledging the concept of the separation of powers applying to New Zealand's constitutional arrangements. Philip A Joseph noted however, that "[j]udicial independence is an indispensable principle of a liberal democracy and the rule of law."[1] Philip A Joseph notes in his seminal work on New Zealand's constitutional and administrative law that judicial independence is a key element of the separation of powers. In the absence of a formal written acknowledgement of that principle, it is implied as being part of constitutional arrangements on the basis of being part of the historical underpinning of a constitution.

In the New Zealand context, an understanding of the independence of the judiciary and the rule of law is found in a collection of statutes, principles and conventions including the common law, Constitution Act 1986, New Zealand Bill of Rights Act 1990, Official Information Act 1982, Ombudsman Act 1975 and the Public Finance Act 1989. The Treaty of Waitangi and the English statutes such as the Magna Carta 1297 and the Bill of Rights 1688[2] are also included amongst New Zealand constitutional documents. Other relevant constitutional documents include the Standing Orders of the House of Representatives, which are the politically agreed procedures governing the affairs of parliament, and the Cabinet Manual which sets out the principles Ministers are expected to observe in exercising their political power, including the conduct within the relationship with the judiciary and court system.

This collection of instruments provides guidance for understanding how the notion of the separation of powers operates in New Zealand. While there is some formal guidance on conducting the relationship between the legislature and the executive, there is a lack of clarity when defining both the nature of the separation of powers in the context of the independence of the judiciary and rule of law. This article will argue there needs to be greater clarity and support for the independence

1 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Brookers, Wellington, 2014) at 797.

2 The Imperial Laws Application Act 1988 specifies the extent to which Imperial enactments, Imperial subordinate legislation and the common law of England are part of the laws of New Zealand.

of the judiciary and the rule of law. The rationale behind the separation of powers is that each branch of government – the executive, the legislature and the judiciary – exercises their functions without intruding into or interfering with another branch. This constraint on the exercise of power by one branch of government is a fundamental constitutional prerequisite for democratic governance. In this context, it is important to note New Zealand has a unicameral governance system. There is no upper house of review.

While the concept of the separation of powers[3] is an important check on the abuse of public power it will be argued that the constitutional protections and support for the concept in New Zealand are fragile. In reality its value is rhetorical. A separate relationship between the legislature and the executive is, in reality, non-existent. The Constitution Act 1986, s 17 requires members of the executive to be members of parliament and the requirement for a simple majority to enact most statutes means the executive controls the legislature.[4] Although the mixed member proportional (MMP) electoral system was designed to provide greater diversity in the membership of the House of Representatives, and did in fact achieve this objective, it did not affect the authority of the executive to control the legislature.

The current constitutional notions support a representative democracy governance model, that is implemented through the three yearly election where the people directly vote for their representatives to exercise public power on their behalf.[5] This provision in the Constitution Act cannot be amended unless this is agreed by 75 per cent of the members of Parliament or a referendum of the electorate.[6] Such a referendum will be held at the next election to determine whether the period between elections should be extended. It should be noted however that an early election may be called if the government loses the majority of support of the members of parliament.

Parliamentary sovereignty is a fundamental constitutional tenet of the New Zealand constitution. Although the parliament has representatives from government and opposition parties, it is the executive that exercises control over much of the business of the parliament. While the reality of government requires there is much discussion and negotiation between the two arms of government, the political reality is that it is difficult to find constitutional constraints of the power of the executive, beyond it losing the confidence of the majority of the members of parliament and the requirement to hold an election once every three years.[7]

Given the power of the executive and its influence, if not control, over the legislature, it is important to understand the role played by the judiciary in constraining a constitutional abuse of power. This question has become increasingly important as courts are presented with individual dispute cases that have wider social and economic implications. Issues relating to climate change are an example of a case involving wider policy questions with implications beyond the specific matter before the court.[8] In such circumstances when the courts are interpreting the law relating to

3 The Constitution Act 1986 recognises the three branches of government as part of the constitution but provides little guidance on the nature of the relationship.

4 Standing Orders of the House of Representatives 2023, SO 140(2) − all questions are determined by majority vote.

5 Constitution Act 1986, s 17.

6 Electoral Act 1993, s 268.

7 Margaret Wilson *The Struggle for Sovereignty New Zealand and Twenty-First Century Statehood* (BWB Texts, Wellington, 2015) at 49.

8 In *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134; and *Students for Climate Solutions Inc v Minister of Energy and Resources* [2024] NZCA 152, [2024] 2 NZLR 822 the Supreme Court granted leave to appeal the Court of Appeal's decision. The Supreme Court's judgment is currently awaited.

the issue using established legal precedents and principles, they are criticised for making law and usurping the role of the legislature. Retired District Court Judge David Harvey[9] raised this issue in an article where he analysed recent criticisms of the courts as straying into the area of politics and concluded, maybe provocatively, if the governments of the day do not address issues of concern by the public, why should the court not take over the role? This would of course signal a dramatic change to the existing constitutional arrangements, but I would argue he raised a legitimate point about the failure of politics. Governments have the responsibility of enacting legislation that clearly reflects its policy objectives. The role of the courts is to interpret that legislation.

II. Increasing Tension

There has been evidence of increasing tension between the government and the role of the judiciary since the election of the government in 2023. The new government has been critical of courts interpreting legislation reflecting the policy of the previous government. The solution to this situation is to enact new legislation, not criticise the courts for exercising their constitutional role. A Minister has described the court system as "totalitarian" and an individual judge, as a "communist",[10] and there has been criticism of the Solicitor-General's decision for including in new prosecution guidelines a reference to the need to think carefully on the impact on Māori within the criminal justice system. The Guidelines were withdrawn for further consideration. They had been shown to the Attorney-General under the no surprises protocol between the public service and the government.[11] Crown Law has also been criticised for representing various governments financial and legal position in Royal Commission Inquiry into the Abuse of Children in Care.[12]

Much of this tension is related to a radical change in policy direction by the government on the implementation of the obligations under the Treaty of Waitangi incorporated in legislation. The introduction of the Treaty of Waitangi Principles Bill clearly demonstrated the change in policy, but other policies have also made clear the direction of the government.[13] Apart from a policy change that governments are entitled to make when elected, it was the direct criticism of the courts by a Minister that caused considerable concern because it was seen as a breach of the constitutional principle of comity.

Apart from Minister Hon Shane Jones, stating that there were "elements of totalitarianism" in the justice system, he also, at a meeting between Ministers and the seafood industry, referred to

9 "Who's in charge here?" *New Zealand Listener* (9 November 2024) at 15.

10 Glen McConnell and Jenna Lynch "Shane Jones in hot water, again, for criticising judges. This time calling out 'totalitarianism'" *Stuff* (online ed, 29 August 2024) <www.stuff.co.nz/politics/350396612/shane-jones-hot-water-again-criticising-judges-time-calling-out-totalitarianism>.

11 Tuwhenuaroa Natanahira "Call for rethink on prosecutions welcomed in some quarters while government disputes need" *RNZ* (online ed, 16 October 2024) <www.rnz.co.nz>.

12 Tim Murphy "A Tarnished Crown" *Newsroom* (online ed, 21 October 2024) <https://newsroom.co.nz>.

13 For example Amending s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 to negate the decision *Whakatohea Kotahianga Waka (Edwards) v Te Kahui and Whakatohea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252; removing s 7AA of the Oranga Tamariki Act 1989 that required the Chief Executive to recognise and provide practical commitment to the principles of the Treaty of Waitangi; the removal of the Māori Health Authority; legislation relating to gang patches; and Local Government (Electoral Legislation and Māori Wards and Māori Constituencies) Amendment Act 2024 rescinding the provision of Māori representation and requiring a poll to be held on the question of Māori representation. The removal of the explicit obligation on school boards to give effect to Te Tiriti o Waitangi from the Education and Training Amendment Act 2025. Other examples may be found but there is evidence of a radical policy shift in government on the recognition and implementation of the Treaty of Waitangi.

a High Court Judge as a "communist". The Judge in question had been a member of the Socialist Action League when she was a young law graduate and freezing worker.[14] This direct personal attack on a judge opened the Minister to criticism for attempting to intimidate a member of the judiciary who had delivered a judgment with which he did not agree.[15]

Although the Minister's comments attracted criticism from politicians as well as the legal profession, the Prime Minister noted the totalitarianism comment was directed towards the Waitangi Tribunal and that it was not a court, though members of the Tribunal do include judges. The Attorney-General publicly reprimanded the Minister for not acting in accordance with the expectation under the Cabinet Manual and the observance of the principles of comity. This situation illustrated that the only real constraint on such a Minister is political, rather than legal. The Minister has continued with his campaign for changes in the court system and against the judiciary, saying that it will be part of his party's election manifesto.[16]

At a time when increasing political conflict is leading to adversarial behaviour that challenges the principle of comity and the independence of the judiciary, it is important to consider this constitutional principle in the New Zealand context and assess whether the current arrangements are sufficient to protect and support this constitutional principle. Before the various conventions on comity and judicial independence are examined in detail, it is important to understand that the concept relies on another fundamental constitutional principle, namely, the rule of law. It is an essential element of the independence of the judiciary.

III. Rule of Law

Philip A Joseph describes the rule of law as "the sentinel of constitutional government".[17] He notes that the rule of law has powerful rhetorical force, but explains in some detail precisely that what is meant by the concept is unclear, and that over time it has developed and changed to reflect the current political constitutional context. A narrow traditional definition is found originally in Dicey[18] and reflected more recently by Lord Tom Bingham in his book, *The Rule of Law*[19] and favours an emphasis on the procedural requirement of the concept; those who make laws must have the authority to make them, no person is above the law, and there is an impartial and independent judiciary to interpret the law. Both Dicey and Lord Tom Bingham also supported the common law role of the courts to develop the rule of law, because it is the last resort to redress injustice. While judges interpret, and apply law as provided in legislation, on occasions the interpretation of the legislation conflicts with the political intention of the government, and thus attracts criticism of the court for "making" law. In such situations, the government is free to amend the legislation and often does so. This should not however provoke criticism of the courts for performing their constitutional role.

Tension between the constitutional roles of the executive and the judiciary are not new and have been an ongoing characteristic of the New Zealand constitution. The former Chief Justice,

14 Jamie Ensor "Shane Jones' 'communist' judge comment: Winston Peters sides with Attorney-General Judith Collins" *The New Zealand Herald* (3 September, 2024) <www.nzherald.co.nz>.

15 *Ngāi Tūmapūhia-a-Rangi Hapū Inc v Attorney General* [2024] NZHC 309.

16 Fox Meyer "Jones wants foreign judges on NZ cases amid war on judiciary" *Newsroom* (online ed, 15 September 2025) <https://newsroom.co.nz>.

17 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Brookers, Wellington, 2014) at 153.

18 AV Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, London, 1959).

19 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010).

Rt Hon Dame Sian Elias GNZM concluded in an article of the process of judging in New Zealand, '[t]he challenges for judging and for the rule of law in New Zealand in the 21st century are to ensure that access to independent courts and the rule of law continue to be valued as constitutional fundamentals by the community. That requires an understanding of our constitutional and legal history.'[20] The fact this tension is ongoing means it is important there is an understanding of how the various constitutional understanding have evolved over time according to experience, and why some concept such as the rule of law and independence of the judiciary have been enduring even without a written constitution.

The importance of maintaining the independence of the judiciary and the rule of law continues to be emphasised by the current Chief Justice Rt Hon Dame Helen Winkelmann. In an address to the New Zealand Law Society the Chief Justice stated:[21]

> It is the constitutional duty of the judicial branch of government to uphold the rule of law, through the administration of justice. My starting point is that a society cannot be fair if all are not equally subject to the law and equally entitled to its benefit. Strong, independent courts are necessary to secure that condition. If people do not have access to independent courts, the rule of law is replaced by the rule of the strong over the economically weak and the vulnerable.

It is clear that there has been increasing political criticism of the courts and the individual decisions of judges. The Chief Justice is taking a leadership role in identifying the consequences of the threats to the rule of law and independence of the judiciary, while remaining within the traditional rules of comity between the courts and the political institutions. Education and understanding of the constitutional rules are the primary means for protecting democratic decision making.

IV. New Zealand Understanding of the Rule of Law

In New Zealand, it is the Legislative Design and Advisory Committee (LDAC) that sets out constitutional guidelines that should be followed when making policy, and it follows the procedural approach.[22] The important role of LDAC is often not clearly understood as became apparent during the debate over the Regulatory Standards Act 2025. It may be argued LDAC could and often does much of the scrutiny of legislation to ensure it complies with accepted constitutional principles including the rule of law. It appears it will continue with this role.

Exactly what is meant by the concept of the rule of law is not always clear. This is partially because it is an evolving notion that reflects the context of the time. For example, Justice Glazebrook in a paper entitled *The Rule of law: Guiding Principle or Catchphrase?* concluded her review of the concept by stating: "The rule of law is a guiding principle as long as it includes human rights, access to justice and I would add, redress for historical disadvantage."[23] This definition includes a substantive as well as a procedural approach to an understanding of the concept. Joseph follows

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20 Sian Elias "Judgery and the Rule of Law" [2015] 14 Otago LR 49. This was an address to the Otago Law School, University of Otago, Dunedin on 7 October 2015) and can be found at: <www.courtsofnz.govt.nz/assets/speechpapers/2hdcj.pdf>.

21 Helen Winkelmann "Chief Justice NZLS breakfast speech" (Address to the New Zealand Law Society, Auckland, 15 May 2025) <https://www.courtsofnz.govt.nz/assets/speechpapers/25-05-15-Chief-Justice-NZLS-breakfast-speech.pdf>.

22 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (2021) at 23 <www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition>.

23 Justice Glazebrook "The Rule of law: Guiding Principle or Catchphrase?" (2021) 29 Wai L Rev 2 at 20.

this approach after a review of the historical development of the concept and notes the rule of law is more than "government according to law". He offers the following definition as being relevant in the 21st century:[24]

(1) The rule of law is a fundamental requirement of civil society;

(2) The rule of law is a substantive as well as procedural concept; and

(3) The rule of law is a norm of institutional morality for the guidance of public action.

The debate on whether the rule of law extends beyond procedural requirements is still ongoing. The former Chief Justice has noted:[25]

> It is true that the content of the rule of law remains uncertain and is contestable. Its central plank is the principle of legality – that no one or no body is above the law and that fundamental values and rights can be trenched on only by unmistakeable legislative intent. Reasonableness and fairness in the exercise of power seem pretty well established as part of the rule of law. But the extent to which substantive values such as human rights are part of the rule of law is more contested.

The lack of formal written clarity as to what exactly the rule of law is, in a given context, contributes to the confusion of the roles of the three branches of government. It means any tension must be resolved through negotiation and respect for the different function of the three branches of government. It is questionable however, whether a legislative definition of the rule of law would enhance observance of the notion. The lack of a formal written constitution enables flexibility and the opportunity for the concept of the rule of law to develop in order to redress injustices. A lack of formality and flexibility is a characteristic of New Zealand's constitutional arrangements. It is also a recognition that sometimes it is both difficult and ineffective to try and encase all constitutional concepts in legislation.

In practice, any statute is open to review by the government that has a majority of votes in Parliament. In theory then, it could be argued all legislation has a short life span and therefore uncertainty is a consequence of the flexible constitutional arrangements. The common law is not restrained in the same way and open to developing new remedies when not specifically prevented by legislation. While uncertainty and ambiguity may result from New Zealand's flexible constitution, it has by and large worked well and reflects political reality.

Although there is no written statutory definition of the rule of law, it has been included in crucial constitutional statutes. Apart from the LDAC Guidelines, reference to the rule of law is found in the Senior Courts Act 2016. Section 3 (1)(d) of the Act that sets out the purposes of this Act including improving the transparency of court arrangements in a manner consistent with judicial independence. More importantly subs (2) also provides:[26]

> Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

24 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (Brookers, Wellington, 2014) at 155.

25 Sian Elias "Judgery and the Rule of Law" [2015] 14 Otago LR 49. This was an address to the Otago Law School, University of Otago, Dunedin on 7 October 2015) and can be found at: <www.courtsofnz.govt.nz/assets/speechpapers/2hdcj.pdf>.

26 Senior Courts Act 2016, s 3(2).

This provision summarises New Zealand's two fundamental constitutional concepts: parliamentary sovereignty and the rule of law, that create the primary cause of tension in governance.[27] This provision was originally included in the Supreme Court Act 2003 by the Select Committee as a response to submissions from opponents of the Bill who argued the new Supreme Court would usurp the authority of Parliament to make law. The tension between the constitutional nature of the two concepts continued to be evidenced in the omission of the clause in the Judicature Modernisation Bill that preceded the provisions of the Senior Courts Act. Concern at this omission from the Bill was expressed not only by the opposition parties but the Chief Justice and the legal profession.[28] The continuing political opposition to the formal recognition of two of the fundamental constitutional concepts highlights the fragility of the rule of law. It should be noted however, the notion of the rule of law was included in the Treaty of Waitangi Principles Bill. It is uncertain whether this inclusion indicated an acceptance of the rule of law as a fundamental constitutional value as the Bill did not progress beyond the Select Committee.

V. Judicial Appointments

The appointment of judges in New Zealand remains a political process that has raised controversy. During the debate over the establishment of the Supreme Court, the independence of the judiciary emerged as a central issue. The concern was that appointments to the Supreme Court would be political.[29] This argument was often accompanied by the assertion that only the Privy Council could preserve the importance of the common law in New Zealand judicial decision-making.[30] In a sense, all judicial appointments are "political" as they are made on the recommendation of the Attorney-General to the Governor-General. The Attorney-General is a political appointment and normally a member of the Cabinet. Although more transparency in judicial appointments was recommended by the Law Commission Report reviewing the Judicature Act,[31] it supported appointments to be made by the Attorney-General after rejecting the idea of an independent Judicial Appointments Commission like that in the United Kingdom. The Commission did however recommend the appointments should reflect not only legal merit, but social awareness of tikanga Māori and other diverse communities in New Zealand.

In response to the concern about political appointments, as Attorney-General I authorised the Ministry of Justice to prepare a consultation paper on the New Zealand establishing independent

27 Margaret Wilson "The Rule of Law and Parliamentary Sovereignty: An Exercise in Creative Tension" (2023) 29 Auckland U L Rev 1.

28 Sian Elias "Judgery and the Rule of Law" [2015] 14 Otago LR 49. This was an address to the Otago Law School, University of Otago, Dunedin on 7 October 2015) and can be found at: <www.courtsofnz.govt.nz/assets/speechpapers/2hdcj.pdf>.

29 The question of appointing overseas judges was raised during the discussion surrounding the establishment of a Supreme Court. I raised the issue with the Chief Justices of Canada, Australia and the United Kingdom at that time and all rejected the notion citing difficulties of administrating their courts without the burden of releasing justices to sit on overseas courts. This issue has been raised again recently by Minister Shane Jones, see: Fox Meyer "Jones wants foreign judges on NZ cases amid war on judiciary" *Newsroom* (online ed, 15 September 2025) <https://newsroom.co.nz>.

30 Margaret Wilson "Establishing a Supreme Court for New Zealand" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) at 1−19.

31 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 45.

judicial appointments commission.[32] No further action has been taken to develop the notion of an independent judicial appointments panel. The Attorney-General retains the authority to recommend judicial appointment, but evidence of more transparency surrounding judicial appointments is now seen in Crown Law publishing the protocols relating to judicial appointments[33] and in November 2024 the NZ law Society CLE sponsored a seminar with the Chief Justice and Attorney-General on judicial appointments.[34]

VI. Dismissal of Judges

Although the debate establishing a Supreme Court provoked the discussion on the appointment of judges, during this period the process for dismissing judges was also raised. As Attorney-General, I had commissioned Sir Geoffrey Palmer KC in 2002 to review the ways in which to improve the administration of justice. In his paper, he raised the issue of the lack of process for the dismissal of judges and in the context of a debate around the independence of the judiciary, this is a significant gap in our system. The media had also started to raise the issue when an inquiry found several judges had accessed inappropriate material online and even though their actions were not unlawful, they raised the issue of maintaining confidence in the judiciary.[35]

In 2004, the Judicial Conduct Commissioner and Judicial Conduct Panel Act was enacted to provide clarity and fairness to the process for complaints against judges to be heard and determined. Under the Act, High Court Judges can only be removed after the Attorney-General address to Parliament to recommend the Governor General to remove the judge.[36] Other judges can only be removed on the recommendation of the Attorney-General to the Governor General. The Act was designed to preserve the independence of the judiciary by ensuring their accountability was through a review of their decisions, the statutory compliant process, and public scrutiny.

The debate surrounding the Supreme Court also raised the issue of the question of whether a referendum was required to establish the Court because of its constitutional significance. In the absence of an accepted framework for a constitutional debate, and the fact the proposal for change had been discussed for 20 years, the Cabinet decided to proceed with the normal legislative process and introduced the Bill in Parliament. Although referendum in New Zealand is not often used to effect constitutional change, the current proposal for a referendum to determine the term of Parliament provides an opportunity to experience how to conduct significant constitutional change through referendum.

It is interesting to note that the use of a referendum to effect constitutional change was incorporated in the Treaty of Waitangi Principles Bill 2024. The Bill in Principle 1,[37] also gave

32 Ministry of Justice *Appointing Judges: A Judicial Appointments Commission for New Zealand: A Public Consultation Paper* (30 April 2004); see also Margaret Wilson "Public urged to have their say on way judges appointed" (30 April 2004) Beehive – The official website of the New Zealand Government <www.beehive.govt.nz/release/public-urged-have-their-say-way-judges-appointed>; and Margaret Wilson "Appointing Judges the New Zealand Way" (2013) 21 Wai L Rev 41.

33 Crown Law Office *Judicial Protocols* (as at 2013, updated October 2023) <www.crownlaw.govt.nz/assets/Uploads/GuidlinesProtocolsArticles/Judicial-Protocol.pdf>.

34 New Zealand Law Society Continuing Legal Education *Judicial Appointment – The Pathway to Becoming a High Court Judge* (webinar, 7 November 2024) <www.lawyerseducation.co.nz>.

35 "Independency of the Judiciary Still in Danger" *New Zealand Herald* (editorial, Auckland, 10 March 2003) <https://www.nzherald.co.nz/nz/ieditoriali-independence-of-judiciary-still-in-danger/NDRJFRBYEZOTWN3N4KVR4NUUFU/>.

36 Constitution Act 1986, s 23.

37 Treaty of Waitangi Principles Bill 2024, cl 6(b).

the executive full power to govern and make laws in accordance with the rule of law and the maintenance of a free and democratic society. However, there is no statutory definition of the rule of law. It would appear that in this context it was included for its rhetorical value. It is significant however, that the rule of law was seen as an element of executive governance. If the Bill had been enacted it required a referendum to be held before the provisions of the Bill were implemented.

Although statutory references to the rule of law are rare, s 4 of the Lawyers and Conveyancers Act 2006 provides that one of the fundamental obligations of every lawyer is to uphold the rule of law and to facilitate the administration of justice in New Zealand. This section places a special constitutional role on the legal profession. It could be argued the legal profession is the guardian of the constitution, and by extension the independence of the judiciary. This role is evidenced in the submissions made by the Law Society and individual lawyers to select committees on legislation. During the public discussion surrounding the Treaty of Waitangi Principles Bill, 40 KCs signed a statement setting out their concerns and reason for not supporting the Bill.

Specific statutory reference to the judiciary is also rare. However, the Constitution Act 1986, s 23 provides that a judge of High Court shall not be removed from office except by the sovereign acting as the Governor-General acting upon an address of the House of Representatives. It also states the only grounds for removal are misbehaviour or incapacity to discharge the functions of the office. Section 24 also states the salary of a High Court Judge cannot be reduced during their term. The purpose of these provisions are to protect the judiciary from the actions of the executive. The statutory foundation for New Zealand's court system is found in the Senior Courts Act 2016 and the District Courts Act 2016 that were enacted after a long period of review of the court system. At the same time the Judicial Review Procedure Act 2016 was enacted. Given that often tension can arise between the executive and the courts as a result of judicial review of government decision making, this is an important Act that provides procedural clarity for the proceedings.

VII. The Concept of Comity

In the absence of a formal recognition in a written constitution, New Zealand has relied on maintaining the notion of the separation of power, independence of the judiciary and rule of law through the constitutional concept of comity. The concept of comity evolved in the context of the Westminster governance model in the absence of a written constitution. Comity is a constitutional convention that reflects the political morality and reality that underpins good constitutional practice. It is important in the New Zealand context where there is a unicameral parliament and no upper house for review of legislative decision making. A definition of comity in the New Zealand context is found in the LDAC Guidelines, the Standing Orders of Parliament and the Cabinet Manual. The Guidelines advice when providing policy advice for legislation is that:[38]

> Separation between the legislature and the judiciary requires that legislation should not direct the punishment and guilt of named or identifiable people without due process of law. Legislation that does so appropriates judicial power and undermines judicial independence, as well as offending against the rule of law. Stringent protections must be maintained to keep the judiciary separate and independent from the other branches to enable proper judicial scrutiny.

38 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (2021) at [4.1] <www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition>.

The LDAC explained the expectation of the observance of comity in the submission to the Māori Affairs Select Committee in the matter of the Ngata Kahungunu ki Wairarapa Tamaki nui-a-Rua Claims Settlement Bill. While under New Zealand's constitutional arrangements governments have the right to make and amend laws, "there is a strong constitutional convention between Parliament and the courts, that legislation should not generally interfere with the judicial process in particular cases before the courts".[39]

The contents of the Bill were the subject of litigation in the courts, and a final decision had not been delivered by the court. Under the principles of comity between the Parliament and the courts, a Bill is not enacted while proceedings in the courts are current on the grounds a litigant may be deprived of their legal rights, and to avoid retrospective legislation reducing the certainty and predictability of the law, and thus undermining the constitutional notion of the rule of law.

Government Ministers failure to always observe the concept of comity has been a consequence of the Government's haste to enact its policy programme. It has attracted criticism not only from Members of Parliament and the legal profession, but also from the Attorney-General Hon Judith Collin KC. The Cabinet Manual states the Attorney-General has responsibility for maintaining the rule of law.[40] The Hon Judith Collins KC in her speech to the Law Association specifically addressed the importance of the principle of comity and discussed the importance of restraint and principled behaviours when describing the importance of comity in the relationship between the executive and the courts. She concluded her speech with the following:[41]

> In conclusion, since responsible government was established in New Zealand in 1853, our constitution has not remained static. In reality, it has been the opposite.
>
> But comity between branches of government has underpinned every iteration – and it is critical to our democracy.
>
> The reciprocal obligations of comity recognise that each branch of government approaches its task with conscientious integrity and respect for each other. By acting with mutual restraint and respect, constitutional actors avoid escalating conflict. This is critical to ensuring the New Zealand people retaining confidence in our constitutional arrangements – and in the actor which exercise power on their behalf under it."

There is no legal requirement to observe the principle of comity under the current constitutional arrangements. Its enforcement is dependent on the goodwill of all Members of Parliament and the expectation that breaches of the principle may incur political criticism. The political nature of New Zealand's constitution was commented on during the above examples of criticism of the courts by Sir Geoffrey Palmer KC in the following terms:[42]

> Political developments are in a very real sense what makes up the constitution at any given time. … Our constitution depends upon a sense of restraint and principled behaviours of ministers. Without that safeguard all can easily be lost. New Zealand has one House of Parliament and is lacking many other checks and balances.

39 Legislation Design and Advisory Committee "2022 Submissions" <https://ldac.org.nz/submissions/2022-submissions>.

40 Cabinet Manual (Cabinet Office, Wellington, 2023) at [4.3].

41 Judith Collins "Speech to Law Association" (speech to the Law Association, Auckland, 13 June 2024) <www.beehive.govt.nz/speech/speech-law-association>.

42 Geoffrey Palmer "Lurching towards constitutional impropriety" *Newsroom* (online ed, New Zealand, 23 August 2024) <https://newsroom.co.nz>.

The constitutional importance of the principle of comity is seen in the inclusion of the concept in both the Standing Orders of the House of Representatives and the Cabinet Manual. Standing Orders 16 and 17 describe what is acceptable and unacceptable references to the judiciary and proceedings in courts. Standing Order 116 makes it clear reference to matters before a court may not be referred to in debate in the Parliament. The Speaker however does have a discretion to permit such a reference but must balance the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes. The Speaker must take account of the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government, and the risk of prejudicing a matter awaiting or under adjudication in any New Zealand court, including one awaiting sentencing.

Standing Order 117 clarifies SO 16 takes effect in relation to all matters awaiting decision in criminal cases, including appeals, and in other proceedings from the time of the filing of the appropriate documents. Standing Order 118 also explicitly states: "A member may not use offensive words against the House or against any member of the judiciary."[43]

The rationale for the *sub judice* rule is discussed in New Zealand Parliamentary Practice[44] as being to safeguard the interests of fundamental justice so that a defendant or jury may not be prejudiced by any statements and also so that confidence in the judicial system is not undermined. As the text notes, if parliament is not satisfied with a decision of the court, then it can change the law, of which there have been plenty of examples recently. If the Speaker however thinks a member's comment has breached the Standing Orders, then the matter can be referred to the Privileges Committee to determine if the member is in contempt.

While Standing Orders apply to all members of Parliament, the Cabinet Manual applies explicitly to members of the executive.[45] The Cabinet Manual has no legal force but is one of the important constitutional documents. The provisions of the Cabinet Manual are agreed by all governments when they assume office and sets out the rules to govern the executive's exercise of public power. It is amended from time to time in the light of experience. This is another instance of the flexible constitutional practice in New Zealand governance. The relationship between the executive and the judicial system are set down in Chapter 4 of the Manual. In this context, it is important to note the important role of the Attorney-General and Crown Law in managing the relationship.

A recent example of application of the expectations on both the executive and the courts was seen in the case of Waitangi Tribunal calling a Minister to appear in person to give evidence on matters raised by the Tribunal.[46] The Minister refused to attend, noting the evidence required was available in writing, but also it was a breach of the comity convention. Although the issue was moot by the time the matter was heard by the Court of Appeal because written answers had been received by the Tribunal, the Court of Appeal decided there was no reason for the Minister to appear in person because written evidence had been given. It also noted it did not agree the principle of comity was relevant in this case.[47] This situation provides an example of serious conflict between the executive and the judiciary being avoided through negotiation and common sense.

43 Standing Orders of the House of Representatives 2023, SO 118.

44 David Wilson (ed) *Parliamentary Practice in New Zealand* (Office of the Clerk of the House of Representatives, Wellington, 2023) <www3.parliament.nz/media/10551/ppnz-2023.pdf>.

45 Cabinet Manual (Cabinet Office, Wellington, 2023) at [4.1]−[4.124].

46 The Tribunal was considering the implication of the removal of s 7AA from the Oranga Tamariki Act 1989 on the Treaty of Waitangi.

47 *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493.

The rationale for Ministers not appearing in court to give evidence is found in the Cabinet Manual at [4.31] that states:[48]

> The practice of limiting cross-examination reflects a balance between two competing objectives. The first is to ensure that the courts are able to discharge their functions properly. The second is to preserve the relationship of mutual respect and deference between the branches of government, acknowledging that the first call on a Minister's time must be the House and the duties of executive office.

The Manual also states that the separation of the Executive and the judiciary under New Zealand's system of government means that Ministers must exercise judgement before commenting on matters before the courts or judicial decisions, whether generally, or in relation to the specifics of an individual case (for example, the sentence).[49] Further, the Manual states Ministers should not express any views that are likely to be publicised if they could be regarded as reflecting adversely on the impartiality, personal views, or ability of any judge. If a Minister has grounds for concern over a sentencing decision, the Attorney-General should be informed.[50] In the above-cited instances of a Minister breaching these provisions, the Attorney-General was reported as reminding the Minister of the provisions in the Cabinet Manual. No further action has been taken and if it was needed then that would be a political decision for the Prime Minister.

VIII. Conclusion

The principle of comity has been incorporated into New Zealand's constitutional rules and conventions referred to above. The enforceability of the rules is primarily political, which is in keeping with the nature of New Zealand's constitution. Whether a written constitution would provide greater protection for the independence of the judiciary and the rule of law is unlikely. The most well-known written constitution is found in the United States of America, and it provides little confidence in the concept of the separation of powers being observed in reality. The greatest protection lies in the willingness of those with power to exercise constraint when exercising their power and follow accepted democratic process. Justice Matthew Palmer has argued:[51]

> The foundations of a constitution are culturally embedded in its operation through the values of those who operate it and who, inherently, subscribe to a national culture. Constitutional culture derives from the complex mixture of factors which reflect and affect national culture as it manifests in attitudes to the exercise of public power. The nature of the attitudes to public power in New Zealand national culture means that some norms of New Zealand's constitution run more deeply than others and change more slowly. These norms are culturally key to the way in which New Zealanders believe public power should be exercised.

He further identifies the salient characteristics of New Zealand's constitutional culture as being "authoritarianism, egalitarianism, and pragmatism", and then argues that four norms are essential to the character of the New Zealand constitution: representative democracy, parliamentary sovereignty, the rule of law and judicial independence. This is a good summary of our constitution. He concludes with the assertion: "Our constitution is not a thing, it is a way of doing things. We have

48 Cabinet Manual (Cabinet Office, Wellington, 2023) at [4.31].
49 Cabinet Manual (Cabinet Office, Wellington, 2023) at [4.13].
50 Cabinet Manual (Cabinet Office, Wellington, 2023) at [4.14].
51 Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 567.

constitutional tikanga."[52] He also observes however that he was "not confident New Zealanders currently understand the rule of law or at a crunch, would necessarily stand by it as a fundamental constitutional norm".[53] I fear he may be correct but hope with a greater understanding of the rule of law and the need to protect the independence of the judiciary, there will hopefully be greater acceptance of its constitutional significance.

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52 Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 567 at 597.
53 Matthew S R Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 567 at 589.

The United Nations Expert Mechanism on the Rights of Indigenous Peoples

Te Rōpū Mātanga a te Kotahitanga o ngā Whenua o te Ao mō ngā Motika o ngā Iwi Taketake

Interview with Valmaine Toki*

Valmaine Toki is a Professor at Te Piringa Faculty of Law and has held various roles within the United Nations (UN). First, as a member of the United Nations Permanent Forum on Indigenous Issues, following her appointment by the President of the UN Economic and Social Council, for two three-year terms. Second, as a member of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), following her appointment by the President of the UN Human Rights Council, where she is serving two three-year terms. She holds both roles as the first Māori and first New Zealander to be appointed.

Complementary UN roles and appointments during this time have included the Climate Investment Fund Programme of the World Bank and the High Level Panel of Experts of the UN Food and Agriculture Organisation. She also undertakes a full raft of invitations to present to UN agencies, such as the World Intellectual Property Organisation, and to engage with special mandate holders, such as the UN Special Rapporteur on the Independence of Judges and Lawyers.

The role of Chair of the Expert Mechanism is a significant commitment that involves many responsibilities, including finalising studies and reports, presenting the annual report to the UN Human Rights Council at its September meeting, attending bilateral meetings with Member States as required, and reporting to the United Nations Permanent Forum on Indigenous Issues during its annual session in New York.

The Waikato Law Review Taumauri is grateful to Professor Toki for accepting this interview.

I. The United Nations Expert Mechanism

Waikato Law Review | Taumauri: Please give us a brief background of the UN Expert Mechanism.

The United Nations Human Rights Council (Council) established the United Nations Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) as a subsidiary body to assist the Council in the implementation of its mandate by resolution.[1] The Expert Mechanism provides the Council with thematic expertise on the rights of Indigenous Peoples through studies, research-based advice, and proposals to the Council for its consideration and approval.[2] The Expert

* The Co-Editors in Chief are grateful to Seamus Lohrey for his outstanding contribution to this interview.

1 *Expert Mechanism on the Rights of Indigenous Peoples* HRC Res 6/36 (2007).

2 See, for example, *EMRIP Annual report of the Expert Mechanism on the Rights of Indigenous Peoples* A/HRC/60/65 (August 2025) at [1].

Mechanism also assists UN member states to achieve the goals and realise the fundamental rights articulated in the United Nations Declaration on the Rights of Indigenous Peoples (Declaration).

Sitting alongside the UN Permanent Forum on Indigenous Issues and the UN Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism is one of three UN mechanisms mandated specifically within the area of Indigenous Rights.

In September 2016, the Council amended and expanded the mandate of the Expert Mechanism, via Resolution 33/25. Under this expanded mandate the Expert Mechanism provides technical advice regarding the development of domestic legislation and policies relating to the rights of Indigenous Peoples; provides advice for the implementation of recommendations made at the Universal Periodic Review and by Treaty Bodies, Special Procedures or other relevant mechanisms; assists the private sector, by engaging with the facilitation of dialogue, in order to achieve the ends of the Declaration; identifies and promotes good practices and lessons learned to achieve the ends of the Declaration; and expands the membership from five to seven experts, in order to reflect the seven Indigenous sociocultural regions.[3]

The effect of this resolution was to transition the Expert Mechanism from a primarily study-focused body into an active mechanism capable of undertaking official country visits and providing national-level technical assistance on laws and policies. The addition of dialogue facilitation enables the Expert Mechanism to actively mediate and facilitate dialogue between States and Indigenous Peoples and private sector actors, and provide assistance for direct implementation.

Each year a resolution is presented to the Council by the Expert Mechanism for adoption. This resolution reflects the work undertaken by the Expert Mechanism and urges, encourages and calls upon Member States to, for example, "respect the rights of Indigenous Peoples, as set out in the Declaration, and to address all forms of violence and discrimination, including multiple and intersecting forms of discrimination, faced by Indigenous Peoples".[4]

The work of the Expert Mechanism is key to assisting Member States to realise the fundamental rights articulated in the Declaration. This can be achieved in various ways including through a country engagement request which has shown signs of success for both the requester and Member State in terms of, for example, meaningful dialogue and the realisation of fundamental rights.[5]

As a current example of the expanded Country Engagement Mandate a Technical Advisory Note provided advice and guidance to the House of Commons in the Parliament of Canada, and the Standing Committee on Indigenous and Northern Affairs, on the implementation of the Declaration, in particular arts 3, 8, 9, 22, 33, 40, and 44 in relation to amendments to the Indian Act and in this instance Bill S-2, An Act to amend the Indian Act (new registration entitlements).[6]

3 *Expert Mechanism on the Rights of Indigenous Peoples* HRC Res 33/25 (2016).

4 *Human rights and Indigenous Peoples* HRC Res 60/13 (2025) at [22].

5 See Technical Advisory Note: <www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/MaasoKova.pdf>.

6 Technical advice to Canada. Technical Advisory Note of the Expert Mechanism on the Rights of Indigenous Peoples: <www.ohchr.org/sites/default/files/documents/issues/indigenouspeoples/emrip/countryengagement/emrip-technical-advisory-note-canada-may-2.pdf>.

II. Virtues and Limitations

Waikato Law Review | Taumauri: What do you think are the virtues and main limitations of the Mechanism?

The members of the Expert Mechanism represent the seven socio cultural regions. This is a major feature ensuring that all Indigenous Peoples are regionally represented. As the members are independent experts this results in impartial contributions. The expanded mandate to include country engagements and the focus on facilitated dialogue is another virtue of the Expert Mechanism.

The current limitation centres on the liquidity crisis in the UN. In a recent proposal to the Council, the Expert Mechanism recalled the importance of States providing adequate, predictable and sustainable funding through the payment in full and in a timely manner in order for the Expert Mechanism to effectively carry out its mandate, including country engagement missions, intersessional meetings, coordination with other Indigenous Peoples' rights mechanisms, and expert seminars.[7]

III. Selection Process

Waikato Law Review | Taumauri: What is the selection process of Aotearoa's representatives? Please describe to our readers not just the formal institutional framework but the internal process that is normally followed.

The Expert Mechanism has "staggered" calls for new members to ensure that continuity and institutional knowledge remains. For instance, this year there will be a call for a North American member and last year there were two calls, one for a member from the Arctic region and a member from the Asian region.

As the Expert Mechanism is a subsidiary body of the Council and reports to the Council, the process for member selection is the same as that for all special procedure mandate holders (e.g. Special Rapporteurs). Simply put, the candidates complete the application online. The applications are then shortlisted by the UN Office of the High Commissioner of Human Rights. The Council establishes a Consultative Committee of Council members who then interview each shortlisted member. The Consultative Committee meet and rank the interviewees. The President of the Council then (usually) confirms the ranking decisions of the Consultative Committee and announces the successful candidate at the Council meeting in May.

Although there was some previous discussion for New Zealand to be a member of the Council (comprised of 47 Member States) they are not and therefore cannot be a member of the Consultative Committee nor vote on a Council resolution. However, New Zealand was a founding member of the United Nations and actively engages with the Council through, for example, the Universal Periodic Review process.

7 Human Rights Council *Annual Report of the Expert Mechanism on the Rights of Indigenous Peoples* (8 August 2025) at [46] and [47] <https://docs.un.org/en/A/HRC/60/65>. Proposal 17: Implementation of the Expert Mechanism's mandate in the context of the liquidity and financial crisis.

IV. Current Challenges

Waikato Law Review | Taumauri: What are the main challenges it will face in the future in light of the current geopolitical environment?

The changing geopolitical context provides challenges for the recognition of Indigenous Peoples' rights and consequently the work of the Expert Mechanism. More States are openly questioning the rights of Indigenous Peoples with the potential of undermining their fundamental rights as captured in the Declaration.

After the annual session of the Expert Mechanism the Council meeting in September discusses the resolution and proposals of the Expert Mechanism. With the position of States more candidly challenging Indigenous Peoples' rights, each Council resolution is now difficult, requiring skilful negotiations.

V. Joint Statements with the Crown

Waikato Law Review | Taumauri: In UN Mechanisms for Indigenous Peoples, Tammy Solonec describes Indigenous delegates debating whether to issue a joint statement with the Australian Government, with some fearing it would simply serve the state's interests. Given Aotearoa New Zealand's UNDRIP[8] national plan of action has been put on hold and then abandoned, does the same tension between independence and engagement arise for Māori organisations? At what point does collaboration become a way of legitimising Crown inaction?

The key right in the Declaration and indeed for Indigenous Peoples is that of self-determination. How this is achieved, for Indigenous Peoples in respective areas, invariably involves dialogue with the respective member State.

For some Māori, the expression of self-determination is practised every day. For instance the right to speak te reo Māori. Māori do not wait for a national plan of action nor wait for collaboration with the government for the right to speak te reo. For some Māori, working in a co-governance environment, rather than a collaborative one, steps towards their ability to realise Indigenous rights.

What is required is meaningful dialogue on a nation-to-nation basis.

VI. Recognition and Implementation of Rights

Waikato Law Review | Taumauri: Australia rejected a Human Rights Act in 2010 in favour of a softer National Human Rights Framework. Is there a parallel to New Zealand's own reluctance to legislate UNDRIP, and is a framework ever a real substitute for an Act?

First, jurisdictional comparisons and/or parallels can be contextually challenging. Second, given these comparative jurisdictional challenges, rejecting proposed federal binding legislation, such as the Human Rights Act 2010, for a National Human Rights framework, is arguably not the same as New Zealand's position not to legislate the Declaration, an international instrument, given New Zealand's continual perspective that these are merely aspirational rights and not binding and thus, there is no obligation for implementation.

However, if an argument was made that a parallel may exist, the underlying issue this question

8 United Nations Declaration on the Rights of Indigenous Peoples.

raises is whether or not legislation is required to recognise fundamental Indigenous human rights or "aspirational" rights. From a previous Borrin funded project I explored whether tikanga or Indigenous human rights exist irrespective of legislative recognition and whether tikanga or Indigenous human rights require legislative or constitutional recognition to exist.

This research found that whether it is through a conceptual approach with an examination of legislation and the doctrine of native title or; from an international perspective with comparative case law, native title and legislation; or the review of relevant international environmental and constitutional frameworks, case law and Indigenous rights; or exploring the nexus of where tikanga sits; what is clear is that first, tikanga rights do exist irrespective of legislative recognition. Second, tikanga rights exist and do not require legislative or constitutional recognition to exist.[9]

So, taking a purely Indigenous human rights approach, these rights stand on their own and do not require a framework or legislative recognition to exist.

VII. Access and Funding

Waikato Law Review | Taumauri: UNPFII[10] is open to all Indigenous Peoples, but participants must fund their own attendance or obtain sponsorship through the UN's voluntary fund. Does this mean international Indigenous advocacy risks privileging well-resourced organisations and English-speaking legal advocates over communities most affected by dispossession, and does the voluntary fund actually close that gap or just soften it?

Proximity to venues such as the UN in New York and the UN in Geneva is definitely an advantage for Indigenous advocacy but this has not changed. For Pacific participation attendance is expensive. The UN Voluntary Fund does support participation costs and in this way assists to facilitate wide involvement from Indigenous Peoples. Of note, some UN agencies, such as the World Intellectual Property Organisation (WIPO) also have a Voluntary Fund to support the participation of Indigenous Peoples within the work of WIPO.

The Expert Mechanism routinely includes within their proposals to the UN Human Rights Council a call for States to provide contributions to this fund. So, collectively these "voluntary" funds offers support, however, more can be done in this space.

Within the work of the Expert Mechanism seminars are held annually to discuss their study. For example, with the 2024 study on "Indigenous Peoples right to data including data collection and disaggregation" a seminar was held in Thailand with participation from all seven regions.[11] Additionally with these studies there is a call for submissions that are posted on the Expert Mechanism website to assist with the study. This encourages participation from all regions.

Of note the President of the Human Rights Council reaffirmed the commitment of the United Nations to Indigenous Peoples' meaningful participation, noting the continued support for the work of the Expert Mechanism and highlighted efforts to strengthen Indigenous engagement through the United Nations Voluntary Fund for Indigenous Peoples and dialogue under Council resolution 54/12.[12]

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9 See Borrin Report – Valmaine Toki "Do Tikanga Rights Stand Independently of Legislation?" <www.borrinfoundation.nz/do-tikanga-rights-stand-independently-of-legislation/>.

10 United Nations Permanent Forum on Indigenous Issues.

11 See: <www.ohchr.org/en/events/events/2024/seminar-expert-mechanism-rights-indigenous-peoples>.

12 *Human Rights Council Annual Report of the Expert Mechanism on the Rights of Indigenous Peoples* (8 August 2025) at [53] <https://docs.un.org/en/A/HRC/60/65>.

VIII. Transforming Legal Structures

Waikato Law Review | Taumauri: Expert Mechanism on the Rights of Indigenous Peoples Advice No. 17 emphasises that implementing the Declaration requires transformation of "broader legal structures", not merely the enactment of Indigenous-specific legislation. The study points to Canada's UNDRIP Act 2021 as a model for this kind of systemic approach. What does that distinction mean in practice for Aotearoa New Zealand, where Treaty principles are incorporated across a wide range of statutes but no equivalent implementing framework exists?

Although Canada's parliamentary system is similar to New Zealand's there are key differences particularly when considering the legislative branch. In Canada it is bicameral, with the appointed Senate and the elected House of Commons. Legislation must pass both chambers and receive royal assent to become law, providing additional steps and processes.

Regarding the Treaty principles, these are a judicial creation captured in legislation. Within these legislative frameworks,[13] principles are merely that − only principles that are subject to legislative change and removal.[14] A simple Act of Parliament can revoke the protection and/or recognition of Māori rights.[15] Subsequently any meaningful reliance on a Treaty principle to recognise fundamental rights, such as the right of tino rangatiratanga or self-determination, is problematic. Second, the application of these "principles" is at the discretion of the decision maker.[16] It is often only one factor to be satisfied or considered by the decision maker. This could result in the dilution or a compromise of Indigenous human rights.

So, even if Treaty principles are incorporated across a wide range of statutes and no equivalent implementing framework exists, any inclusion is subject to the political climate. For instance, the purpose of the Principles of the Treaty Deletion Bill 2006 was to delete and remove from every enactment those provisions which contain the expressions (a) the principles of the Treaty; (b) the principles of the Treaty of Waitangi; and (c) Treaty of Waitangi and its principles.

IX. A Canadian Approach in Aotearoa?

Waikato Law Review | Taumauri: The study contrasts Canada's federal UNDRIP Act 2021 with New Zealand's position, described as treating many Declaration rights as "merely aspirational".[17] Do you think a similar legislative approach could work here in Aotearoa, and what would that actually need to look like?

Ideally, the approach taken in Canada could work in New Zealand, however, the different structures and political climate would make this challenging.

13 Arnu Turvey "Te Ao Māori in a Sympathetic Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531.

14 See Principles of the Treaty Deletion Bill 2006.

15 See Phillip Joseph *The Māori seats in Parliament* (New Zealand Business Roundtable, Working Paper, May 2008) for the ongoing dialogue to remove the dedicated Māori seats in Parliament.

16 The inclusion of the "principles of the Treaty" in legislation is usually only one factor that the decision maker takes into account when determining the outcome of a matter and weighted against competing interests.

17 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [26]–[27].

X. Facilitating Domestic Reform

Waikato Law Review | Taumauri: The study notes that Australia's 2023 referendum, which proposed recognising Aboriginal and Torres Strait Islander peoples in the Constitution and establishing a body to advise Parliament on Indigenous issues, was rejected, while progress on the Makarrata Commission remains stalled.[18] What lessons, if any, does that experience hold for UNDRIP implementation and constitutional recognition processes more broadly in the Pacific region? What role can mechanisms such as the EMRIP play where domestic political processes fail or stall in more adequately recognising the rights of Indigenous Peoples?

The Australian 2023 constitutional referendum required a double majority to pass, a high bar. Although early indications were favourable this unfortunately was not reflected in the final results due to a raft of reasons.

The Expert Mechanism is well placed to facilitate dialogue and/or provide national-level technical assistance on laws and policies to achieve the ends of the Declaration. This activity is a key component of the Expert Mechanism's mandate.

Of relevance here, the Expert Mechanism provided advice to Finland on the proposed amendments to the Sámi Parliament Act 1995, for instance, the definition of Sami for the purpose of the electoral roll.[19] This has now been achieved. Subsequently, there is a role for the Expert Mechanism to continue to assist States to facilitate dialogue to achieve the ends of the Declaration.

XI. Regression

Waikato Law Review | Taumauri: Brazil's Law No. 14.701 of 2023 is cited in the study as introducing provisions that directly contravene UNDRIP, including on free, prior and informed consent and territorial rights, demonstrating that legislative action can regress rather than advance Indigenous rights.[20] What domestic or international accountability mechanisms are available to Indigenous Peoples when State legislation is deliberately inconsistent with the Declaration, and what role can the EMRIP continue to play in responding to such regression?

The mandate of the Expert Mechanism includes the ability to provide advice for the implementation of recommendations made at the Universal Periodic Review and by Treaty Bodies, Special Procedures or other relevant mechanisms. Should Indigenous Peoples appeal to a Treaty body to address a breach that is reflected in a recommendation from that Treaty body, the Expert Mechanism can follow up and provide (additional) advice and/or facilitate dialogue. This is also applicable to special procedures, such as Special Rapporteurs, enabling the Expert Mechanism through its country engagement mandate to assist in facilitating dialogue between the parties.

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18 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [17].

19 The Expert Mechanism on the Rights of Indigenous Peoples Country Engagement Mission (10−16 February 2018) – Finland 28 March 2018. See: <www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/country-engagement>.

20 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [37].

XII. Free, Prior and Informed Consent

Waikato Law Review | Taumauri: The paper repeatedly identifies free, prior and informed consent (FPIC) as a point of implementation failure, from Ecuador's Constitution to Mexico City's development plans and West Papua's autonomy law.[21] Does FPIC under UNDRIP work as a veto, a consultation process, or a stronger requirement depending on the seriousness of the impact on Indigenous rights?

Free, prior and informed consent is a human rights norm grounded in the fundamental right of self-determination. The Declaration, includes a right to free, prior and informed consent as a contextualised elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous Peoples.[22]

The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not new in international human rights law.[23] These concepts derive from the elements of the right to self-determination, taking into account the particular historical, cultural and social situation of Indigenous Peoples.[24]

Free, prior and informed consent as provided for in the Declaration has three major rationales. "First, it seeks to restore to Indigenous Peoples control over their lands and resources, as specified in art 28. Second, the potential for free, prior and informed consent to restore Indigenous Peoples' cultural integrity, pride and self-esteem as reflected in art 11 of the Declaration. Third, free, prior and informed consent has the potential to redress the power imbalance between Indigenous Peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties."[25]

Free, prior and informed consent is thus more than "consultation" and viewed as an approach that can restore the relationship of Indigenous Peoples with their lands, territories and resources and provide an avenue of redress between Indigenous Peoples and States.

XIII. Invoking the Declaration in Judgments

Waikato Law Review | Taumauri: The study documents 791 judgments from constitutional and supreme courts in Latin America applying the Declaration between 2007 and 2023, with Mexico, Colombia and Bolivia leading this trend.[26] By contrast, the study also notes

21 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [31], [44] and [55].

22 Expert Mechanism on the Rights of Indigenous Peoples *Free, Prior and Informed Consent: A Human Rights-Based Approach* UN Doc A/HRC/39/62 (10 August 2018) at [3].

23 Expert Mechanism on the Rights of Indigenous Peoples *Free, Prior and Informed Consent: A Human Rights-Based Approach* UN Doc A/HRC/39/62 (10 August 2018) at [7].

24 Expert Mechanism on the Rights of Indigenous Peoples Free, Prior and Informed Consent: A Human Rights-Based Approach UN Doc A/HRC/39/62 (10 August 2018) at [7].

25 Expert Mechanism on the Rights of Indigenous Peoples Free, Prior and Informed Consent: A Human Rights-Based Approach UN Doc A/HRC/39/62 (10 August 2018) at [11].

26 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [58].

New Zealand courts have invoked the Declaration more selectively.[27] What structural or doctrinal factors do you think explains this divergence, and is there scope for New Zealand courts to engage more directly with the Declaration as a source of interpretive authority?

Procedurally, if legal counsel in Aotearoa, New Zealand, refer to the Declaration within written and oral submissions there is more likelihood the Declaration will be included in written judgments. Structurally, Indigenous Peoples in Colombia comprise only 5 per cent of the country's population, in Bolivia Indigenous Peoples are the majority and Mexico contains the largest number of Indigenous Peoples in Latin America but only comprise 20 per cent of the total population. Subsequently, the Bolivian courts references and welcomes the application of the Declaration to assist the constitutional scope of Indigenous rights. Regarding Mexico, their constitution is very progressive when considering Indigenous rights and consequently the courts are more open to applying the fundamental Indigenous human rights in the Declaration. There are currently some exciting and progressive developments occurring in Mexico regarding their constitution and Indigenous rights, including that of free, prior and informed consent.

Recalling that Aotearoa, New Zealand was only one of four States that initially voted against adoption of the Declaration before offering support approximately four years later, this arguably has hastened the judicial and legislative uptake of the Declaration in Aotearoa, New Zealand.

XIV. Māori Representation in the Judiciary

Waikato Law Review | Taumauri: EMRIP Advice No. 17 recommends judicial training on the Declaration "carried out in consultation and cooperation with Indigenous Peoples" and the appointment of more Indigenous judges.[28] How do you think the presence of more Māori judges and tikanga-informed judicial reasoning reshape the application of UNDRIP principles within New Zealand's legal system?

Despite various reports, that recommend more Māori be appointed as Judges, the underrepresentation of Māori judges is still not addressed.[29] The Institute of Judicial Studies (Te Kura Kaiwhakawā) considers it necessary for judges to be educated in tikanga and provides education to all judges, at all stages of their careers. This includes tikanga and te reo. The Institute of Judicial Studies notes the importance of tikanga education for judges. More Māori judges are recommended to be appointed. It follows that more Māori judges need to be appointed and if so, this will result in a lucid approach to applying the Declaration particularly given the synergy with the articles of the Declaration and that of Te Tiriti. However, in saying this, the study mentions the Supreme Court case, *Ellis v R* where the Declaration was drawn upon,[30] within the written judgement, and the Supreme Court bench comprises of both Māori and non-Māori.

27 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) At [64].

28 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) annex at 8.

29 Law Commission *Criminal Prosecution* (NZLC R66, 2000) Appendix A at 99–108.

30 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

XV. State Non-compliance with Judgments

Waikato Law Review | Taumauri: The Norwegian Supreme Court's 2021 *Fosen* decision found a human rights violation against the Sami People in relation to a wind farm, yet the Government delayed implementing the ruling for over a year.[31] The study also references Kenya's failure to execute the African Court's orders regarding the Ogiek people.[32] How should international and domestic law respond to State non-compliance with Indigenous rights judgments, and what remedial frameworks do you think are currently most effective?

The Fosen case was arguably as a result of extensive advocacy by Indigenous and other groups that forced the government and power companies into mediation leading to settlements. In their decision the Supreme Court referenced international instruments including art 27 (culture) of the International Covenant on Civil and Political Rights. With the Ogiek case, again extensive advocacy and awareness raising would be suggested.

Through the lens of the Expert Mechanism, the Country Engagement component of the mandate enables, the Expert Mechanism to, upon the request of Member States, Indigenous Peoples and/or the private sector, engage and assist by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the Declaration. This would help to facilitate dialogue between parties to reach a possible settlement.

XVI. Addressing the Implementation Gap

Waikato Law Review | Taumauri: The study identifies a persistent "implementation gap between legislation and day-to-day reality," a concern first raised by the Special Rapporteur in 2006 and evidently still unresolved.[33] What institutional design features (like independent monitoring bodies) are most critical to closing that gap, and how does New Zealand's current framework measure up?

The Special Rapporteur is referring to the constitutional recognition of the Declaration and, irrespectively, how in some jurisdictions, a gap still exists between the legislation and "day to day reality". Aotearoa, New Zealand not only, initially, voted against the Declaration, but views the Declaration as aspirational with questionable legal effect. There is no recognition of the Declaration and nor any current steps for legislative implementation. So, given this position, it could be argued that the "gap" here in Aotearoa, New Zealand is larger.

However, the Declaration contains fundamental rights, such as the right of self-determination, right to culture and the right to education, so alternative avenues, both nationally and internationally can be pursued to realise these rights.

Through an Expert Mechanism lens, again the Country Engagement part of the mandate provides an ability for the Expert Mechanism to, upon Member State request, provide assistance

31 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [66].

32 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [56].

33 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [11].

and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms. In this respect, it could be considered an independent monitoring as a follow up from an existing recommendation from a treaty body or special procedure.

XVII. Applicability to the Pacific Region

Waikato Law Review | Taumauri: The study is largely focused on the Americas, Europe, Africa and parts of Asia-Pacific. To what extent does the EMRIP study's analytical framework, with its emphasis on constitutional reform, national legislation and domestic courts, translate meaningfully to the Pacific Island context?

The work of the Expert Mechanism, such as studies and reports, includes participation and contributions from all of the seven socio cultural regions. With respect to the Declaration and constitutional reform in the Pacific, the doctrine of state sovereignty provides a restriction on international instruments, such as the Declaration, to regulate matters within the realm of the state. However, the Expert Mechanism can facilitate dialogue if requested to realise the fundamental rights within the Declaration.

XVIII. Direct Engagement at the International Level

Waikato Law Review | Taumauri: The study highlights the Inuit's successful engagement in international forums, including the Arctic Ocean fisheries agreement[34] and the International Maritime Organization, as examples of Indigenous Peoples shaping international law directly.[35] What comparable opportunities exist for Māori and Pacific Indigenous Peoples to engage at the international level? Are there changes that could be made to help them participate more meaningfully?

Yes, there are opportunities for Māori and Pacific Indigenous Peoples to engage at the international level. As you indicate a big hurdle is financial support. Other jurisdictions, such as First Nations, are fortunate to have organised bodies that support not only international participation at the Expert Mechanism sessions and UN Agency meetings but also advocacy in these spaces.

Thank you very much, Professor Toki, for agreeing to this interview. Despite its significance, the United Nations Expert Mechanism on the Rights of Indigenous Peoples remains little explored by scholars and we are sure that your insight will be very valuable to future research in Aotearoa and in other jurisdictions.

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34 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean.

35 Expert Mechanism on the Rights of Indigenous Peoples *Constitutions, laws, legislation, policies, judicial decisions and other mechanisms through which States have taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration* A/HRC/57/62 (2024) at [80].

Critical Insights on the India New Zealand Free Trade Agreement

Ngā Tūtohu Matua mai i te Whakaaetanga Tauhokohoko Wātea o Īnia me Aotearoa

Emeritus Professor Jane Kelsey*

The free trade agreement between New Zealand and India was launched in March 2025 and negotiated from start to finish in less than a year through just five in-person negotiating rounds coupled with virtual meetings between negotiators. The Trade Minister heralded its potential to diversify markets and "deliver thousands of jobs and billions of dollars in additional exports, more jobs and higher incomes for Kiwis".[1] No-one outside government had access to the text to assess those claims. By the time the scrubbed text was available and more sceptical experts could analyse its twenty chapters and multiple annexes the celebratory narrative was firmly established by those responsible for its negotiation.

This article provides a more forensic assessment of the Agreement, highlighting the most notable points of concern that were downplayed or misrepresented in the official version. It also seeks to dispel misinformation that distracted attention from the genuine substantive issues, while generating division and distress, especially to the Indian diaspora and Māori communities. That was made possible by the intense secrecy that shielded the negotiations from informed analysis and responsible debate.

This analysis begins by outlining the asymmetrical context for the negotiations: for the Indian Government, to advance its Make in India strategy in return for limited access to its market, and the political imperative for the National-led Government to conclude an agreement before New Zealand's next election. This leads into a discussion of the domestic politics of the deal, highlighting the key issues of real contention in the agreement and the inflammatory politicking in which it was embroiled.

The substantive analysis of the Agreement focuses on five specific areas: (i) the minimalist economic gains to New Zealand from the deal; (ii) India's potential ability to clawback tariff concessions if it is unsatisfied with New Zealand's assistance to its producers in kiwifruit, apples and honey, and with New Zealand's efforts to achieve US$20 billion of investment into India; (iii) backwards movements in both the process and substance of advancing the Crown's Te Tiriti o Waitangi obligations, including in areas of traditional knowledge and traditional healthcare; (iv) foreseeable commitments on labour mobility; and (v) the hollow commitments to sustainable development.

This, and other, alternative perspectives on the text only became possible after the fact. The Agreement had been signed and the select committee expedited its process through Parliament,

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1 Prime Minister Christopher Luxon and Trade Minister Todd McClay "Historic NZ-India FTA signed in New Delhi" (press release, 27 April 2026).

unimpeded by any rigorous review. Future governments will have to decide how to live with some of the consequences, especially if India exercises its unilateral powers to revoke the most significant tariff concessions and quotas based on its assessment that New Zealand failed to deliver its part of the bargain to the benefit of India's producers.

But there is an important immediate lesson: proposals to fast-track a raft of new agreements under similar conditions of secrecy must be put on hold. The process and substance of these agreements are not matters to be left to the political whims of the Executive. The future requires us to understand the potential downsides of the current templates and explore alternatives for Aotearoa that can address a number of pressing challenges, including rethinking current approaches to trade in response to the climate crisis and harnessing mātauranga Māori and te Tiriti o Waitangi to benefit us all.

I. The Context

The historical context is fundamental to understanding the free trade agreement (FTA) signed between India and Aotearoa New Zealand (India NZ FTA) in April 2026. New Zealand and India began painfully slow negotiations for a FTA in 2010. Those talks stalled, then stopped altogether in 2015 after ten rounds. The main stumbling block was New Zealand's insistence on market access for dairy products, a politically untenable demand of a country with some 80 million smallholder dairy farmers.

The bilateral negotiations were informally rolled into the 16-country Regional Comprehensive Economic Partnership (RCEP) that ran from May 2013 to November 2020, of which India and New Zealand were two of sixteen negotiating parties. The RCEP also failed to deliver a deal. India withdrew in 2019, a year before the agreement was signed. Among its reasons were the demands from New Zealand and Australia that India open its agriculture sector and the paucity of gains for its significant services sector, although the potential impact of China's exports on India's domestic economy was the decisive consideration.[2]

India's approach to RCEP was soon framed by the Make in India strategy Prime Minister Modi launched in 2014.[3] That dictated a cautious approach to traditional FTAs, while seeking a massive boost to investment, manufacturing and employment in the domestic economy.

India was comfortable participating in the United States (US)-led Biden-era Indo-Pacific Economic Framework for Prosperity (IPEF), launched in May 2022. New Zealand took part also. The IPEF was billed as an alternative approach designed to strengthen investment and trade relationships without market access or, for the most part, enforcement. In September 2024, the Government signed and ratified the four concluded IPEF agreements on Supply Chain Resilience, Clean Economy, Fair Economy, and an overarching administrative arrangement. The official announcement emphasised the prospects for catalysing investment, upskilling the workforce and research collaboration.[4] However, it was only ever an observer in the trade pillar, which was never concluded.

2 Rajaram Panda "A Step Too Far: Why India Opted Out of RCEP" (2019) 14(4) Global Asia 82; and Rahul Mishra "Why India Pulled out of the RCEP Free Trade Deal" *DW* (online ed, 11 June 2019).

3 hfAI Lab "What is the 'Make in India' Policy?" (1 October 2025) Hinrich Foundation <www.hinrichfoundation.com>.

4 Government of India Ministry of Commerce and Industry "India signs first-of-its-kind agreements focused on Clean Economy, Fair Economy, and the IPEF Overarching Arrangement under the Indo-Pacific Economic Framework" (press release, 22 September 2024).

The second Trump administration largely abandoned the embryonic IPEF processes in favour of unilateral imposition of coercive tariffs. The uncertainties that generated deepened India's determination to establish India as a global hub, expanding exports and reducing import dependency through various forms of support for domestic production.[5]

A new pivot towards FTAs saw the reported conclusion of numerous trade pacts between 2021 and 2026.[6] Despite the much-heralded relationship with Brazil, Russia, China and South Africa known as the BRICS, India's most significant agreements have been with developed countries. Eight trade agreements have been finalised with individual or groups of countries, including the United Kingdom, the European Free Trade Association of Switzerland, Norway, Iceland, Liechtenstein (EFTA), New Zealand in 2025, and the European Union (EU) in 2026, alongside a controversial and prolonged negotiation with the United States.

Along the way, India had developed its own FTA template to reflect its priorities: securing lower tariffs for its manufacturing exports; attracting inwards investment, especially in infrastructure and productive capacity; transfers of knowledge and technologies that would strengthen domestic producers; and access for the highly skilled middle-class workforce in information technology services, with associated remittances, alongside training of the domestic workforce.

The size and rapid expansion of the Indian market has made it an attractive trade pact partner in return. The relative bargaining power of India's negotiating partners has varied dramatically from the European Union and United States at one end of the spectrum − and New Zealand at the other. It is notable that number of recent FTAs involve concessions by India related to tariffs in the automobile sector, commitments in the digital sector and government procurement that are seemingly inconsistent with its Make in India strategy. Not so with New Zealand.

II. The Domestic Politics of the Deal

Past experience shows how little leverage New Zealand had in a trade negotiation with India at the best of times. When Prime Minister Luxon promised in March 2025 to deliver a FTA with India during the current term of government,[7] due to end in late 2026, he gave away what little negotiating coin New Zealand still had. India was always going to set the terms within which New Zealand had to negotiate. There are reports that its negotiators threatened to walk out if New Zealand continued to seek market access commitments on dairy.[8] With virtually no tariffs on India's exports, New Zealand had relatively little to offer of value beyond knowhow to assist India's domestic development and study or work opportunities for some of its middle-class. This was also a relative low priority for India's officials, with its resources stretched in negotiations with much more significant countries, especially the United States.

The negotiations themselves attracted relatively little attention outside of business circles and were shielded from closer scrutiny by strict secrecy. Officials and supporters were able to herald the potential gains and address few of the costs, aside from low expectations on dairy, before others

5 hfAI Lab "What is the 'Make in India' Policy?" (1 October 2025) Hinrich Foundation www.hinrichfoundation.com; Pratiyogita Darpan official "India's new trade strategy explained" (4 July 2026) YouTube <www.youtube.com>.

6 "India's new trade diplomacy of trade deals" (4 July 2026) IntelliNews <www.intellinews.com>.

7 Adam Pearse "PM in India: Free trade negotiations to restart with India and Christopher Luxon begins visit" *The New Zealand Herald* (online ed, 17 March 2025).

8 Craig McCulloch "India's negotiators threatened to walk out of trade talks with New Zealand, officials reveal" (14 May 2026) Radio New Zealand <www.rnz.co.nz>.

had access to the text.[9] That uncritical appraisal was reflected in the National Interest Analysis,[10] which was produced by the Ministry of Foreign Affairs and Trade that had negotiated the agreement and was tabled in Parliament alongside the text.

Once the text became available,[11] after it was signed, the downsides were apparent to those who could decipher the dense legalese. The agreement has twenty chapters. Many are standard, such as market access for goods, technical barriers to trade, trade in services, but with an Indian twist. Some topics that India finds sensitive are omitted, notably digital trade, or diluted, such as intellectual property rights. The investment chapter omits controversial investor protections and the Investor-State Dispute Settlement mechanism on which India shares New Zealand government's antipathy.[12] The Indigenous or Māori trade cooperation chapter included in recent New Zealand FTAs becomes a more generic cooperation chapter on culture and traditional knowledge. There are side agreements include consultations on dairy and a side instrument on working holiday visas.

Sensitive sectors, notably market access for primary dairy products, are excluded. As discussed below, a commitment to "promote" tens of billions of dollars of investment into India over 15 years allows India unilaterally to revoke tariff cuts and quotas when New Zealand does not deliver. Other gains, such as tariff rate quotas for apples, kiwifruit and mānuka honey exports are also at risk if New Zealand fails to deliver on action plans that are designed to elevate India's domestic productivity of apples, kiwifruit and honey. These plans were not complete at the time of signing, yet they needed to be underway when the agreement would enter into force. Consistent with the Make in India vision, these obligations are intended to make Indian producers more effective competitors in India's domestic and export markets in sectors where New Zealand exporters expect to gain from the FTA.

Regrettably, debates on the substance of the agreement were diverted by pre-election politicking and race-baiting. New Zealand First refused to support the FTA, using inflammatory language and seemingly contradictory messaging on the terms of entry for Indian workers and students.[13] Lobby groups fuelled anti-Māori sentiments through misrepresentations of a hortatory reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[14] This opportunism opened the door to broader racist attacks on the Indian community from Māori and non-Māori.

That left Parliament's Foreign Affairs Defence and Trade select committee as the main forum for analysis and informed engagement on the agreement. Parliamentary Standing Orders[15] require major bilateral treaties to be submitted to the House for treaty examination, along with the National Interest Analysis (NIA). That committee reports back to the House on whether the agreement should proceed, but it lacks authority to make amendments, and in the case of trade treaties the bipartisan majority has historically shown no political will to reject a deal. In this case, the Labour Opposition

9 MFAT − Manatū Aorere "New Zealand India Economic Relationship Overview" (undated) <www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/new-zealand-india-free-trade-agreement/overview>.

10 MFAT − Manatū Aorere "National Interest Analysis: New Zealand India Free Trade Agreement" (April 2026) <www.mfat.govt.nz>.

11 Free Trade Agreement between the Government of New Zealand and the Government of the Republic of India (signed 27 April 2026, not yet in force) [India New Zealand FTA].

12 "India asks 68 countries to renegotiate bilateral investment pacts" *Times of India* (online ed, 16 March 2023); "NZ to block corporate lawsuit rights in Asia trade deal" (14 July 2025) Newsroom <https://newsroom.co.nz>.

13 "Free trade deal discrimination claim just wrong, Luxon says" (6 July 2026) Radio New Zealand <www.rnz.co.nz>.

14 "India FTA reopens door to UNDRIP" Democracy Action Newsletter (online ed, July 2026).

15 "Standing Orders of the House of Representatives 2023" SO 405−408.

belatedly endorsed the agreement to provide the necessary numbers, given New Zealand First signalled its opposition.

The Foreign Affairs Defence and Trade Committee held a peremptory examination over just two days, with individual submitters allocated five minutes, and organisations ten minutes. The committee's report uncritically reflected the advice from MFAT, with only the Green Party tabling a minority view.[16]

III. The Economics of the Deal

India's FTA schedule has about 12,500 tariff lines over almost 800 pages. Some tariffs are cut immediately, some remain unchanged. In between, there are phase-in periods of up to ten years, as well as tariff rate quotas (TRQs) that allow a quantum of product entry into India at a lower tariff or duty free, above which higher tariffs cut in.

MFAT's NIA projects the gains to New Zealand from the Agreement by 2037 (after ten years, by which time most of the tariff cuts should have come into force) will be just 0.07 per cent of gross domestic product (GDP) or NZ$401 million relative to the non-FTA baseline.[17] That is miniscule, even before the problematic assumptions of Computer General Equilibrium modelling,[18] such as perfect competition and full employment, and factors such as trade diversion, are factored in.

Expected benefits also assume that India's domestic market will continue to expand dynamically at the rate it has been. Yet India's GDP growth has been slowing from 9.7 per cent in 2021, with the International Monetary Fund projecting 6.5 per cent for 2026 and it is expected to remain under 7 per cent for the next few years.[19] It is also important to recall that, while New Zealand will receive tariff cuts over the next decade for a number of products, exporters will be competing in that market with many other countries that India has negotiated FTAs with, including the EU, United Kingdom (UK), United Arab Emirates (UAE), Australia and EFTA. The FTA is a partial catch-up with those other deals.

What is perhaps most extraordinary is a seeming own-goal for exports of apples, kiwifruit and mānuka honey. As discussed below, in return for tariff rate quotas on those products, New Zealand has agreed to develop action plans which must be implemented within five years. These plans are designed to enhance India's production and quality of those products, and over time to enable its domestic producers to compete with imports from New Zealand. This is reminiscent of the misjudgement when New Zealand companies exported kiwifruit vines and technical knowhow to Chile, one even winning an export award.[20] Chile then became a major competitor for New Zealand's kiwifruit internationally.

16 Foreign Affairs Defence and Trade Committee *International treaty examination of the Free Trade Agreement between the Government of New Zealand and the Government of the Republic of India,* (54th Parliament, June 2026).

17 MFAT − Manatū Aorere "National Interest Analysis: New Zealand India Free Trade Agreement" (April 2026) < www.mfat.govt.nz> at 10.

18 Richard Denniss and Matt Saunders "The Limits of CGE Modelling" The Australia Institute Discussion Paper (January 2025).

19 International Monetary Fund "India Country Data" <www.imf.org/en/countries/ind>.

20 "Kiwifruit Industry" *Rural Delivery* (online ed, June 2008).

IV. India's Unilateral Clawbacks

India has built into the agreement two significant opportunities to claw back tariff cuts on the basis of its unilateral determination that New Zealand has not met its obligations. In summary:

1. The TRQs for apples, kiwifruit and honey are contingent on New Zealand delivering on Action Plans for each within short timeframes. While the mandatory elements of these plans are described in the Agreement, it appears that the plans themselves are still being finalised. As they are not part of the FTA it has been impossible to assess them and whether they contain leeway relating to New Zealand's performance. Nevertheless, these Action Plans must be in place before the FTA enters into force.
2. Depending on contested interpretations and ambiguous procedural steps, India could also unilaterally claw back tariff reductions to an unpredictable degree based on its assessment that New Zealand has failed to deliver on India's understanding of New Zealand's commitment to promote USD20 billion of investment into India over fifteen years. India could also then determine unilaterally what the cost of that failure has been to India as the basis for "rebalancing" concessions under the FTA.

Chapter 14: *Economic Cooperation and Technical Assistance* sets out the mechanisms for identifying and implementing cooperation and technical assistance between the Parties, their respective business communities, scientific and academic communities, and Māori in the case of New Zealand. The Parties commit to implement concrete actions on priorities they agree on and subject to available resources (art 14.2.4(a)).

Thematic areas for cooperation are set out in two annexes, Annex 14A on Agricultural, and 14B on Non-Agricultural, Cooperation and Technical Assistance, as well as other areas mutually agreed. Priorities are to be "decided by the parties based on their interests, available resources, benefits resulting from those activities, and in accordance with the laws and regulations of the Parties". However, that flexibility is without prejudice to requirements for New Zealand to support mandatory cooperation activities relating to horticulture and honey, discussed below.

A. Agricultural Products

An *Agriculture Productivity Partnership* (art 14.4) is tasked to promote productivity in agriculture and "allied areas" including livestock, fisheries, apiculture, forestry and food processing. The explicit goals are to help increase returns to Indian farmers, fisheries and producers, and promote bilateral engagement across the value chain. The Partnership's mandate includes sectors and cross-cutting themes under Section A of Annex 14A: *Agricultural Cooperation and Technical Assistance Thematic Areas,* which identifies priority agriculture sectors (forestry, horticulture, apiculture and honey, livestock, fisheries and aquaculture, and wine), while Section B applies two cross-cutting thematic areas (organics cooperation, cooperatives). That work will be governed by a Joint Agricultural Productivity Council (art 14.5).

However, apples, kiwifruit and honey are treated differently. "Cooperation" is mandatory and operationalised through Action Plans. Annex 14A notes in art 14A.3.3 "progress in discussions" on the development towards finalisation of a Kiwifruit Action Plan and Apple Action Plan in accordance with a *Memorandum of Cooperation on Horticulture between the Ministry of Agriculture and Farmer's Welfare, India and the Ministry of Primary Industries, New Zealand,* signed in March 2025 (art 14A.3.3). The Annex sets out activities that must be included in the Action Plans for

kiwifruit (art 14A.3.4), apples (art 14A.3.5), and honey (art 14A.4.3) These are aimed at enhancing production, productivity, fruit quality and commercialisation in India.

Specifically, the Kiwifruit Action Plan is to support efforts to enhance kiwifruit production and fruit quality in India, including through Centres of Excellence and technical expertise. The Apple Action Plan is to enhance horticultural productivity, again through Centres of Excellence and collaboration on plant variety rights and intellectual property protection "to enable introduction of high-value, globally developed intellectual property protected plant varieties into India". Parallel obligations on New Zealand relating to honey (art 14A.4), which notes "progress in the discussions" on the development towards the finalisation of an Apiculture and Honey Cooperation Action Plan to support the development of India's honey industry.

However, the Plans were not finalised at the time the FTA was signed and were still not available when it was before the selection committee. That made it impossible for submitters on the FTA to assess their implications for the export market or whether New Zealand would have difficulty delivering on them. It also remains unclear how these parallel instruments will inter-relate and whether there is any leeway that could help to shelter New Zealand from potential clawbacks of the related TRQs.

The critical issue is the direct linkage in Annex 2B to the chapter on Trade in Goods between a review on "achieving meaningful outcomes and tangible progress" under the three Action Plans and India's continuation of TRQs on kiwifruit and apples (art 14A.3.6) and mānuka honey (art 14A.4.4). Annex 2B: *Implementation and Review of Economic Cooperation Action Plans and Related Tariff Rate Quotas Action Plans,* and arts 14A.3.6 and 14A.4.4 say explicitly that continued market access liberalisation through TRQs is contingent on reviews showing there has been tangible progress under the Action Plans on apples, kiwifruit and honey set out in Annex 14A *Agricultural Cooperation and Technical Assistance Thematic Areas*.[21]

These obligations give India leverage to cut back market access in key products if New Zealand fails to deliver to India's satisfaction. Annex 2B cross-references the Action Plans, noting they are in place for five years from their date of commencement, although they may be extended by agreement. Continuation of the product-specific TRQs is subject to New Zealand providing resources and support to fulfill its obligations within the specified timelines.

The Joint Agriculture Productivity Council will meet every six months to review progress. Under Annex 2B, if New Zealand has not been able to fulfil its commitments India can request consultations. If they cannot agree on a solution, the issue is elevated to the Joint Agricultural Productivity Council, from there after 60 days to the Joint Commission, and upwards again to the Parties' Ministers. If there is still no agreement, India can notify New Zealand that it is suspending the quota market access for the relevant product in whole or part. That suspension can continue until India believes New Zealand has met its obligations or a solution has been mutually agreed.

Chapter 14, including Annex 14A which carries the primary obligation on New Zealand to implement these Action Plans, is not subject to dispute settlement. That means India could not enforce compliance through the dispute mechanism. Chapter 2 is subject to dispute settlement, but the Annex 2B sanctions relate to the implementation of Chapter 14. This appears to leave India in the position where it can unilaterally determine whether New Zealand has met its obligations in the Action Plans, and if not, what "rebalancing" it may undertake by suspension of the TRQs. It does

21 The initial text contained a drafting error in art 14.11 that inaccurately cross-referenced to the paragraphs on forestry cooperation instead of honey.

not appear that New Zealand could bring a dispute under Chapter 2 challenging India's exercise of that power.

B. Non-agricultural Products

Annex 14B *Non-agriculture Cooperation and Technical Assistance Thematic Areas* specifies four areas for cooperation: traditional knowledge and traditional medicine (see below), tourism, audio-visual production and sports. Articles 14.7 to 14.9 provide for working groups to be established in thematic areas or sectors other than those in Annex 14A that can undertake work programmes, or develop an action plan where a work plan is considered too resource-intensive or inappropriate.

Annex 14B includes a long list of possible forms of "cooperation" and "technical assistance", which include introduction of high-yield, low-input plant varieties, exchange of high-yield seeds, establishing Centres of Excellence, skills development and training, joint research and development – all of which seem intended to expand production within India of precisely the products that New Zealand aims to export there. The Parties need to agree on the priorities for these initiatives based on their interests and resources and the expected benefits. A Committee on Economic Cooperation and Technical Assistance (art 14.6) will oversee these activities.

V. Investment Commitment a Free Pass to India?

Article 9.2 makes it mandatory for New Zealand to "promote" foreign direct investment (FDI) by New Zealand investors into India "with the aim" to increase investment inflows by US$20 billion (approximately NZ$34 billion at May 2026 exchange rates) within fifteen years of the FTA's entry into force. India will establish a dedicated investment desk to assist those New Zealand investors (art 9.4).

India first introduced such a provision in its FTA with EFTA countries (Switzerland, Norway, Iceland, Liechtenstein) in 2024, which it described as a "binding pledge".[22] The wording here differs slightly, although neither talks of investment by the state itself. Article 7.1 of the EFTA agreement says:[23]

> The Parties share the objectives that the EFTA States *shall aim to increase* foreign direct investment from investors of the EFTA States into India by 50 billion (US dollars) within 10 years from the entry into force of this Agreement and an additional 50 billion (US dollars) in the succeeding 5 years."

and art 7.2 says:[24]

> To achieve the shared objectives in paragraph 3 of Article 7.1, the EFTA States *shall promote foreign direct investments* from investors of the EFTA States into India and generation of jobs in India as a result of such investments.

Article 9.2 of the India NZ FTA merges the two:[25]

22 Government of India "India EFTA Trade Pact: Boosting $100 Billion Investment and 1 Million Jobs" (press release, 11 October 2025).
23 Emphasis added.
24 Emphasis added.
25 Emphasis added.

> New Zealand *shall promote FDI* from investors of New Zealand into India *with the aim to increase* such investment by US Dollars 20 billion within 15 years of the date of entry into force of this Agreement.

"Promote" is a positive obligation on both, with the aim to which the obligation applies remaining the same. The nature and extent of that obligation is contested between the parties: for New Zealand, it requires a best-endeavours effort to promote investment; for India, it is a firm commitment.[26]

Significantly, footnote 7 to the EFTA agreement ties the investment objective to specific GDP growth values, which provides an exit for EFTA if that value is not sustained:[27]

> The Parties recognise that India's rapid economic development *over the last two decades*, a time period during which the country's *annual nominal GDP growth rate of around 9.5% in US dollars terms*, was accompanied by a sustained increase of nominal foreign direct investment stocks from the EFTA States into India (around 13% annual increase over the same time period), resulting in an [sic] foreign direct investment stock of the EFTA States in India of 10.7 billion US dollars in 2022. Based on these observations and on future economic growth foreseen by India, the EFTA States aim to contribute to sustaining, and strengthening their, investment footprint in India. *BI*, from which the Parties anticipate an outperformance margin on investment of 3 percentage points per year, in addition to estimated annual foreign direct investment increases from the EFTA States based on past growth rates as referred to above.

By contrast, footnote 2 to art 9.2 in the India NZ FTA is more general. It does not refer to India achieving a specific growth rate as the basis for the commitment, leaving it open to interpretation:[28]

> The Parties recognise that India's economic performance over the last two decades was accompanied by a sustained increase of nominal FDI into India, reflecting a confidence of foreign investors in the potential of the Indian economy. *Based on this observation, and on estimated nominal GDP growth rate of India over the next 15 years, in line with the past growth rates, New Zealand aims to strengthen* its FDI footprint in India, leveraging a full implementation of this Agreement by the Parties …

New Zealand needs all the potential grounds for exit that it can point to. There is no possibility that the country can deliver that quantum of investment to India. New Zealand's FDI total outflow – investment abroad to all countries – in 2025 was NZ$1.463 billion (one and a half billion dollars). The average for the decade was minus NZ$28 million because there was negative investment (net disinvestment) in many years.[29]

Even if, hypothetically, the target was met, it is hard to see how New Zealanders would benefit from such investment, beyond the investors' shareholders. Capital that is sorely needed for investment in Aotearoa would have been exported offshore, with the government's support. Exporting such massive amounts of capital would also fly in the face of New Zealand's current balance of payments position. New Zealand runs a chronic current account deficit, being NZ$4.6 billion for the December 2025 quarter.[30] That is largely driven by the outflow of profits on foreign investment in New Zealand. Any additional financial outflows of direct investment to India

26 Tuwhenuaroa Natanahira "Luxon and Modi agree on partnership with trade and maritime security ambitions" (11 July 2026) Radio New Zealand <www.rnz.co.nz>.

27 Emphasis added.

28 Emphasis added.

29 Statistics New Zealand Infoshare series BOPA.S06AD20000000C1, Table BOP061AA, last updated 30 September 2025, downloaded 30 July 2026. Total and average calculated by author.

30 Stats NZ – Tatauranga Aotearoa "Current account deficit $4.6 billion for the December 2025 quarter" (18 March 2026) <www.stats.govt.nz>.

would require either additional exports, fewer imports or higher overseas debt to compensate. The New Zealand dollar would fall in value, making imports more expensive and overseas debt more expensive to service.

Which version of the obligation prevails will depend on the enforcement procedures, which are themselves contestable. Again, the text mirrors the EFTA investment chapter. Chapter 9 on Investment and Promotion Cooperation is not subject to dispute settlement (art 9.11). That may work in India's favour. Articles 9.9 to 9.10 set out a multi-step process to assess New Zealand's compliance with this commitment. The terminology is one of obligation: it refers to the "commitment undertaken by New Zealand".

In step one, the Investment Committee of the parties will review progress towards achieving the investment objective, and New Zealand's commitment, after 5, 10 and 15 years, unless a different time frame is agreed. The Committee shall produce a written report. That will include any "unforeseen circumstances" that have had a material effect on progress, in which case the Parties may agree to adjust the objective. The Committee will make decisions by consensus, which gives India (or New Zealand) a veto.

If, at the 15-year review, the investment objective has not been achieved, and India considers New Zealand has not fulfilled its commitment, India can request consultations with New Zealand at the Investment Committee on whether the commitment has been fulfilled and, if necessary, a mutually agreed solution. If the Committee agrees the commitment has not been fulfilled it must make recommendations to the Joint Commission of the Parties. But if the matter remains unresolved at the end of eight months of consultations the matter is elevated from the Committee to the Joint Commission. It remains unclear whether the parties must agree that it remains unresolved, and the consequences of such a disagreement without access to a dispute mechanism.

If the Commission cannot resolve the matter within six months, it is referred to the Parties' respective Ministers. New Zealand can ask for another three years' grace period, but that would need India's consent. If the Ministers have not agreed on a solution within six months, and India "determines that New Zealand has not fulfilled its commitment", art 9.10 allows India to take "proportionate remedial measures to rebalance the concessions" in the FTA by increasing tariffs it has cut or revoking TRQs. That would likely affect goods that are sensitive for India, such as wine, industrial or horticulture products, which are also amongst the last tariffs to be cut. The overall benefits New Zealand secured from those tariff cuts would then be minimal. India must give New Zealand 30 days' notice that it intends to do this, but New Zealand cannot do anything about it.

This "rebalancing" is meant to be temporary until the objective of New Zealand's FDI commitments have been met. But, because this chapter is not subject to dispute settlement it would left to India to decide. New Zealand would have no recourse to dispute India's assessment of compliance or the quantum of harm caused. If these "rebalancing" tariffs continue beyond five years, New Zealand can ask for consultations at the Joint Commission. If the Commission cannot resolve this (by consensus) within six months, the matter is elevated to the ministerial level. If the ministers have not agreed within six months, the hiked tariffs would continue until the next scheduled review, and be examined every three years after that.

VI. Moving Backwards on Te Tiriti o Waitangi

Since the Waitangi Tribunal inquiry into the compliance of the Crown's negotiating processes and substance of the Trans-Pacific Partnership Agreement (Wai 2522) from 2015 to 2023,[31] There have been incremental improvements in subsequent agreements. The India FTA regressed on both process and substance. The negotiation process shut Indigenous Peoples, knowledge holders and traditional communities, including Māori, out of negotiations that were making rules about (and for) them. Te Tiriti o Waitangi is referred to only three times in the entire FTA: one reference to Te Tiriti/The Treaty in Chapter 13: *Cultural, Trade, Traditional Knowledge and Economic Cooperation*; the art 18.5 Treaty of Waitangi Exception, using the version that dates back to 2001; and a variation on that exception as a reservation on trade in services for "trade enabled by electronic means".[32]

A. Process

Under its Mediation Agreement with Ngā Toki Whakarururanga in October 2020, which concluded the Wai 2522 inquiry on issues of secrecy and engagement, the Crown has an obligation to ensure that Māori have genuine and effective influence on negotiations.[33] Input has been facilitated in recent years by confidential access to negotiating texts. Despite the best endeavours of New Zealand ministers and officials, India refused to allow such access to draft texts. That meant Māori had no minimal ability to input, let alone have genuine influence, on the text. During the negotiating round in Queenstown in September 2025, the Crown organised a roundtable with Indian negotiators. However, that had little effect on discussions around the negotiating table judging by the final text.

This backward step was not confined to India. The New Zealand Cabinet also reneged on recent practice in which Tiriti o Waitangi Assessments of FTAs prepared by Ngā Toki Whakarururanga pursuant to the Mediation Agreement have been annexed to the formal NIA tabled in Parliament,[34] although MFAT did post it on its website.

B. Cooperation chapter

Chapter 13 *Cultural, Trade, Traditional Knowledge and Economic Cooperation* is loosely modelled on recent chapters in New Zealand's FTAs with the United Kingdom, EU and UAE entitled *Māori* or *Indigenous Peoples Trade and Economic Cooperation*. The chapter acknowledges that "preserving and promoting traditional language, culture and heritage that are vital for economic benefit and cultural continuity", and "should be implemented in a manner consistent with te Tiriti o Waitangi/the Treaty of Waitangi". But it is unenforceable and any cooperation activities rely on agreement between the parties, including on resources.

India evidently rejected a reference to Indigenous Peoples in the chapter title and insisted that any references to Indigenous Peoples in the text were limited to Aotearoa. That reflects India's

31 See the Waitangi Tribunal Reports on the Wai 2522 Inquiry at <www.waitangitribunal.govt.nz/en/publications/tribunal-reports/by-wai-number>.

32 India New Zealand FTA, chapter 8, art 8.8.2 and List B: Entry 47, reflecting the findings of the Waitangi Tribunal *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2023) that the Electronic Commerce chapter of the agreement breached the Crown's obligations of active protection of Māori data and digital sovereignty.

33 Mediation Agreement between the Claimants and the Crown, Waitangi Tribunal *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2023), Appendix II at [11].

34 Ngā Toki Whakarururanga *Te Tiriti o Waitangi Assessment of the Free Trade Agreement between New Zealand and India* (17 May 2026).

position, expressed in a reservation to the United Nations Declaration on the Rights of Indigenous Peoples and reiterated in footnote 2 to art 13.2, that all people in India post-Independence are Indigenous.

The Objective of Chapter 13 "affirms" the "importance of defensive protection mechanisms that assist in preventing the misappropriation of traditional knowledge", but the Agreement itself has no such mechanisms. A number of international agreements are "recognised" or "affirmed". That affirmation includes the United Nations Declaration on the Rights of Indigenous Peoples, but is explicitly subject to the Parties' respective reservations to the Declaration. This reference created an unexpected furore among some submitters and politicians, who misrepresented it as treating the Declaration as binding on New Zealand.[35] Ironically, New Zealand's FTA with the UAE, which had a similar provision that made no reference to parties' reservations, attracted no similar backlash. In art 15.2 in the UAE FTA reads:

> The Parties agree to implement this Chapter consistent with their respective constitutional frameworks, which for New Zealand includes Te Tiriti o Waitangi/The Treaty of Waitangi. The Parties recognise the importance of relevant multilateral instruments to which both Parties are party to, inter alia: (a) The United Nations Declaration on the Rights of Indigenous Peoples, adopted in New York on 13 September 2007; …

Moreover, the Parties stated that any work, process or cooperation under the chapter must not duplicate what was happening in other forums (art 13.2.3) and must be carried out "within the existing framework" of the Agreement (art 13.3.1). Unlike many other chapters, there is no working group or specific committee responsible for its oversight and implementation; instead, decisions will be made through the top-tier Joint Commission of the Agreement that has no place for Indigenous Peoples. The form of any activities, such as workshops, exchanges and awareness raising, must be agreed by the Parties. Participation by Māori in cooperation activities would be "as deemed appropriate", which presumably requires India to agree.

The chapter is unenforceable, requires both Parties to agree to take action on any particular kaupapa, and depends on both Parties making resources available, with no legal or financial obligation to do so. Within those significant constraints, there may be potential for some cooperation around matters of traditional knowledge, medicines and culture, as discussed below.

C. Treaty of Waitangi Exception

Article 18.5 contains the Treaty of Waitangi Exception that was first introduced into New Zealand's FTAs in 2001:[36]

> **Treaty of Waitangi**
>
> 1. *Provided that such measures are not used as a means of arbitrary or unjustified discrimination* against persons of the other Party *or as a disguised restriction* on trade in goods, trade in services, or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord *more favourable treatment* to Māori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

35 "India FTA reopens door to UNDRIP" Democracy Action Newsletter (online ed, July 2026).

36 Emphasis added.

> 2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 19 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 19.7 may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with its rights under this Agreement.

That exception applies only to measures that constitute "more favourable treatment", or preferences to Māori, that the Crown decides are necessary under Te Tiriti/The Treaty and, if challenged, are not held to involve arbitrary or unjustified discrimination or a disguised restriction on trade.

In 2025 Ngā Toki Whakarururanga and MFAT co-developed a new best-practice Tiriti o Waitangi protection to replace the 2001 Exception, pursuant to the Mediation Agreement in the Wai 2522 inquiry.

> **Te Tiriti o Waitangi**
>
> 1. This Agreement shall not apply to measures adopted or maintained by New Zealand that it deems necessary to protect or promote rights, interests, duties and responsibilities of Māori, including in fulfilment of its obligations under Te Tiriti o Waitangi / the Treaty of Waitangi.
>
> 2. The Parties agree that the interpretation of Te Tiriti o Waitangi / the Treaty of Waitangi, including as to the nature of obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.

The stronger protection applies broadly to measures taken to protect or promote rights, interests, duties, and responsibilities of Māori, including in fulfilment of its obligations under Te Tiriti o Waitangi / the Treaty of Waitangi. It operates as a "carveout" from an agreement for such measures, rather than an exception; omits the problematic language from the 2001 exception on "more favourable treatment", unjustified discrimination or disguised trade restrictions; and clarifies points of ambiguity regarding disputes.

MFAT tabled the new Tiriti o Waitangi protection text for the first time in this negotiation.

India rejected it. The Agreement retains the flawed 2001 exception, which the Crown's National Interest Analysis misleadingly claims "enables the Crown to meet its obligations to Māori under Te Tiriti o Waitangi/the Treaty of Waitangi".[37] Retention of that flawed text raises serious concerns about when and how the Crown will insist that the more effective protection is adopted as a condition of future agreements.

D. Traditional Knowledge, Genetic Resources and Traditional Medicines

Genetic resources, traditional knowledge and healing therapies and practices were the main area of potential mutual benefit for Aotearoa and India, as Māori pointed out during the negotiations, including at the meeting with India officials in Queenstown.[38] The FTA does have provisions relating to them in numerous parts of the text. But the cultural dimension, and the responsibilities of Māori knowledge keepers as kaitiaki, are consistently distorted by the commercial lens and objectives of the "free trade" agreement.

India has repeatedly sought to re-balance the western intellectual property (IP) regime, especially

37 MFAT − Manatū Aorere "National Interest Analysis: New Zealand India Free Trade Agreement" (April 2026) < www.mfat.govt.nz> at 136.

38 Ngā Toki Whakarururanga *Te Tiriti o Waitangi Assessment of the Free Trade Agreement between New Zealand and India* (17 May 2026) at [59]–[83].

the World Trade Organization (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), so as to secure recognition of traditional knowledge and genetic resources. Māori first raised similar issues over western intellectual property rights in trade agreements that override rangatiratanga and kaitiakitanga over mātauranga Māori, in breach of Te Tiriti o Waitangi, during the Wai 262 Waitangi Tribunal inquiry on protection of taonga in the mid-1990s.[39]

At the WTO, India and some other developing countries have repeatedly sought a review of the relationship of TRIPS to the Convention on Biological Diversity (CBD), protection of traditional knowledge and folklore.[40] New Zealand has not supported that call. That may explain why the reference to the review is not in the FTA's Chapter 11 Intellectual Property, but instead in art 13.2 of the unenforceable *Culture, Trade, Traditional Knowledge and Economic Cooperation* chapter. That provision merely "affirms" the instruction in the WTO Doha Declaration to examine the TRIPS-CBD relationship.[41] It also says the Parties must avoid duplication of such work in any other forum, so the issue seems likely to remain stalled with no obligation on New Zealand to change its position at the WTO or to engage it under this FTA.

Section H of the IP chapter is headed *Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*. Article 11.32 just "affirms" the WIPO treaty on *Intellectual Property, Genetic Resources and Associated Traditional Knowledge* and the work of the World Intellectual Property Organization *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. That refers to recent WIPO work that made some small advances on those matters, but stopped well short of what Indigenous Peoples required.[42]

Where the FTA does recognise traditional knowledge, it tends to be treated as if it can be assimilated within, or co-exist with, western IP. Section 11.32 "recognises" the relevance of IP systems to traditional knowledge that is associated with genetic resources, "when traditional knowledge is related to those systems*"* – ignoring the reality that they are in conflict with each other. Likewise, an exchange of views and information is meant to enhance the understanding "of IP-related aspects*"* of genetic resources, traditional knowledge, and traditional cultural expressions. Māori are not referred to; such engagement is to be conducted through officials, with participation by "relevant stakeholders ... if appropriate and practicable".

The operational art 11.33, on how to conduct patent examination to "*take account of traditional knowledge associated with genetic resources",* says nothing about obligations to enhance protections for mātauranga Māori or taonga species and ignores the Waitangi Tribunal reports in the Wai 262 and Wai 2522 inquiries.[43]

E. Rongoā and Traditional Medicine

India has heightened the contradiction between Indigenous values, practices and responsibilities and western science and property rights as it pursues a combination of commercial and public policy goals. India has long sought to use "trade in services" agreements and chapters to advance

39 Maui Solomon "Forty years of struggle to protect Te Tiriti, Te Taiao, Taonga and Mātauarnga", Ngā Toki Whakarururanga (August 2025).

40 Thiru "WTO, Brazil and Peru call for the inclusion of a mandatory disclosure requirement in the WTO TRIPS Agreement" Knowledge Ecology International (20 June 2025) <www.keionline.org>.

41 *The Doha Ministerial Declaration* WT/MIN(01)DEC/1, 14 November 2001 at [19].

42 David Jefferson, Jesse Pirini and Jessica Lai "Patently insufficient: a new intellectual property treaty does little to protect Māori traditional knowledge" (10 June 2024) The Conversation <https://the conversation.com>.

43 Maui Solomon "Forty years of struggle to protect Te Tiriti, Te Taiao, Taonga and Mātauarnga", Ngā Toki Whakarururanga (August 2025).

its interests in "exporting" health workers, including practitioners of ayurveda medicine. The trade rubric might make sense for India: ayurveda might well find a market in Aotearoa New Zealand, given the Indian diaspora is 292,000 or nearly 6 per cent of New Zealand's population and the third largest ethnic group in the country.[44] But it is highly unlikely that rongoā Māori practitioners would find an export market in India, given the local population have well-established traditional medicines of their own.

The "trade" lens gives rise to other contradictions. The services chapter has an Annex 8G *Health-related Services and Traditional Medicine Services*. This includes any service related to the practice of Rongoā Māori, Ayurveda, Siddha, Unani and Sowa-Rigpa fields of medicine. But the Annex treats these practices as one with western private health services, despite their profoundly different conceptual foundations, practices and responsibilities.

Article 8G.4 refers to "trade in traditional medicine services", including on research and development. This positively encourages stronger engagement between the professional bodies and recognition authorities in each country, and the harmonisation of health standards; yet, there is no role for the practitioners to set those standards in ways that safeguard the integrity and health and cultural safety of their practice. The Annex also seeks to expedite verification and licensing procedures, encourage mutual recognition of qualifications and encourage steps to harmonise standards, without recognising these differences and that mutual recognition and harmonisation may be inappropriate. A Working Group established under art 8G.9 again combines the two categories, peopled by officials without any role for or recognition of Rongoā Māori practitioners as kaitiaki. They report to the Committee on Trade in Services that oversees western commercialised services.

Similarly inappropriate treatment of Traditional Knowledge and Traditional Medicines is evident in Annex 14B on *Non-agricultural Cooperation and Technical Assistance Thematic Areas* to Chapter 14 *Economic Cooperation and Technical Assistance*. Article 14B.2 says the Parties may undertake cooperation and technical assistance, while "respecting any rights, interests, duties, and responsibilities" of holders of traditional knowledge and traditional systems of medicine. But traditional healers, including rongoā experts, were not asked if they wanted this form of cooperation, were excluded from the development of these provisions, and have no control over their implementation. Moreover, there is nothing that provides any protections for Māori to exercise those "rights, interests, duties, and responsibilities". Again, the focus is on commercial and export opportunities for profit, not cooperation between knowledge holders in Aotearoa New Zealand and India to bring mutual benefits to them.

The Agreement also provides for cooperation on matters that the Crown knows, or should know, are the antithesis of mātauranga. One proposed area for cooperation is research collaboration to "*enhance scientific validation, evidence based practices, and innovation through the use of biotechnology*" (art 14B.2.2(c)), rather than enhancing the traditional knowledge and traditional systems of medicine themselves. In recent times, western "science" and "evidence based" practices have been used to attack the very validity of mātauranga.[45] The Crown, including MFAT officials, should equally well understand Māori objections to biotechnology as a violation of the integrity of whakapapa. Biotech has the potential to positively harm the traditional medicines that are relied on by practitioners; for example, creating new species of Mānuka may yield more honey, but easily hybridise with native species that put the safety of traditional medicine practice at risk.

44 Stats NZ – Tatauranga Aotearoa "Ethnic Group Summaries: Indian" New Zealand Census 2023.

45 Māni Dunlop "University academics' claim Mātauranga 'not science' sparks controversy" (28 July 2021) Radio New Zealand <www.rnz.co.nz>.

Another clause proposes strengthening cooperation on the development and use of "emerging technologies" for the preservation and restoration of traditional knowledge and traditional medicine systems, including "*artificial intelligence-based software, e-commerce, and digital distribution platforms"* (art 14B.2.2(h)). This assumes that traditional knowledge holders want to "protect" traditional medicine knowledge by sharing it using those technologies. It ignores the essence of mātauranga as a living knowledge that is invested in people who have responsibilities to safeguard it and evolve it to meet the needs of their descendants.

Further, there is nothing in this provision that recognises the need for, let alone provides, protections for data sovereignty or data governance in those AI-based software, e-commerce, or digital distribution platforms. Without control over that mātauranga, there cannot be respect for the rights, interests, duties, and responsibilities of Māori. These same issues were central to the Waitangi Tribunal Wai 2522 claim on e-commerce in the Trans-Pacific Partnership Agreement. The Tribunal found the lack of protections breached the Crown's Tiriti obligations, and that the 2001 Treaty of Waitangi Exception, along with the flexibility of several others, was not enough.[46] Crown officials appear to have repeated that breach through what is proposed in this provision.

Article 13.3 of the *Cultural, Trade, Traditional Knowledge and Economic Cooperation* chapter also raises the possibility for cooperation activities relating to "traditional medicines and healing systems" and training, research and teaching in Ayush and Rongoā Māori practitioners (art 13.3.2(c)). But this depends on both India and New Zealand according it priority and the necessary resources. Neither those decisions, nor the activities themselves, would be driven and controlled by the practitioners themselves.

Māori who saw this one area as a possible win-win from the negotiation expressed profound disappointment and frustration at an opportunity lost, with limited expectations that the cooperation provisions in the agreement might produce any substantive outcome.[47]

VII. Little New on Labour Mobility

There is relatively little difference between this and other agreements with regard to labour mobility and immigration. Guaranteeing access to a quota of nationals who meet certain criteria has become quite common in FTAs in the name of "trade in services". India has a long-standing demand in trade negotiations for temporary access for its skilled workers into other countries through such chapters, so it was already expected to feature in this FTA.

Labour mobility takes five forms in the FTA, none of which is remarkable. New Zealand is required implement these arrangements within a year of the FTA entering into force. In most instances there cannot be a dispute over how individuals have been dealt with; that could only arise from a pattern of practice and once all domestic administrative remedies have been exhausted.

First, Annex 8C follows the standard approach of trade in services chapters: temporary entry is guaranteed for a person (not a company) to deliver a service, subject to specified conditions and limitations, but not to enter the employment market. Any economic needs or labour market tests that apply must be specified in the Party's Annex. New Zealand has made commitments in

46 Waitangi Tribunal *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2021).

47 Ngā Toki Whakarururanga "Submission to the Foreign Affairs Defence and Trade Committee International Treaty Examination of the Free Trade Agreement between the Government of New Zealand and the Government of the Republic of India" (20 May 2026).

Annex 8K to entry for short-term business visitors, for example to a trade fair, and for servicers of equipment; corporate executives, managers and specialists for a maximum three years; an existing employee of an Indian firm to deliver a contract for up to a year in specific professions; and independent professionals, including for IT, for up to a year where there is a shortage.

Most of Annex 8C is concerned with facilitating the entry processes. Those gaining entry still need to comply with visa requirements and licensing and qualification requirements where those apply. The FTA seeks to streamline their entry. Where they are granted entry for more than a year they can bring their partner and dependent children aged under 20 years for the time they are in Aotearoa. A dispute can only be lodged where a pattern of breach is alleged and all administrative remedies, such as reviews, have been exhausted.

Secondly, Annex 8L-1 Section A promises temporary employment entry to a small number of people qualified in Iconic Indian occupations, to a maximum of 600 at any one time. These apply to: yoga instructors (100 visas); Indian chefs (250 visas); Music teachers (50 visas); Ayush practitioners (200 visas).

The third category, temporary employment entry under Annex 8L-1 Section B, applies to skilled workers where New Zealand has identified a skills shortage, with a maximum for IT workers (1000 visas), engineers (1000 visas), construction and building project managers (700 visas), primary and secondary teachers (500 visas), and registered nurses and physiotherapists (900 visas). Entrants can stay for a maximum of three years, then must leave and cannot return to New Zealand under a work visa or permit for three years. They must have necessary qualifications and professional registration or licence, and meet IELTS language requirements. The allocations are to be reviewed every five years.

Next, Annex 8F applies to students and graduates who meet immigration requirements and enrol for a recognised education institution. Under this visa students can work for 20 hours a week, based on work policies that apply to student visas. Once the student completes their full degree programme, subject to fulfilling immigration requirements, including labour market tests, they can stay for a specified maximum time: graduates with a bachelor degree can stay two more years, those with a master's degree three more years and four more years for those with a doctorate. Those who hold a first-class honours degree in a STEM field, including IT, may stay an extra two or three years.

It is important to note that New Zealand has no cap on international students. Rather, it encourages them.[48] Years of government disinvestment in tertiary education has left universities and polytechnics dependent on international fees, and has spawned a private industry of tertiary providers of variable quality. The problem with this is not student numbers, but government policy and the need for more effective and rigorous scrutiny of recruiters and agents.

The final category is a working holiday visa, set out in a side letter.[49] It allows for 1000 multiple entry visas for a one-off temporary stay of 12 months, subject to a series of conditions including age (18−30 years), medical insurance, no dependents, a tertiary qualification and language proficiency, onward ticket, and funds for support, with work being incidental to the visit. The scheme is to be in place within two years of the FTA entering into force.

48 Cristobal Castro Barrientos "NZ wants to double foreign students revenue by 2034 – but does it have the capacity?" (5 March 2026) The Conversation <https://the conversation.com>.

49 Letter from Shri Piyush Goyal (Minister of Commerce and Industry Government of the Republic of India) to Hon Todd McClay (Minister for Trade and Investment Government of New Zealand) regarding working holiday visas (27 April 2026).

As noted earlier, public and political discourse on the agreement, and these commitments in particular, descended into racist attacks on Indian immigrants,[50] and politicking around confidential Cabinet documents.[51] The backlash signals a broader problem with defining immigration as a form of "trade in services". Each new agreement reduces New Zealand's ability to control migration in the light of its skills needs, and ensuring that necessary infrastructure and services, such as housing, health and education, are available for the new immigrants when they arrive. The Productivity Commission's inquiry in 2021−2022 *Immigration – Fit for the Future*[52] highlighted these issues, which have still not been addressed. But that was not the basis for attacks on this FTA.

VIII. Contradictions of Trade and Sustainable Development

The rise of neoliberal globalisation in the 1990s provoked a backlash against FTAs as instruments designed largely for, and by, corporate interests from rich countries, with negative impacts on the livelihoods of the workers, farmers, fishers and women, heightening inequalities, and undermining domestic self-sufficiency rather than strengthening it. More recently, the climate crisis has heightened challenges to the environmental impacts of the free trade model. The inclusion of sustainable development chapters in recent FTAs is a response to that. Yet, they compound the underlying contradictions by purporting to address these concerns without revisiting the model itself that is seen to generate these outcomes.

At the same time, India and many other developing countries have long argued that labour and environment provisions do not belong in trade agreements, seeing them as protectionist measures designed to undermine the comparative advantage of cheaper-labour countries.

Chapter 12: Trade and Sustainable Development in the India NZ FTA seeks to accommodate both positions. Article 2 says:

> The Parties agree to promote international trade in such as way as to contribute towards sustainable development for eradicating poverty and hunger, including towards broad-based, sustained and inclusive economic growth, social development, high levels of environmental protection and progress towards long-term strategies for transition, and to work to integrate and reflect this objective in their trade relationship …

But there is no enforceable obligation anywhere in this FTA to achieve that objective. Even the Action Plans New Zealand agreed to implement on apples, kiwifruit and honey are designed for larger-scale commercialisation, despite being designed to benefit India's poor producers.

On climate change, art 12.8 repeats New Zealand's commitment in other recent FTAs to implement its obligations under the United Nations Framework Convention on Climate Change (UNFCCC) and Paris Agreement, which the 2023−2026 National-led government has backed away from.[53] The requirement in art 12.8.4(b) to "endeavour" to cooperate on climate mitigation and adaptation includes yet another contradictory combination of "sharing knowledge and evidence-based innovations, including traditional, local and Indigenous knowledge, especially

50 "NZ First's Shane Jones defends comparing India FTA to 'butter chicken tsunami'" (21 April 2026) Radio New Zealand <www.rnz.co.nz>.

51 Emma Ricketts "Winston Peters' theories on the India FTA, explained" (8 July 2026) Stuff <www.stuff.co.nz>.

52 New Zealand Productivity Commission *Immigration – Fit for the Future* (Final report, April 2022).

53 Jane Kelsey and Fernando Hernandez "It's not climate lawsuits that will cost NZ; it's the short-sighted bet to ban them" (17 July 2026) Newsroom <www.newsroom.co.nz>; and Kate Newton "New Zealand now at risk of missing all its climate targets, Commission warns" (22 July 2026) Radio New Zealand <www.rnz.co.nz>.

technological innovations, to support solutions to climate change, including climate-smart and resilient agricultural production". But there is no commitment to address agricultural production that account for half New Zealand's greenhouse gas emissions.[54]

IX. Bad Processes Produce Flawed Deals

Given the political context of this agreement in both Aotearoa New Zealand and India and its asymmetries, it was almost inevitable that it would reflect India's priorities for Make in India and its sensitivities, especially on agriculture. The secrecy under which it was negotiated prevented a fully informed cost-benefit analysis, including of the matters raised in this article. Nor was there a genuine opportunity to advocate for alternatives, including by those Māori who were promised the ability to influence such negotiations. The resulting agreement lacked social license and democratic legitimacy, as well as Tiriti compliance. It too easily became the catalyst for political and ideological agendas that misrepresented the content and implications of the agreement while marginalising genuine analysis and debate.

The only potential forum for an open, informed and un-predetermined analysis of the agreement was the *ex post facto review* by the Select Committee. That, too, was curtailed by political expediency, with both major parties allowing only peremptory submissions. Their minimalist report was a bare nine pages, uncritically accepting the trade officials' assurances, with only a three-page dissent from the Green Party.[55] The implementing legislation was likewise rushed through the select committee and Parliament. This continues the rubber-stamp exercise that has become standard in recent years, enabling an expansion of executive treaty making without any effective scrutiny or accountability. Given the announcement by Prime Minister Luxon that the National Party, if re-elected, would prioritise seven new free trade agreements,[56] there is a real urgency to learn from the India NZ FTA.

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54 Earth Sciences New Zealand "Climate change and agriculture" <https://niwa.co.nz/agriculture/climate-change-information-climate-solvers/climate-change-and-agriculture>.

55 Foreign Affairs Defence and Trade Committee *International treaty examination of the Free Trade Agreement between the Government of New Zealand and the Government of the Republic of India,* (54th Parliament, June 2026).

56 "National promises to prioritise seven trade deals if elected" Radio New Zealand (5 July 2026) Radio New Zealand <www.rnz.co.nz>.

The Working of the Westminster System of Parliamentary Democracy in Sāmoa since Independence in 1962

Te Whakahaere o te Pūnaha Westminster o te Manapori Pāremata i Hāmoa mai i te Rangatiratanga Motuhake o te Tau 1962

Professor Fui Asofou So'o*

I. Introduction

Sāmoa celebrated political independence from the United Nations on 1 January 1962. Her constitution blends selected aspects of her indigenous socio-political system with the Westminster-style form of parliamentary democracy. This paper traces some of the important developments in the working of Sāmoa's constitution and political system since independence, focusing on parliamentary representation, head of state office, women parliamentary quota, campaign strategies and political party competition.

The paper concludes that, despite challenges in the implementation of the country's constitution and the practical reality in trying to harmonise the working of the Westminster parliamentary system against the background of an entrenched indigenous socio-political system, those challenges have contributed to further development of both the constitution and Sāmoa's Westminster-style form of parliamentary democracy.

II. Parliamentary Representation

Part V of Sāmoa's constitution establishes parliament comprising the head of state and the legislative assembly. The latter passes bills, which are then approved by the former to become law.

As in Westminster-style parliamentary democracy, Sāmoan voters elect from among their number candidates to represent them in parliament. For this purpose, two distinct types of constituencies were created to elect representatives − Members of Parliament (MP) − to represent their views in parliament. They were the Territorial Constituencies (TC) and the Electoral Constituencies (EC).[1]

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1 A Dziedzic "Constituencies in a Hybrid State: An Examination of the Shift from 'Territorial' to 'Electoral' Constituencies in Sāmoa" (2022) 57 The Journal of Pacific History at 498–523.

A. Territorial Constituencies

TCs accommodated the existing traditional political divisions of Sāmoa. Sāmoa comprised four islands. Savai'i on the western side of the group and 'Upolu on the eastern side were the bigger islands with the smaller islands Manono and Apolima situated between them.

Savai'i Island was divided into six traditional political districts. They were Fa'asālele'aga, Gāga'emauga, Gagaifomauga, Vaisigano, Satupa'itea and Palauli. Each of these political districts had a capital village. They led the social and political affairs of their respective districts. As such, these capital villages were referred to as *pule e ono*, literally, the six authorities on Savai'i Island. In the 1961−1964 Legislative Assembly, Fa'asālele'aga political district was subdivided into four TCs.[2] Gāga'emauga was subdivided into three TCs.[3] Gagaifomauga was subdivided into three TCs.[4] Vaisigano was divided into four TCs.[5] Palauli was subdivided into four TCs.[6] Satupa'itea, the sixth political district, was a TC by itself. In total, Savai'i Island had 19 TCs.

The geographical subdivisions of the six political districts into TCs were also influenced by other factors such as lineages and orator group connections, and population size. Of the country's 45 MPs by 1957, one MP represented about 2,555 people.[7] That number aligned well with Sāmoa's actual population of 114,000 at the time.[8] However, given that about 94,000 *matai* (chiefly) titles were registered at the time but only 5030 *matai* registered as voters for the general elections[9] (as only *matai* could vote and be parliamentary candidates in TCs), just five per cent of the potential TC electorate chose 41 of parliament's 45 seats.

'Upolu Island was divided into three traditional political districts. Ā'ana and Ātua districts were on the western and eastern sides of the Island respectively with Tuamāsaga district in the middle. Like those on Savai'i Island, these political districts were subdivided to create TCs. Ā'ana was subdivided into five TCs,[10] while Tuamāsaga[11] and Ātua were subdivided into eight TCs each.[12] 'Upolu Island, therefore, had 21 TCs.

The smaller Islands Manono and Apolima situated between 'Upolu and Savai'i Islands and their extensions on the 'Upolu Island coastline directly facing them[13] made up one TC. The number of parliamentary seats occupied by representatives of TCs totalled 41.

In the 1964−1967 parliament, four of the TCs had two seats each because of their bigger

2 Fa'asālele'aga No. 1, Fa'asālele'aga No. 2, Fa'asālele'aga No. 3 and Fa'asālele'aga No. 4.
3 Gāga'emauga No. 1, Gāga'emauga No. 2 and Gāga'emauga No. 3.
4 Gagaifomauga No. 1, Gagaifomauga No. 2 and Gagaifomauga No. 3.
5 Vaisigano East No. 1, Vaisigano East No. 2, Faleālupo and Ālataua West.
6 Palauli East, Palauli le Falefā, Palauli West and Sālega.
7 JW Davidson *Sāmoa mō Sāmoa: The Emergence of the Independent State of Sāmoa* (Oxford University Press, Melbourne, 1967) at 377.
8 Cited in Samoa Bureau of Statistics *Report of the Census of Population and Housing of Sāmoa* (Government of Sāmoa, 2001).
9 JW Davidson *Sāmoa mō Sāmoa: The Emergence of the Independent State of Sāmoa* (Oxford University Press, Melbourne, 1967) at 336; and Samoa Bureau of Statistics *Report of the Census of Population and Housing of Sāmoa* (Government of Sāmoa, 2001).
10 Ā'ana Ālofi No. 1, Ā'ana Ālofi No. 2, Ā'ana Ālofi No. 3, Lefaga and Faleāse'elā, and Falelātai and Sāmatau.
11 Sāfata and Si'umu (on the southern side), and Vaimauga East, Vaimauga West, Faleata East, Faleata West, Sāgaga le Usoga and Sāgaga le Falefā (on the northern side).
12 Faleālili, Āleipata Itūpā i Lalo, Āleipata Itūpā i Luga, Lepā, Lotofaga, Va'a o Fonotī, Anoāma'a East and Anoāma'a West.
13 They include Apolima-uta, Manono-uta and Mulifanua villages.

population sizes. They were Fa'asālele'aga No. 1 on Savai'i Island and Ā'ana Ālofa No. 1, Faleālili and Vaimauga West on 'Upolu Island increasing the number of TCs seats from 41 to 45.[14]

Following the passing of the Constitution Amendment Act (No 2) 1991, Sāfata and Sālega Constituencies on 'Upolu and Savai'i Islands respectively were added to the four existing two-seat constituencies increasing to 47 the number of TC seats. In the two-seat constituencies a voter can cast two votes, one for each of the voter's two preferred candidates. The Electoral Amendment Act 2010 divided all the six two-seat constituencies into single-seat constituencies. Election candidates contesting these seats were required to hold *matai* titles regardless of the constituencies in which the villages that conferred the *matai* titles were situated. The Electoral Constituencies Act 2019 redefined the boundaries of some of the TCs. The rationale behind the review were two-fold, first, to restrict to people residing in the constituencies the right to elect candidates in those constituencies (with the option given to *matai* titleholders to choose whether to vote in their resident constituency or the constituency in which their *matai* titles – or any of their titles − were conferred), and second, to have roughly the same number of people represented in parliament by constituency candidates.[15]

From the traditional perspective, the four villages most affected in the changes brought about by the Electoral Constituencies Act 2019 were Salamumu, Le'auva'a and Faleāpuna on 'Upolu Island, and Sāle'aula on Savai'i Island.

Salamumu and Le'auva'a villages were established in the two different subdistricts of Sāfata and Sāgaga respectively in Tuamāsaga political district on 'Upolu Island. These villages were established by the people from Savai'i Island who sought refuge in these places during the volcanic eruption in the early twentieth century that destroyed their settlements in Gāga'emauga political district on Savai'i Island. Even though Salamumu and Le'auva'a were re-established on 'Upolu, they had always been part of Gāga'emauga political district when electing their representatives to the central government of Sāmoa before independence in 1962 until the passing of the Electoral Constituencies Act 2019.

As already mentioned, prior to the enactment of the Electoral Constituencies Act 2019, Gāga'emauga was subdivided into the three TCs of Gāga'emauga No. 1, Gāga'emauga No. 2 and Gāga'emauga No. 3. Le'auva'a was part of Gāga'emauga No. 1 while Sāle'aula was part of Gāga'emauga No. 2. Following the enactment of the Electoral Constituencies Act 2019, however, Sāle'aula was incorporated to Sāfata No. 1 TC while Le'auva'a became an additional TC by itself in Sāgaga subdistrict as Sāgaga No. 2 Constituency. Sāfata and Sāgaga were two of the subdistricts of Tuamāsaga political district on 'Upolu Island.

Va'a-o-Fonotī traditional political district included Faleāpuna village and Fagaloa subdistrict within Atua political district. Between Faleāpuna and Fagaloa was Falefā, a village of Anoāma'a subdistrict. Faleāpuna had always voted with Fagaloa subdistrict as one TC because they were parts of Va'a-o-Fonotī traditional political district. The Electoral Constituencies Act 2019 separated Faleāpuna village from the rest of Vā'a-o-Fonotī TC and incorporated it instead as part of Anoāma'a No. 1 TC.

Therefore, as a result of the 2019 electoral boundary review Salamumu and Le'auva'a villages were separated from their original political district of Gāga'emauga on Savai'i Island. They were incorporated instead to two different subdistricts of Tuamāsaga political district on 'Upolu Island.

14 *The Western Sāmoa Parliamentary Debates* (vol 2, 1963) at 236.

15 Electoral Constituencies Act 2019 (Samoa).

Similarly, Faleāpuna became part of the Anoāma'a No. 1 TC, separating her from her traditional political district and TC of Va'a-o-Fonotī.

B. Electoral Constituencies

Electoral constituencies were specifically established to accommodate the Individual Voters (IV). They were Sāmoan citizens who could trace their descent to European and other non-Sāmoan origins who had resided in Sāmoa in the period before independence. The eligibility criteria for registration in the IV Roll and candidacy for parliamentary elections were Sāmoan citizenship and at least 21 years of age. The election candidates were not required to hold a *matai* title, as this would have entitled them to Sāmoan customary lands thereby disqualifying them as voters in the IV Roll.

In the 1961−1964 Legislative Assembly there were five seats occupied by the IVs. With 41 seats for the TCs and five for the IVs the number of parliamentary seats totalled 46.[16]

In the 1964−1967 parliament the number of IV seats was reduced from five to two. With the number of TC seats being increased to 45 and the number of IV seats reduced from five in the previous Legislative Assembly to two, the total number of parliamentary seats had been reduced from 46 in the previous Legislative Assembly to 45.[17]

The Electoral Amendment Act 2009 changed parliamentary candidate eligibility for IV seats to holders of *matai* titles regardless of the title's constituency of origin. In accordance with custom, a *matai* title was conferred in its village of origin by the *matai* of the same village. *Matai* titles held by parliamentary candidates in TCs adhered strictly to this custom. The change in the Electoral Amendment Act 2009 meant that a parliamentary candidate for the IV seats could hold a *matai* title from a village in any constituency. This criterion change was to ensure that all parliamentary candidates were holders of *matai* titles, thereby aligning with candidate eligibility in TCs. For example, Niko Lee Hang, who was the successful candidate for the IV's seat in the two parliamentary terms from 2001−2005 and 2006−2010 now had to have a *matai* title to be able to contest the next parliamentary general elections in 2011. He took his family title Papāli'i from Sāpapāli'i village in Fa'asālele'aga No. 3 Constituency on Savai'i Island. Similarly, the other successful IV candidate, Pat Ah Him, had taken his family title Mauala'ivao from Malie Village in Sāgaga le Usoga TC on 'Upolu Island.

The Constitution Amendment Act 2015 abolished the two IV seats and replaced them with Urban East Constituency and Urban West Constituency seats. Like the IV candidates in the previous parliament, candidates running in the newly created seats still had to be holders of *matai* titles from any village. Niko Lee Hang successfully contested the Urban East Constituency seat under the Papāli'i title he used in the last parliament. Wayne Fong, using his Faumuinā title from Gagaifo village in Lefaga and Faleāse'elā TC, successfully contested the Urban West Constituency seat.

The Constitution Amendment Act (No 3) 2019 abolished the two Urban Constituency seats and had them incorporated in the Vaimauga and Faleata subdistrict TCs. One constituency was added to the three existing TCs of Vaimauga subdistrict. The other constituency was added to the three existing TCs of Faleata subdistrict. As in other TCs, the candidates had to hold *matai* titles

16 *The Western Sāmoa Parliamentary Debates* (1963) vol 2 at 236 (citing A So'o "O le fuata ma lona lou: Indigenous Institutions and Democracy in Western Sāmoa" (PhD Thesis, Australian National University, 1996) at 384).

17 *The Western Sāmoa Parliamentary Debates* (1963) vol 2 at 236 (citing A So'o "O le fuata ma lona lou: Indigenous Institutions and Democracy in Western Sāmoa" (PhD Thesis, Australian National University, 1996) at 384).

from any of the villages in that constituency. Now that the two Urban Constituency seats had been abolished, Niko Lee Hang took up the new title Tapunu'u from Vailima Village within Vaimauga 4 TC he successfully contested in the next general elections in 2021. Wayne Fong also changed title to Leatinu'u, a title of Vaigaga Village in Faleata No. 2 Constituency whose seat he also successfully contested in the 2021 general elections.

After over 60 years since independence in 1962, the TCs and ECs have successfully merged into one uniform electoral system where only holders of *matai* titles could be election candidates for the country's 51 single-seat-TCs.[18] The 51 seats of parliament, therefore, included 49 from the same number of TCs and the additional two seats that were originally IV seats whose candidacy eligibility changed in 2011 to holders of *matai* titles from any constituency. They transitioned again to two urban seats in the 2016−2020 parliament before becoming additional TCs to the existing TCs in Vaimauga and Faleata in the shortened 2021−2026 parliament following the snap elections in August 2025. Because the technical distinction between TCs and ECs had now been removed, all constituencies were now known as ECs.[19]

Although there had been quiet disapproval of some of the changes brought about by the Electoral Constituencies Act 2019 in some constituencies, there seemed to be a general acceptance of the changes. Perhaps only Sāle'aula village found it difficult to accept the change. As already explained, every traditional political district had a political centre, or capital village. Orator groups of capital villages take the lead in the socio-political affairs of their respective districts. Sale'aula was (and still is) the capital village of Gāga'emauga political district. As the capital village of Gāga'emauga, Sāle'aula had been part of Gāga'emauga No. 1 Constituency. To try and balance population sizes among the three constituencies of Gāga'emauga political district in the 2019 electoral boundary review, Sālae'aula was reallocated to Gāga'aemauga No. 2 Constituency. That decision was perceived by Sāle'aula people and her supporters as forcefully taking away from Sāle'aula her traditional authority, recognition and influence as the capital village of Gāga'emauga political district. One of the political parties in its election campaigns in the 2021 general elections and again in the 2025 snap-elections had taken up the Sale'aula issue as a part of their election campaign manifesto promising that should they become the next government, they would re-allocate Salea'ula back to Gāga'emauga No. 1 TC befitting of her traditional authority and influence. It was the leader of the same political party who strongly objected to the Constituency Amendment Bill at the time it was debated in parliament primarily because of the loss of Sale'aula's traditional political status. In its defence, the Human Rights Protection Party (HRPP) government who was responsible for the Electoral Constituencies Act 2019, argued that even though Sāle'aula village was now part of Gāga'emauga No. 2 Constituency, that did not necessarily remove or in any way downgraded her authority, recognition and influence as the capital village of Gāga'emauga traditional district.

Despite trying to balance constituency populations as one of the two rationales behind the Electoral Constituencies Act 2019, there were still constituencies with much higher populations, especially those around the Apia urban area, such as Vaimauga and Faleata Constituencies. Based on Sāmoa's population of 205,557 in 2021[20] and 51 seats of parliament each constituency should

18 Constitution Amendment Act (No 3) 2019 (Samoa).

19 A Dziedzic "Constituencies in a Hybrid State: An Examination of the Shift from 'Territorial' to 'Electoral' Constituencies in Sāmoa" (2022) 57 The Journal of Pacific History at 498–523.

20 Samoa Bureau of Statistics *Report of the Census of Population and Housing of Sāmoa 2021* (Government of Sāmoa, 2022).

have a population of 4,031.[21] In the 2021 general elections 33 per cent of the country's population resided in the eight combined constituencies of Vaimauga 1−4 and Faleata 1−4. The other 67 per cent of the population lived in the other 43 constituencies.[22] The constituency population sizes in 'Upolu Island ranged from 1,290 (1,933 voters) in Āleipata Itūpā i Luga to 12,740 (5,029 voters) in Faleata 1. In Savai'i the population sizes ranged from 1,095 (1,346 voters) in Faleālupo Constituency to 3,662 (2,440 voters) in Fa'asālele'aga No. 1 Constituency.[23] As gauged from these population figures, the Savai'i constituency populations were generally much smaller than those in Upolu and that there was a bigger discrepancy in population sizes among Upolu constituencies than it was among Savai'i constituencies. Generally, the population sizes of constituencies in Savai'i were much smaller than those in 'Upolu. Clearly, there was a need to address the imbalance in constituency population sizes across the country's 51 electoral constituencies. The *Commission of Inquiry into the General Elections 2021*[24] had made recommendations to that effect which hopefully the government would take up.

The unfair spread of population among the 51 electoral constituencies was starkly reflected in the allocation of funds for constituency development introduced by the FAST government when it came to power in the 2021 general elections and had continued in the current parliamentary term (2025−2030). In its campaign in the period leading up to the 2021 general elections, the FAST party promised to implement a 1,000,000 *Tala* Project for district developments. It further promised that this amount of cash would be handed over to constituencies to spend on their development programmes as they saw fit. When it took office, the FAST government followed through with that promise. Each constituency was given that amount of money every year of its five-year-term to spend as they wished. When FAST regained power following the snap-elections in August 2025, it announced that the One Million *Tala* Project would be renamed the District Development Project (DDP) and one million *tala* per constituency for five years would be increased to two million *tala* to fund constituency projects. Despite the big discrepancies in constituency populations, each of the 51 constituencies in the last and the present parliament terms was equally entitled to the same amount for the DDP fund.

One of the objectives of the Constitution Amendment Act 2019 was to restrict the right to vote in a constituency to voters residing in that constituency. This is still a challenge primarily because of the extended family nature of Sāmoan society. A person can have many families throughout the island group to which one maintains active participation. Because of that a person can hold several *matai* titles from any of these families. To accommodate this aspect of Sāmoan culture, a potential voter can choose to register in the constituency of their title's origin or the constituency in which one resides. That legal strategy works to some extent, but there are still challenges. As the Faleālupo MP had pointed out in parliament, although many of her voters reside semi-permanently on 'Upolu Island, especially around the Apia urban area because of employment and better education opportunities, they are primarily from Faleālupo village on Savai'i Island and would regularly visit their families during school breaks and when on employment leave. Thus, success in having all election candidates hold *matai* titles contesting single seats in all constituencies has yet to be matched by voter-registration on residency only.[25] As noted above in the constituency

21 *Commission of Inquiry into the General Elections 2021: Book 1* (Sāmoa, 2023) at 26.
22 *Commission of Inquiry into the General Elections 2021: Book 1* (Sāmoa, 2023) at 31.
23 *Commission of Inquiry into the General Elections 2021: Book 1* (Sāmoa, 2023) at 27–28.
24 *Commission of Inquiry into the General Elections 2021: Book 1* (Sāmoa, 2023) at 26–29.
25 For more discussion on these points and recommendations therefrom for the future, see *Commission of Inquiry into the General Elections 2021: Book 1* (Sāmoa, 2023).

populations of the rural constituencies of Faleālupo and Āleipata Itūpā i Luga on Savai'i and 'Upolu Islands respectively their voter populations outnumber their resident populations during elections. They thus suggest that a substantial number of voters do not reside in their constituencies as required under the electoral act.

III. Head of State

Sāmoa's *matai* system is hierarchical and encompassing.[26] It connects all the villages. At its apex are the *tama-a-'āiga*, literally the sons of the royal lineages. At the time of the second constitutional convention in 1960, there were four *tama-a-'āiga* titles – Mālietoa, Tupua Tamasese, Matā'afa and Tuimaleali'ifano. Every Sāmoan could trace his or her descent to at least one of these titles. Although the holders of those titles were expected to hold the position of Head of State, there were issues relating to those titles that needed to be decided. For example, who was to be appointed first, should they be the only ones to hold that office, and should the appointment be for life or not.

The highest office of the colonial government at the time of the constitutional convention was the *Fautua* (Advisor). It was held jointly by Mālietoa Tanumāfili II and Tupua Tamasese Mea'ole. The constitutional convention decided that the holders of the *Fautua* Office would be Joint Head of State for life upon independence. Thereafter, only one person would be elected by the Legislative Assembly on terms to be decided by that body.

Eligibility for appointment to that office would be anyone who could be a candidate in parliamentary elections.[27] Upon independence candidates for the IV seats were not holders of *matai* titles. And although the general belief at the time was that only *tama-a-'āiga* were to be appointed as Head of State, that belief was not entrenched in the constitution. Provisions in the constitution relating to these points reflected the debates in the constitutional convention that revolved around the underlying tension between Sāmoan customs and traditions and democracy.

When Tupua Tamasese passed away in April 1963, Mālietoa Tanumāfili II remained the sole holder of the Office. When he in turn passed away in 2007, the Legislative Assembly appointed Tupua Tamasese 'Efi on 20 June 2007 to be the next Head of State for a term of five years.[28] He was reappointed in 2012 for another term of five years.[29] The Legislative Assembly decided that a person could only be appointed for two terms.[30] When Tupua Tamasese 'Efi's second term expired in 2017,[31] Tuimaleali'ifano Va'aleto'a Sualauvī II was appointed. His second term will expire in 2027.

There is speculation in some sections of the local community that Prime Minister La'aulialemālietoa Leuatea Polāta'ivao Fosi Schmidt might decide to make appointments to the Office of Head of State life appointments to which he might initially appoint Tui 'Ātua Tupua Tamasese 'Efi, given the latter's visible public support behind the FAST party's election campaign in the 2021 general elections. As of 2015,[32] the head of state was appointed by the

26 See also A So'o *Democracy and Custom in Sāmoa: An uneasy alliance* (IPS Publications, University of the South Pacific, Suva, 2008), at 1–26.

27 Constitution of the Independent State of Sāmoa, art 18(2)(a).

28 Constitution Amendment Act 2019 (Samoa); and "Former Samoa prime minister elected Head of State" (18 June 2007) RNZ <www.rnz.co.nz>.

29 Constitution of The Independent State of Samoa, art 19.

30 Constitution Amendment Act 2019 (Samoa), s 19(2A).

31 Constitution Amendment Act 2019 (Samoa), s 19(2A).

32 Constitution of the Independent State of Sāmoa, art 18.

party in government. The constitution had to be amended to change the length of the Head of State appointment from two five-year terms to a life term. Of the 51 seats of parliament the FAST party won 31 seats in the snap-election in August 2025. One of the three successful independent candidates in the same elections decided to resign his parliamentary seat, in accordance with The Electoral Amendment Act 2015, and re-contest the same seat as a FAST candidate. He regained his seat by an overwhelming majority thereby increasing to 32 FAST seats. As per the Supreme Court decision of 9 May 2025,[33] the Speaker could also cast a vote to make up a two-third majority. That vote would increase the FAST seats to 33. Two former HRPP MPs have already resigned their parliamentary seats and would, therefore, also need to re-contest their seats. One of the by-elections for these two seats (the Vaimauga Constituency 3 seat) was held on 1 May 2026. If successful, that seat would increase to 34 the number of FAST seats, the magic number to get the needed two-third majority to amend the constitution. The by-election for the other seat (Sāfata 2 Constituency) had yet to be scheduled at the time the present paper was finalised.

The Electoral Amendment Act 2009 required all parliamentary candidates for the IV seats to hold *matai* titles thereby eliminating the opportunity for non-titleholders, as it was the case with the IVs upon independence, to be appointed as Head of State. Given that only *matai* could contest parliamentary seats, is it likely that non-*matai* will be allowed to contest parliamentary seats in the future? Will the *tama-a-'āiga* remain the only category of *matai* to be candidates for the Head of State Office? Will members of the orator groups (*tūmua ma pule*)[34] ever be considered as candidates for the head of state office? These questions are not easy to answer because they imply a disconnect, or a clash, between introduced and the indigenous world views that have both been incorporated in the constitution. It is interesting that one of the seven political parties that contested the snap-elections in August 2025 was named the *Tūmua ma Pule* Reformed Party (TPRP). One of the two questions in the 1990 referendum that decided to accept universal suffrage was: Should Sāmoa have an Upper and Lower Houses of Parliament?[35] While universal suffrage was accepted with a slim majority, the second question was defeated by an overwhelming majority. As implied in that question, the Upper House was expected to accommodate representatives of both the orator groups and the royal lineages. The Lower House, on the other hand, would accommodate the rest of the MPs. The choice of name for that political party reflected an undercurrent yearning among some orator groups to bring back to prominence their traditional influence and recognition as orator groups (or *tūmua and pule*) in Sāmoa's traditional political system that they used to enjoy in pre-colonial times.

IV. The Women Quota of Parliamentary Seats

For a number of factors including cultural reasons, very few women have contested, let alone, win parliamentary seats. For example, in the 27 parliaments since independence, an average of three women per parliament have been elected. In the first four parliaments since independence

33 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32.

34 These orator groups imply the leading orator groups in the political capitals of Sāmoa's 11 traditional political districts as discussed earlier. *Tūmua* refers to the three orator groups in 'Upolu Island whose leadership reside in the three capital villages of Leulumoega, Afega and Lufilufi. The *pule e ono* (six authorities) refers to the orator groups in Savai'i Island led by those residing in the six capital villages in those six political districts. See also A So'o *Democracy and Custom in Sāmoa: An uneasy alliance* (IPS Publications, University of the South Pacific, Suva, 2008) at 1–26.

35 A So'o "Universal suffrage in Western Samoa: The 1991 general elections" (Regime Change Discussion Paper, Department of Political and Social Change, Research School of Pacific Studies, Australian National University, 1993).

(1961–64, 1964–67, 1967–70, 1970–73), there had been no woman who was elected to parliament. In the next four parliaments (1973–76, 1976–79, 1979–82, 1982–85), one woman was elected in each parliament. In the 1985–88 parliament two women were elected followed by one in the 1988–91 parliament, two in the next parliament (1991–96), two in 1996–2001, three in 2001–06, three in 2006–2011, two in 2011–16, five in 2016–21, six in the 2021–2025 (four were elected and two came in under the 10% quota for women seats) and five in 2025–2030. The sixth women seat for the current parliament will be appointed after the two pending by-elections given only male candidates are contesting those seats.[36] That reality, in addition to the international drive for increased women participation in decision-making at all levels, prompted parliament to pass The Constitution Amendment Act 2013. It stipulates that at least 10 per cent of all parliamentary seats are to be occupied by women, thereafter referred to as the 10 per cent quota. The highest number of women elected to parliament were the five who were elected in the 2021−2025 parliament although one of them, Leota Tima Leavai, later resigned following a pending election petition filed by one of her constituency contestants. The fifth and sixth women seats in this parliamentary term were appointed under the women quota provision after all the by-election results were officially declared in accordance with the Supreme Court decision of 2 June 2021.[37]

The vexed issue with this court decision was deferring the appointment of additional women seats under the women quota until after the by-election results were confirmed. It would have been more in keeping with the general drive for greater representation of women at all levels of decision-making had the additional quota seats been filled when the Electoral Commissioner certified the official general election results for the Head of State's endorsement.

However, should the appointed women lose their seats due to election petitions, their replacements could then be appointed from the women candidates with the next highest number of votes in the general elections or the by-elections. In that way, women are accorded the same privilege as male candidates. Elected candidates and appointed women under the quota should all be available in the first meeting of parliament as potential candidates for appointment to ministerial and other parliamentary positions. It is a contradiction that for all the efforts to increase the number of women seats in parliament in order to provide for them more political opportunities to compete with male MPs in a level parliamentary playing field, the Supreme Court decision treats women appointed under the quota as second-class MPs. After all, both male and female candidates all contested seats in the parliamentary elections. Should women candidates win more seats in by-elections, then it's all the better in increasing the overall number of women seats in parliament. The constitution stipulates that at least 10 per cent of parliamentary seats are to be occupied by women, thus, the more women the better.

V. Campaign Strategies

Because of the limited scope of the present paper, only a brief mention of campaign strategies is made as an update of how far Sāmoa has come since independence regarding campaign strategies.

36 A So'o "Political development" in M Meleiseā and others (eds) *Samoa's Journey 1962–2012: Aspects of History* (PrintStop, Wellington, 2012) 44 at 44–76, available at.<https://palemene.ws › members-of-parliament>.

37 *Electoral Commissioner v FAST Party* [2021] WSCA 2 (2 June 2021).

Sāmoan campaign strategies have been discussed at length elsewhere.[38] Since independence, campaigning in parliamentary elections was an individual effort of candidates. A major shift followed the establishment of the political party system when the HRPP was established in May 1979. Thereafter, election manifestos and names of election candidates were published for the information of potential voters and the public generally. By and large, however, the bulk of the campaign effort remained the responsibility of the candidates. These were the general campaign strategies until the lead-up to the 2021 general elections. A major shift in election campaigning was introduced by the newly established *Fa'atuatua i le Atua ua Tasi* (FAST) Party.

The new campaign strategy introduced by FAST aligned well with general Sāmoan philosophy and custom, the core of which centres around recognition, respect and care for all aspects of being Sāmoan and more importantly, their feelings. Up to this time, HRPP campaigning had been restricted to disseminating manifestos with the names of candidates in a public meeting that was conducted in Apia on the main Island 'Upolu and another one in Sālelologa on the bigger Island of Savai'i. Through different local and international media outlets this information was relayed to the public. The new FAST campaign strategy was built on and extended what the HRPP had been doing since its establishment. FAST also published their manifestos with names of their candidates. However, instead of holding meetings in Apia and Sālelologa, FAST travelled to the constituencies throughout the country and held their meetings there with their supporters, potential voters and the general public. There was new excitement in the air with both the adults and youths of all ages and genders participating in these community engagements. The public and in particular the voters, felt respected, recognised, appreciated and emotionally elevated. For the first time there was someone out there who cared about their thoughts, their wishes and their feelings. They felt included as part of the country's political process in electing the country's MPs. The party's campaign machine was no longer confined to just Apia and Sālelologa. Instead, the whole party leadership, election candidates and supporters travelled to the constituencies to meet and shake hands with excited voters waiting willingly to welcome their newfound heroes. The label "Road Show" became the catch phrase for the FAST's exciting campaign strategy. The community was truly and meaningfully mobilised with the clear aim of wooing political support.

Organised and managed by the party leadership, a convoy of buses and supporting vehicles travelled together from Apia and Sāleleoga to the constituencies throughout the country to meet and greet their fans and the community at large. On arrival at their designated venues, the travelling party was officially welcomed in a kava ceremony in accordance with Sāmoan custom, followed by gift-giving which was part and parcel of Sāmoan traditions associated with welcoming travelling parties. The visitors responded appropriately in accordance with custom by presenting their own gifts to reciprocate the hospitality of their hosts.

It was a relatively expensive undertaking on both sides. The expense, however, was a relatively minor consideration if it meant winning the hearts of the voters, and that indeed seemed to be the overall outcome of this new campaign strategy. In fact, the idea and practice of visiting parties travelling to other villages where they were hosted with elaborate cultural hospitality, a feat that was similarly reciprocated by an even higher level of enthusiasm, was an old practice entrenched in Sāmoan custom. For the FAST party to revive this old travelling party (*malaga*)

38 A So'o *Democracy and Custom in Sāmoa: An uneasy alliance* (IPS Publications, University of the South Pacific, Suva, 2008) at 131–151; A So'o "The price of election campaigning in Samoa" in Peter Larmour (ed) *Governance and Reform in the South Pacific* (National Centre for Development Studies, Australian National University, Canberra, 1998) 289 at 289–305.

tradition and refashion it in the context of modern-day political campaigning strategy was a wise and heart-winning political ploy. The community and in particular the voting public had never been so effectively mobilised in this manner before.

Established in September 2020, six months before the 2021 general elections, the FAST party unexpectedly won 24 out of parliament's 51 seats. The two independents who joined them before the first meeting of parliament, one a newcomer to politics who stood as an independent candidate and the other a former deputy prime minister under the outgoing HRPP government, gave FAST the majority of seats to oust the HRPP which had been in power for over 40 years.

An internal power struggle split the FAST party and resulted in the defeat of the FAST minority government in May 2025 prompting a snap-election in August 2025 which the FAST Party again won by an overwhelming majority of 31 seats. HRPP won 14 seats, the Sāmoa United Party 3 seats and three Independents. FAST was reinstated again as the new government.

The FAST Road Show Strategy was thereafter emulated by the other competing political parties. The HRPP started conducting their own road shows in the by-elections that followed the 2021 general elections. All political parties vying for power in the 2025 snap-elections conducted road shows, however, they were no match to the exponential popularity of the FAST Party. From the voters' perspective, the most significant aspect of this form of political campaigning was that it made the voters feel important and respected or as they say in Sāmoan *āmana'ia*. In one of the rally venues in the lead up to the snap-elections in August 2025, a senior *matai* told the HRPP travelling party that his constituency did not support the HRPP in the last general election because HRPP did not seem to care about them. *'E lē āmana'ia lātou.*

Although the media had contributed meaningfully to the dissemination of political information during election campaigning since the establishment of the political party system, it had been confined mainly to the print media and the local television and radio broadcast platforms. The full utilisation of the social media during the FAST campaign in the lead up to the 2021 general elections took to the next level the utilisation of various social media platforms. Legally unregulated and free for all members of the public to post comments and receive feedback online, the rise of the social media brought with it moral and ethical challenges to freedom of information such as online fabrication of information, disinformation, misinformation, slander and online bullying, with authors hiding their identity behind "fake pages". The balance between the "truth" or otherwise in the information that was disseminated widely in the social media seemed to tip ultimately in favour of the FAST party. Arguably, that contributed in a great way to the political success of the FAST party to date as of May 2026.

For a tight-knit community of 200,000 people that prides itself in the eloquent use of its vernacular to define and elevate personal, family, village, religious, royal lineage and orator group relationships, the use of slander and foul language authored by both local and diaspora Sāmoans often hiding behind fake pages has divided Sāmoan society within and without. Added to the media dissemination of political information for better or worse has been the visible nature of political alliances formed and catapulted through political road shows. The ultimate political statement conveyed by the media and political road shows is that if you are not here then you must definitely be in the rival political camp. Overall, resident and diaspora Sāmoans equally lament with regret the divisive nature of Sāmoan society brought about by party political competition. Although there is, to some extent, an element of nostalgia associated with these sentiments, there is nevertheless a great degree of truth in the divisive nature of Sāmoan society brought about by party

political competition. Understandably, the forefathers of Sāmoa's constitution strongly rejected the introduction of political parties into Sāmoa's political system.[39]

VI. Political Party Competition

Political competition is an important aspect of parliamentary democracy. As Diamond and others pointed out democracy denotes a system of government which meets three essential conditions. They are:[40]

> meaningful and extensive *competition* among individuals and organised groups (especially political parties) for all effective positions of government power, at regular intervals and excluding the use of force; a highly inclusive level of *political participation* in the selection of leaders and policies, at least through regular and fair elections, such that no major (adult) social group is excluded; and a level of *civil and political liberties* − freedom of expression, freedom of the press, freedom to form and join organisations – sufficient to ensure the integrity of political competition and participation.

This section starts with the following comment taken from the Supreme Court's decision on 17 May 2021 on the question of whether or not Sāmoa's Head of State had legal authority to declare void the results of the April 2021 general elections and call instead for new elections on 24 May to decide Sāmoa's next government:[41]

> In sixty years of independent and sovereign governance, Samoa faces a Constitutional test which is novel in this country. Following the holding of a General Election two parties have garnered between them all the Parliamentary seats. The number of seats that each party [won] is equal; neither party can claim a majority.

There are three important points to be extracted from this comment − intensive competition for power, constitutional test, and a novel experience in Sāmoa in sixty years of sovereign governance. It might be added that this was not the only constitutional test in this parliamentary term, there were more to come. The rest of this paper revolves around the constitutional tests in the 2021−2025 parliamentary term and how constitutional interpretations and decisions arising therefrom could provide more clarity than before in Sāmoa's constitution for a smoother operation of Sāmoan democracy and the rule of law going forward.

Political party competition for power between the HRPP and FAST Party in the period leading up to the establishment of the FAST government in 2021 was not new in Sāmoa's political landscape. What was different this time around was that competition was far more intensive than in any previous parliament to the extent that both political parties resorted to the court's decisions to settle differences in their political perspectives. Some of the constitutional issues arising out of political competition that were clarified by the court included the appointment of women members of parliament under the women 10 per cent quota; the right date on which parliament was to convene to elect a new government; and the authority of the Speaker of parliament (i) to prevent elected candidates from being sworn in as MPs (ii) to remove MPs and (iii) to cast a vote to make up the required two-third majority to be able to amend the constitution.

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39 A So'o *Democracy and Custom in Sāmoa: An uneasy alliance* (IPS Publications, University of the South Pacific, Suva, 2008) at 63.

40 L Diamond and others (eds) *Democracy in Developing Countries: Volume Two, Africa* (Oxford University Press, Boulder, 1988) at xvi.

41 *FAST Party v Attorney General* [2021] WSSC 24 at [1].

A. Women 10 per cent Quota in Parliament

The Constitution Amendment Act 2013 stipulates that at least 10 per cent of parliamentary seats must be occupied by women. Two constitutional issues were to be clarified in the lead-up to the first meeting of parliament after the general elections in 2021. The first issue was how many seats equated to 10 per cent of the 51 seats of parliament. The second issue was, when should the appointed women take up their seats in parliament. The decision on the first issue supported the HRPP's view that 10 per cent of 51 is six, not five as the FAST had argued. On the second question, the Court ruled that only after by-elections results were confirmed would the additional women seats be appointed. I have already discussed above my views on this second decision of the Court.

B. Time for the Legislative Assembly to Convene

There were two points of view. FAST was adamant that the constitution is very clear on this point. Article 52 of the constitution stipulates that "the assembly shall meet at least forty-five days after the holding of a general elections". The HRPP, on the other hand, took the view that the appointed women under the women quota is part of the definition of parliament and must therefore be present at the first meeting of parliament to elect a new government.[42] Therefore, the meeting of parliament had to wait until the appointment to the sixth women seat was confirmed. At that time the sixth women seat was a HRPP candidate, Ali'imalemanu Alofa Tu'u'au. She was appointed on 20 April. Her appointment would increase to 26 the number of HRPP seats. On the same day Ali'imalemanu was appointed, the two independent candidates − Fiamē Nāomi and Tuala Iōsefo Ponifāsio − joined the 24 elected FAST candidates giving that party 26 seats and a hung parliament. Against that background, the caretaker Prime Minister then advised the Head of State to declare void the results of the general elections and order that the country go back to the polls. The Head of State accepted the caretaker Prime Minister's advice.[43]

FAST filed two separate petitions in the Supreme Court to declare unconstitutional the proclamation of the Head of State and the appointment of Ali'imalemanu. The decisions on both petitions were handed down on 17 May 2021. Ali'imalemanu's appointment was declared unconstitutional and therefore void because the sixth women seat appointment should have been submitted for the approval of the Head of Sate at the same time as the other election results.[44] The Head of State's proclamation was also declared unconstitutional.

On 21 May Ali'imalemanu's application for a stay of execution of the decision on her appointment that was declared unconstitutional on 17 May was rejected. The Appeal Court's decision on 2 June confirmed that 10 per cent of 51 was six as the Electoral Commissioner had stated in his decision on 20 April to appoint Ali'imalemanu.

Let's pause for a minute and examine closely what had unfolded after the general elections. After the two elected independent candidates had joined the FAST party on 20 April giving that party 26 seats against HRPP's 25 seats, FAST understandably wanted parliament to convene right away to elect a new government in accordance with art 52 of the constitution. The HRPP, on the other hand, fought back citing art 48(1) of the constitution. Article 48(1) includes the number of women members of parliament appointed under the women quota. The HRPP had relied on the

42 Constitution of the Independent State of Sāmoa, art 44(1A).

43 A So'o "The Constitutionalization of Sāmoan Politics: A Comparison of the 1975, 1982 and 2021 Political Crises" Journal of Pacific History (2022) 57 407 at 407–423.

44 *FAST Party v Electoral Commissioner* [2021] WSSC 23.

appointment of the sixth women seat to give them 26 seats. That would in turn result in a hung parliament, thereby justifying the caretaker Prime Minister's advice that was given to the Head of State for the country to go back to the polls. However, the Court's schedule of dates for the hearing of the appeal against the non-appointment of Ali'imalemanu and when to hand down that decision avoided a hung parliament. It in turn prevented the country from going back to the polls and denied the HRPP the chance to re-contest all the seats of parliament. Most importantly, however − as the HRPP had argued − it prevented the voting public from deciding which party they preferred to lead the country in the next five years. Instead that critical decision had now become a prerogative of the court.

From the HRPP's perspective, it was critical that the sixth women seat under the quota had to be confirmed before parliament met to elect a new government. However, that confirmation, through the Appeal Court's decision, only came on 2 June 2021, eight working days after the deadline of 24 May, the forty-fifth day after the general elections on which parliament should meet in accordance with art 52 of the constitution. As already referred to, Ali'imalemanu's appointment by the electoral commissioner on 20 April was declared unconstitutional and therefore void on 17 May. The application for a stay of execution of that decision until after the first session of parliament to elect a new government was unsuccessful.[45] However, the application to appeal the non-appointment decision was accepted to be heard on a date to be decided.[46]

The Appeal Court sat on 27 May, three days outside the 45th day after the general elections on which the legislative assembly should meet to decide the next government, with the decision handed down four working days later on 2 June. In other words, the decision to confirm the sixth women seat was only finalised 31 working days later after the initial appointment of Ali'imalemanu on 20 April 2021. The actual appointment, however, had to wait until November when election petition results were confirmed. The two appointed women under the women quota, both HRPP candidates, were only sworn in on 17 May 2022, 13 months since Ali'imalemanu's initial appointment on 20 April 2021.

C. The Speaker of Parliament Refused to Swear-in 18 HRPP MPs

The 26 FAST MPs were sworn in outside parliament on 24 May in accordance with art 56 of the constitution. On the same day the HRPP, through the Attorney General, filed a court petition to declare void the FAST swearing-in ceremony because it was held under a tent outside parliament and the Head of State was not present, among other reasons. Handed down on 28 June the decision declared unconstitutional the swearing-in of 26 FAST MPs. The FAST party appealed the Court's decision. The Appeal Court's decision was handed down on 23 July in favour of the FAST party. The decision clarified that the FAST government was legal as of 24 May when the 26 FAST MPs were sworn-in under a tent outside parliament.

The first meeting of parliament was held on 14 September following the decision of the Appeal Court on 23 July that confirmed the legality of the FAST government. All the 18 HRPP MPs were prevented from entering parliament. A heavy police presence armed with iron shields and iron fences ensured that the HRPP MPs were blocked at least 100 metres away from the parliament house. On the second day, 15 September, HRPP MPs were able to get closer to parliament where

45 *Electoral Commissioner v FAST Party* [2021] WSCA 1.
46 *Electoral Commissioner v FAST Party* [2021] WSCA 1.

they sat outside in the heat of the sun waiting unsuccessfully to be addressed by the Speaker of Parliament.

Following an HRPP court petition, the decision was handed down on 16 September that ordered the Speaker of parliament to swear in the 18 HRPP MPs, which he did the following Monday. The Court reasoned that the HRPP MPs had to be sworn in immediately as representatives of their respective constituencies. It was their legal responsibility to represent in parliament their respective constituency voters who elected them.

Although it was never clearly explained by the Speaker why the 18 HRPP MPs were not allowed into parliament to be sworn in, it is suspected that it was in revenge for not allowing the FAST elected candidates into parliament to be sworn in on 24 May 2021 to elect a new government.

D. Suspension of the Leader and Secretary of the HRPP Opposition Party

Before we look at the suspension from parliament of the leader and secretary of the opposition HRPP, a brief explanation of the root cause of that suspension is necessary. On 23 March 2022 the FAST government and the HRPP opposition signed what came to be known as the Harmony Agreement between the two parties. This is a brief background of the harmony agreement.

Although the FAST government had been established following the Appeal Court decision on 23 July 2021, there were pending court cases relating to alleged corrupt campaign strategies in the lead-up to the general elections in which candidates of both the FAST party and the HRPP were involved. Proceedings of the contempt of court application by the FAST Party and its leader Fiamē Nāomi Matā'afa against the HRPP for scandalising[47] of the Court began on 26 May 2021. The sole purpose of the proceedings was "to restore public confidence in the courts".[48] They were also about "the place of the Courts in upholding the rule of law". Of the eight respondents three were elected members of the HRPP,[49] two were former HRPP MPs,[50] two were former senior public servants[51] and one was a HRPP supporter.[52] The incumbent Attorney General[53] was added as the intervener.

The Harmony Agreement was signed on 23 March 2022 between the leader of the FAST, in her own capacity and as leader of the FAST party, and the leader of the HRPP, in his own capacity and as leader of the HRPP.[54] It states that:

> The two Hon Leaders have engaged in thorough discussion following the aftermath of the April 2021 General Election and the consequent court proceedings and the wider challenges that Samoa now faces. They have formed the common view that it is now necessary:[55]

47 As the Court explains, in this decision we refer to contempt by abusive and false allegations against judges and courts as "scandalising the Court". We recognise that this is a phrase from a past era which is falling into disuse elsewhere; it remains in use in Samoa and is a useful label for this aspect of contempt in this country. (*Fa'atuatua i le Atua Sāmoa ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7).

48 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7.

49 Tuila'epa Sa'ilele Malielegaoi – leader (first respondent); Lauofo Fonotoe Nuafesili Pierre Lauofo – deputy leader (seventh respondent); Leala'ilepule – secretary (fifth respondent).

50 Tole'afoa Fa'afisi – previous Speaker of Parliament (second respondent); and Maiava Visekota Pēteru – former HRPP member of parliament (sixth respondent).

51 Savalenoa Māreva Betham-Annandale – Attorney General (fourth respondent); and Tiatia Graeme Tuālaulelei – previous Clerk of the Legislative Assembly (third respondent).

52 Taule'ale'a Siōeli Alofaifo (eighth respondent).

53 Su'a Hellene Wallwork-Lamb – incumbent Attorney General (ninth respondent).

54 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7.

55 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7 at Appendix A.

- to ensure and secure political and social stability for the benefit of all people and residents of Samoa;
- to promote peace and harmony for the public of Samoa, which is the prevailing public interest in light of the months of uncertainty and disruption to the conduct of governance after the general elections in April 2021;
- to face the current challenges to Samoa in terms of the global pandemic brought upon by Covid-19 and the effect on the environment caused by climate change, as a nation united under God; and
- to recognise that Samoa is a small country with limited resources and therefore particularly vulnerable during times of economic, political and social instability and, further, that Samoa has a unique culture where everyone is connected one way or another either through family ties or *matai* titles;
- to restore public confidence in all the democratic institutions upon which our government and society are founded;
- to restore and acknowledge the traditional honor and dignity belonging to all those who lead the country, from the heart of each family, to the villages, districts and islands; and
- in doing so seek to respect to the overarching spiritual leadership of the various denominations of our Christian churches for the glory of God.

They have, therefore, agreed that, rather than cause further disagreement and disharmony, they discontinue the contempt proceedings and, further: to emphasise and uphold their shared respect, and their support for all Samoa to respect, for the Supreme Court, the Court of Appeal and the judiciary of Samoa; and to record their agreement to move forward under the Constitution, with which Samoa is blessed and under which the courts of Samoa were able to resolve the unprecedented disagreements of the past year.

The bottom line in the harmony agreement is that "the parties agreed that to achieve harmony in Samoa they should discontinue these proceedings". However, the Court declined to accept discontinuance on the grounds that:[56]

> the interests of Samoa also included restoration of the rule of law … if the evidence in the applicants' affidavits were accepted it would support findings of contempt. It would not be possible to commit contempts of the kind alleged without causing serious damage to the rule of law in Samoa.

After an in-depth analysis of relevant legal issues and available evidence the Supreme Court handed down its decision on 23 March 2022. Before its decision was handed down, however, the Court made the following comment:[57]

> Although it is important to publicly record and condemn these contempts of court, we see no need to go further. The precedent now stands. It should now be plain how the Court would deal with repetitions. On this occasion penalties would simply inflame disruptions and conflicts that have done enough harm already. The current Prime Minister and FAST party are anxious to put them to bed. It is not our place to disagree.

The decision reads:[58]

56 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7 at [19].
57 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7 at [117].
58 *Fa'atuatua i Le Atua ua tasi (FAST) Inc v Malielegaoi* [2022] WSSC 7 at [118] and [119].

> We find the first, fifth and sixth respondents guilty of contempt of court. In the very special circumstances we impose no penalty. We find the other respondents not guilty of contempt of court. There will be no order as to costs.

The first, fifth and sixth respondents were the leader and secretary of the HRPP, and a former HRPP MP respectively.

Coming back to the suspension of the leader and secretary of the opposition on 29 April 2022, the Speaker of Parliament received from the Deputy Prime Minister (DPM) a letter expressing concern about MPs bringing disrepute to the dignity of parliament. On 4 May the Speaker informed parliament about this letter. Under s 181(1) of the Standing Orders of Parliament "[t]he Speaker shall consider the nature of the complaint or alleged breach and determine whether a question of privilege is involved." The Speaker believed that the question of privilege was involved and the complaint was therefore referred to the Privileges and Ethics Committee of Parliament (PEC) for their consideration and report back to the next session of parliament. The DPM then moved the motion for parliament to accept the decision of the Speaker to refer the matter to PEC. Parliament voted in favour of the motion. On 24 May 2022 the report of PEC was tabled in parliament. It recommended suspending the leader and secretary of HRPP until an appropriate time to be decided by parliament, or in Sāmoan *se'ia iai se aso*. The two HRPP MPs filed in court a petition to quash their suspension and reinstate them as "full Members of Parliament to attend and participate at the proceedings of Parliament".[59] The Court's decision was handed down on 30 August 2022. It found that the:[60]

> … disciplinary rules and practice [of parliament] do not give the persons who are the subject of adverse recommendations by the Privileges and Ethics Committee, the opportunity to be heard as to penalty before the Assembly. This is a failure which breaches a fundamental plank of the rules of fairness that are secured in art 9(1) of the Constitution – the right to be heard.
>
> The Assembly's resolution as to the Applicants' liability for the contempt of Parliament, was not itself directly challenged, and so there is no reason for this Court to consider much less disturb that finding.
>
> … we consider the treatment of both of the Applicants rights to natural justice with respect to penalty were inconsistent with their rights preserved under Article 9(1) of the Constitution. We accordingly declare that the part of the Assembly's motion which purports to suspend the Applicants is void as at the date of the declaration in this judgment.
>
> … as at the date of this decision, there is no lawful impediment in the way of the Applicants resuming their duties as members.

The leader and secretary of the HRPP took up their seats in parliament on 20 September 2022.

1. Second suspension of the leader and secretary of the HRPP

In the Court's decision on the first suspension of the leader and secretary of the opposition, it mentioned that "the Assembly may wish to revisit the penalty aspect, consistently with the Constitution, but that is entirely a matter for that body".[61]

Following the Supreme Court's voiding of the initial suspension of the leader and secretary of the HRPP, the Speaker of Parliament directed PEC to reconvene "to take necessary steps in accordance with Article 9(1) of the Constitution so as to determine a penalty for the alleged

59 *Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35 at [31].
60 *Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35 at [112].
61 *Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35 at [112].

members." Following the tabling of the PEC's Second Report and Recommendations, Parliament on 18 October 2022 suspended for the second time the leader and secretary of the HRPP for 24 months without remuneration and allowances. The matter was heard in the Supreme Court on 24 April 2023.

In this second proceeding, the Applicants challenged (i) the Assembly's contempt of Parliament decision made on 24 May 2022; (ii) their second suspension from Parliament for 24 months; (iii) the denial of their remuneration and allowances made on 18 October 2022; and (iv) amendments made to the Standing Orders by Parliament by the insertion of Standing Order 187(7) and 187(8).[62]

Handed down on 4 July 2023, the Court's decision stated that the Legislative Assembly's suspension of the leader and secretary of the opposition party (HRPP) breached art 44(1) of the Constitution and the framework of Sāmoa's Constitution of responsible government. The suspensions were therefore void. For those reasons the leader and secretary of the opposition were entitled to be paid their remuneration and allowances that were withheld on account of the terms of the suspensions. Sections 187(7)(iii)−187(7)(v) inclusive of the Standing Orders of Parliament breached art 13 of the Constitution and, therefore, also declared them to be void.[63]

The Court's decision on the second suspension of the leader and secretary of the HRPP was appealed by the Speaker of Parliament. Handed down on 5 February 2024, the Appeal Court ruled that:

(a) The Speaker's appeal is dismissed;

(b) The cross-appeal of the first and second respondents is allowed and it is declared that the decision of the Assembly on 18 October 2022 to suspend them from the Assembly had no basis in law and was accordingly void; and

(c) The first and second respondents are entitled to be paid their Parliamentary salaries and allowances relating to the period or periods of their suspensions and it is ordered that they be paid forthwith.

The decision of the Appeal Court settled once and for all the issues relating to two suspensions by the Legislative Assembly of the leader and secretary of the HRPP. The cause of the two suspensions was contempt of parliament, which in turn originated from the Harmony Agreement signed between the FAST and HRPP on 15 February 2022 and legally endorsed by the Supreme Court on 22 February 2022.

There are constitutional lessons learned from these two suspensions. First, Parliament's decisions and Standing Orders do not override the constitution. Second, suspension penalties decided by Parliament against MPs should seriously consider their implications on law-making responsibilities of MPs as representatives in parliament of their respective constituencies. Third, the Speaker's belief that Parliament is independent of the Court in its own decision-making processes and resulting outcomes was unfounded. And fourth, these four decisions are constitutional guides going forward.

Regarding the contempt of court proceedings and decision, as the Court had reminded, it was an exercise in court scandalising deterrence. That is, it was for law abiding citizens to uphold and respect the rule of law. However, there are issues from a layman's perspective that might also

62 *Malielegaoi v Speaker of the Legislative Assembly* [2023] WSSC 37.
63 *Malielegaoi v Speaker of the Legislative Assembly* [2023] WSSC 37.

contribute to the law-abiding citizens' willingness, or otherwise, to uphold and respect the rule of law.

From the HRPP's perspective, the first issue relates to small societies like Sāmoa which has a population of 200,000 people. As the Supreme Court had pointed out in its Contempt of Court Judgment relating to the Harmony Agreement between FAST and HRPP, "Samoa has a unique culture where everyone is connected one way or another either through family ties or *matai* titles." As long as you know your genealogical connections, everyone is your brother and sister, your aunt and uncle, your father and mother. Family occasions like funerals, title conferring ceremonies, weddings, reunions and others, where families come together is a testament to Sāmoa being a family community. The leader of the FAST Party and Prime Minister, Fiamē Nāomi Matā'afa, is a fourth cousin of the Chief Justice. As a closeknit community, Samoans not only know their genealogies, they also know which family members tend to "hang out" together. The HRPP did make a submission to the Court that the Chief Justice be recused from presiding over some of the key cases because he was not only a fourth cousin of the Prime Minister, he was often spotted "hanging out" with her. The petition was rejected.

The second HRPP issue relates to the scheduling of hearing and decision dates. For example, it took the Court 30 working days between the date on which the case against the appointment of the sixth women seat was filed on 21 April to June 2 when the appeal decision was handed down. Compare that to the pickwick case on 23 May against the Head of State's second proclamation to defer the convening of parliament to a later date. That case was filed, heard and decided in five hours, and on a Sunday. Both cases decided the political death of either party. Had the sixth women seat been decided before 24 May 2021, it would have resulted in a hung parliament, which in turn would have meant that the country would go back to the polls. Contrastingly, the pickwick decision paved the way for the Appeal Court's decision on 4 July that reversed the Supreme Court decision on 28 June that declared void the FAST swearing-in ceremony on 24 May 2021. The Appeal Court's decision relied predominantly on the application of the doctrine of necessity.

The questionable decision of the Supreme Court to add a seventh women seat under the women quota to which a FAST candidate was appointed was appealed by the HRPP candidate who was appointed to the sixth women seat. Furthermore, whilst it took until 17 May 2022 − 13 months since her initial appointment on 20 April 2021 − for the HRPP member to take up her seat in parliament, the FAST member took up her seat in a few days after the same decision. The Supreme Court's decision was appealed by the HRPP candidate who was appointed to the sixth seat. Presided over by two overseas judges, the appeal found that the addition of the seventh women seat was unconstitutional. The initial Supreme Court decision, therefore, did not contribute to restoring respect for the rule of law.

In all the politically critical court decisions mentioned above, the Chief Justice was present as a member of the Coram. They included the decision that deferred the appointment of the sixth women seat until after the by-elections in November 2021, the pickwick decision on 23 May – the day before the swearing-in ceremony of the FAST MPs, the appeal decision that reversed the initial decision that declared void the FAST MPs swearing-in ceremony on 24 May 2021 and the appointment of a FAST candidate to a seventh women seat. It was two overseas judges that decided against a seventh women seat and ordered that she vacated that seat immediately.

The harmony agreement that was signed on 23 March 2022 did not solve once and for all Sāmoa's political issues that it was supposed to solve. Those who were found guilty of contempt of court admitted to and withdrew their scandalous comments. The FAST government, on the other

hand, prolonged community divisiveness by having the leader and secretary of the opposition party suspended from parliament twice. The matter was finally settled once and for all following the Appeal Court decision on 5 February 2024. Fifteen months later on 27 May 2025, the FAST government ended abruptly when her budget was defeated in Parliament by 20 FAST MPs who had sided with 14 HRPP MPs. By which time the FAST government was already irreversibly split into two factions after La'auli Leuatea Polāta'ivao Fosi Schmidt, the president of the FAST Party and one of its senior Cabinet Ministers, had been charged by the Police on 3 January 2025 on allegations of fabricating evidence, conspiracy to commit an offence, defamation, and harassment via electronic means.[64] Community divisiveness did not end with the contempt of court decision and the harmony agreement, they seemed to have further propelled it.

That brings the present discussion to the last constitutional issue of interest, the two-third majority required to pass a constitution amendment.

2. The Speaker's vote to amend the constitution

One of the controversial issues in the period leading up to the general elections in 2021 was the passing of the three bills to separate the Supreme Court[65] and the Land and Titles Court. One of the campaign promises of the FAST party was to re-separate the Supreme Court and the Land and Titles Court. That required amending the constitution by a two-third majority of MPs.

Given there were 53 seats of parliament,[66] two-third of that number is 35.3. The 0.3 fraction was rounded up to 1, thus two-third of 53 increased from 35 to 36. That was the number of seats FAST needed in order to pass the Constitution Amendment Bill. The FAST party had 34 seats. It is likely that by the time of the third reading of the bill on 26 February 2025, FAST knew that one of the HRPP MPs would support the bill, thereby giving them 35 votes. Therefore, they needed one more vote. When the motion was moved to pass the bill, the Speaker's vote was counted as the 36th vote that was required to get the two-third majority. One of the HRPP MPs did indeed support the bill. On 26 February 2025 parliament passed the Constitution Amendment Bill 2025 by 36 votes to 16.

The leader and deputy leader of the HRPP disputed the Speaker's vote arguing that arts 58(2) and 109(1-2) of the Constitution prohibit the Speaker from casting a vote. According to art 58(2):

> The Speaker, or the Deputy Speaker or any other Member of Parliament while presiding over a sitting of the Legislative Assembly in the absence of the Speaker, shall not have a deliberative vote but, in the case of an equality of votes, shall have a casting vote.

Article 109(1) provides that a constitutional amendment bill is passed "if a bill for any such purpose is supported at its third reading by the votes of not less than two-thirds of the total number of Members of Parliament (including vacancies)." Article 109(2) says that "[a] certificate under the hand of the Speaker that a bill has been passed under the provisions of clause (1) shall be conclusive and shall not be questioned in any Court."

The Speaker argued that he also needed to cast a vote on behalf of his constituency, a decision he told parliament was supported by the Attorney General after seeking her counsel.

The leader and deputy leader of the HRPP, took the matter to the Court. They challenged "whether the Speaker was permitted to cast a deliberative vote". They also challenged "the

64 SS Sanerivi "La'auli charged" *Sāmoa Observer* (online ed, Apia, 3 January 2025).

65 The Constitution Amendment Act 2020 (Samoa); The Judicature Act 2020 (Samoa); The Land and Titles Act 2020 (Samoa).

66 Fa'agaseali'i and Ali'imalemanu were the 52nd and 53rd MPs. They came in under the 10 per cent quota.

certification of the third reading vote if it is found that the Speaker was not permitted to vote".[67] The leader of the HRPP told parliament that during his lengthy term as a Member of Parliament from 1980 to the present, "a speaker has never exercised a deliberative vote in a constitutional amendment vote".[68]

The Chief Justice sat alone to hear this matter on 29 April 2025. According to the Chief Justice "[t]he issues raised in this matter are new and asks important questions about the role of the Speaker and the Speaker's representative function and duties to his or her constituents."[69] Handed down on 9 May 2025, the decision reads:[70]

> I am unable to accept the Applicants interpretation of 58(2), which purports to apply to the prohibition against casting a deliberative vote to a constitutional amendment under art. 109. I find that the Speaker was permitted to vote at the third reading of the CAA [Constitution Amendment Act 2025], and that with the Speaker's vote, the two-thirds majority support of the total of all the members including vacancies has been satisfied. The result of the third reading vote was certified.
>
> It follows that the Applicants application for the making of various declarations is declined.

After receiving the decision, the leader and deputy leader of the HRPP filed for leave to appeal it. The appeal decision was handed down on 19 June 2025 confirming that the Speaker can indeed cast a vote to make up the two-third majority. This Appeal Court decision is an eye opener for Sāmoa as it has always been assumed that the Speaker's vote can't be counted towards a two-third majority as stated in art 58(2) which reads:[71]

> The Speaker, or the Deputy Speaker or any other Member of Parliament while presiding over a sitting of the Legislative Assembly in the absence of the Speaker, shall not have a deliberative vote but, in the case of an equality of votes, shall have a casting vote.

The constitutional issues aside, what of the political implications of all the court decisions after the last general elections and during the FAST party's term as government against the backdrop of political party competition?

E. The Speaker's Vote and the FAST Party's Political Agenda

One of the most important promises in the FAST's campaign manifesto in the last general elections was to merge the Supreme Court and Land and Titles Court again when they became the government. They knew they needed a two-third majority to be able to amend the constitution. The 26 seats they had when they were sworn in on 24 May 2021 had increased to 32 after the by-elections. Expulsion from parliament of the leader and secretary of the HRPP would have created two vacant seats of parliament, which if won by the FAST in the by-elections to fill those seats, would have increased the FAST majority further to 34. However, the leader and secretary of the HRPP successfully fended off three FAST attempts to remove them from parliament, two suspensions and the appeal.

The defection to the FAST party of three HRPP MPs was greatly welcomed by the FAST party. Their reason for leaving the HRPP was that the HRPP had not followed their original party objectives. The three defected HRPP MPs further increased the FAST number of seats to 34. FAST

67 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32 at [6].
68 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32 at [7].
69 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32 at [7].
70 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32 at [59] and [60].
71 *Malielegaoi v Speaker of the Legislative Assembly of Samoa* [2025] WSSC 32 at [15].

therefore needed the Speaker's vote to make up the two-third majority to pass the constitution amendment bill.

VII. Conclusion

In 64 years of independence, Sāmoa's parliament has progressed from two distinct types of constituencies comprising the IVs and TCs to an electoral constituency system consisting of 51 seats to which *matai* are elected by adults aged 21 years and over. Discussions however continue on what formula would best accommodate population size, voter residency and traditional considerations in determining equitable constituencies across the country.

Women representation in parliament has increased greatly to 12.5 per cent with 20 per cent of the 15-member cabinet being women as of the 2021−2025 parliament following the introduction of the women's 10 per cent quota. As Baker and others have commented: "While gender parity is yet to be achieved, this is the highest level of women's representation in either institution to date".[72]

The FAST's road show campaign strategy has actively mobilised and extended to all potential voters and the community generally political awareness, emotional connection and the value of one's vote. As a closeknit extended family community the actual or perceived sense of divisiveness associated with political party mobilisation will continue to linger in the background of Sāmoan society for some time.

Public discussions relating to the merits and demerits of Sāmoan traditions and democratic ideals associated with appointments to the office of Head of State will continue. As of now, only the *tama-a-'āiga* are still the preferred candidates for that office for a maximum of two five-year terms. The current FAST prime minister seems to favour life appointments of *tama-a-'āiga* to that office, not the current arrangement that was introduced by the HRPP government when Tui ʻĀtua Tupua Tamasese ʻEfi succeeded the late Mālietoa Tanumafili II who passed away in 2007.

As the Court commented in its decision on 17 May 2021 that declared unconstitutional the head of states' proclamation to void the results of the general elections and conduct new elections, "in sixty years of independent and sovereign governance, Samoa faces a Constitutional test which is novel in this country".[73] In fact, there were more constitutional tests that followed after that initial one. Those constitutional tests provided opportunities for continued interpretations of the constitution thereby further developing the constitution. In the same manner the tension areas in the constitution have continued to evolve to where they are today. Those progressive changes required amending certain provisions of the constitution and relevant acts associated with those constitutional provisions. It has been the fierce competition for power between and among competing political parties − one of the cornerstones of democracy − that had been the driving force behind that competition.

As a living document and supreme law of the country, Sāmoa's constitution has responded positively to not one but many constitutional tests, in that it was able to accommodate the "novel" realities it encountered, and in the process further developed the constitution through constitutional interpretation.

Despite the challenges thrown at the judiciary before and during the establishment of the FAST government, it had succeeded in calming the political storm even if threads of HRPP suspicion

72 K Baker and others "Tradition Meets Democracy: Perceptions of Women's Political Leadership in Sāmoa" *Politics & Gender* (online ed, 17 October 2024).

73 *FAST Party v Attorney General* [2021] WSSC 24 (17 May 2021) at [1].

against some of the decisions lingered on during the last parliamentary term. Some of the court cases "tested the limits of Sāmoa's democratic framework, judicial independence, and rule of law."[74] As one former Sāmoan Justice of the Supreme Court has commented, the 2021 constitutional crisis:[75]

> … put to the test the principle of separation of powers between the Legislature, the Executive, and the Judiciary.
>
> … Judicial independence and public confidence in the judiciary are essential for preserving the separation of powers and, by extension, upholding the rule of law.
>
> … Upholding this principle is a shared responsibility across all sectors of society. An integral aspect of the rule of law is social harmony, which is fostered by building public trust in the legal and justice system and ensuring consistent compliance with the law.

The present author shares the same Justice's optimism that:[76]

> The future of constitutionalism in the Pacific region looks promising. The journey these nations have undertaken reflects resilience, adaptability, and hope. Although colonial legacies still pose challenges, they also create opportunities for innovation and strength, as Pacific island countries strive to harmonize indigenous governance traditions with contemporary political realities.

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74 L Tuala-Warren "Pacific Constitutions: An Inside View of Samoa's 2021 Constitutional Crisis" (paper presented to Australian Association for Pacific Studies Conference 2025, Sydney, 6 June 2025).

75 L Tuala-Warren "Pacific Constitutions: An Inside View of Samoa's 2021 Constitutional Crisis" (paper presented to Australian Association for Pacific Studies Conference 2025, Sydney, 6 June 2025).

76 L Tuala-Warren "Pacific Constitutions: An Inside View of Samoa's 2021 Constitutional Crisis" (paper presented to Australian Association for Pacific Studies Conference 2025, Sydney, 6 June 2025).

Tidemarks of Sovereignty: Ngāti Porou Co-Governance, BBNJ Obligations, and the Legislative Architecture for Treaty-Compliant Marine Genetic Resource Benefit-Sharing in Aotearoa, New Zealand

Ngā Tohu Tai o te Rangatiratanga: Te Kāwanatanga Ngātahi o Ngāti Porou, ngā Kawenga BBNJ, me te Hoahoanga Take Ture mō te Tuari-Painga Rauemi Iranga Moana Tautuku-Tiriti i Aotearoa

Ruby Oriwia Rumanako Sadlier Spooner*

To what extent can the co-governance model established under the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019 (Ngā Rohe Moana Act) inform New Zealand's domestic implementation of marine genetic resource benefit-sharing obligations under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Treaty), and what legislative adaptations would be required to ensure compliance with both international law and Treaty of Waitangi principles?

The convergence of three recent developments creates unprecedented opportunities and complex challenges for marine resource governance in Aotearoa New Zealand: the finalisation of the BBNJ Treaty in June 2023, the establishment of the Ngā Rohe Moana Act, and growing recognition of tikanga Māori as foundational law in New Zealand jurisprudence.[1] This temporal intersection demands urgent scholarly attention as New Zealand must develop implementing legislation before the BBNJ Treaty enters into force, despite minimal research examining how these frameworks might integrate.

The BBNJ Agreement establishes comprehensive benefit-sharing obligations for marine genetic resources (MGRs) accessed from areas beyond national jurisdiction (ABNJ), requiring States to ensure that benefits resulting from activities involving MGRs and digital sequence information are shared in a manner that is both fair and equitable.[2] Nevertheless, the Agreement lacks definitional clarity on what constitutes fair and equitable benefit-sharing and omits provisions

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1 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162; Trevor Daya-Winterbottom "Defining Our Legacy to All Future Generations" (2024) 54 Journal of the Royal Society of New Zealand 547.

2 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023) art 14(1).

ensuring transparency in distribution amongst stakeholders, creating implementation challenges that domestic governance models might address through participatory structures.[3]

The Ngā Rohe Moana Act represents New Zealand's most sophisticated statutory co-governance framework for marine resources, embedding Māori authority directly into environmental decision-making through substantive veto powers over resource consent applications within customary marine title areas.[4]

This essay argues that while the Ngā Rohe Moana co-governance model provides essential structural elements for implementing BBNJ benefit-sharing obligations, significant legislative adaptations are required to reconcile three fundamentally incompatible paradigms: the BBNJ Treaty's common heritage framework treating MGRs as extractable commodities, tikanga Māori principles centring relational responsibilities to marine entities as living ancestors, and Treaty of Waitangi obligations requiring genuine partnership and active protection of Māori interests.

This analysis demonstrates the model can inform BBNJ implementation to a foundational but limited extent. Despite the Act establishing constitutional precedent for marine co-governance and providing proven institutional templates such as consent-based access, hapū representation, and collective benefit distribution, three fundamental incompatibilities prevent direct transfer of specific statutory mechanisms: ontological tensions between common heritage commodification and kaitiakitanga relationality; jurisdictional constraints when territorially bounded customary marine title encounters migratory species in ABNJ; and technological challenges governing digital sequence information through physical resource frameworks. This necessitates a dedicated Marine Genetic Resources Act drawing normative and institutional inspiration from Ngā Rohe Moana while developing novel operational mechanisms.

This research employs doctrinal legal methodology, examining primary sources including the BBNJ Treaty, the Ngā Rohe Moana Act, the Māori Fisheries Act 2004, and relevant Treaty of Waitangi jurisprudence. The research draws on comparative analysis of co-governance frameworks in freshwater and fisheries contexts to identify structural elements and persistent challenges. Secondary literature from international environmental law, Indigenous legal studies, and marine governance scholarship informs the critical analysis of compatibility between frameworks and the normative proposals for legislative reform.

The analysis proceeds in four parts. Part I examines the fundamental tensions between international MGR regimes and Indigenous governance frameworks. Part II analyses the structural requirements for authentic co-governance that moves beyond consultation. Part III addresses the integration of mātauranga Māori and traditional knowledge protection mechanisms. Part IV proposes specific legislative adaptations required to operationalise benefit-sharing needed to honour both international obligations and Treaty principles.

3 Zakieh Taghizadeh "Marine Genetic Resources as Common Heritage of Mankind under the BBNJ Agreement: The International Community toward a Pragmatic Benefit-Sharing Approach?" (2025) 34 Biodiversity and Conservation 131 at 143–144.

4 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 74(1).

I. Reconciling Indigenous Governance Frameworks with International Marine Genetic Resource Regimes

A. The Ontological Incompatibility Between Common Heritage and Kaitiakitanga

The BBNJ Agreement's foundation rests upon the common heritage of mankind principle, establishing that MGR activities shall be carried out exclusively for peaceful purposes and are in the benefit of all humanity.[5] This conceptualises genetic resources as res communis, common property available for humanity's collective utilisation. Yet, this framework fundamentally contradicts Indigenous legal systems centred on relational responsibilities rather than property rights. An important distinction exists between settler-colonial legal frameworks underpinned by rights over or to water, and Indigenous legal and governance frameworks centred on responsibilities and duties to water as a living entity.[6] This ontological difference extends to marine genetic resources, where Western frameworks treat genetic sequences as extractable information whereas tikanga Māori recognises living entities with mauri (life force) requiring protection through kaitiakitanga (guardianship).

Kaitiakitanga represents not the transactional or proprietary relationships characteristic of Western market systems but rather a permanent and mandatory family relationship that binds both individuals and communities across generations.[7] This creates profound challenges for benefit-sharing frameworks premised on resource commodification. This relational framework has found legal expression in New Zealand, most notably through the Whanganui River settlement, where Te Awa Tupua is recognised as an indivisible and living whole with all the rights, powers, duties, and liabilities of a legal person, an approach that moves beyond dualistic understandings of nature as separate or distinct from culture.[8]

Applying this framework to marine genetic resources would require reconceptualising genetic material not as extractable commodities but as intrinsic elements of living taonga requiring protection of their mauri and whakapapa connections. Recognising legal personality for nature serves as a reconciliation strategy for Indigenous ancestors' ongoing presence in natural entities, and fundamentally challenges Western property assumptions.[9] This reconciliation approach, while developed in freshwater contexts, has direct implications for marine genetic resources where whakapapa connections extend across jurisdictional boundaries.

The tension manifests acutely in how the BBNJ Agreement structures benefit-sharing. Article 14 mandates sharing of both non-monetary and monetary benefits, with monetary benefits flowing

5 Zakieh Taghizadeh "Marine Genetic Resources as Common Heritage of Mankind under the BBNJ Agreement: The International Community toward a Pragmatic Benefit-Sharing Approach?" (2025) 34 Biodiversity and Conservation 131 at 145–146.

6 M Parsons, K Fisher and RP Crease "Transforming River Governance: The Co-Governance Arrangements in the Waikato River Settlement" in M Parsons, K Fisher and RP Crease (eds) *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (Springer International Publishing, Cham, 2021) 285 at 285–286.

7 Catherine J Iorns Magallanes "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand" (2015) VertigO Hors-série 22 at [8].

8 Karen Fisher and others "Broadening Environmental Governance Ontologies to Enhance Ecosystem-Based Management in Aotearoa New Zealand" (2022) 21 Maritime Studies 609 at 617 and 624.

9 Jacinta Ruru "Indigenous Ancestors: Recognizing Legal Personality of Nature as a Reconciliation Strategy for Connective Sustainable Governance" in Shawkat Alam and others (eds) *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge University Press, Cambridge, 2021) 183 at 185–187.

through a Special Fund while non-monetary benefits include access to samples, digital sequence information, technology transfer, and research partnerships.[10] This bifurcation assumes benefits can be quantified and distributed as discrete entitlements. More fundamentally, when genetic resources derive from species holding cultural significance as tipuna (ancestors), the very act of extraction may constitute a breach of kaitiakitanga obligations regardless of subsequent benefit distribution. The literature provides extensive critique of this incompatibility but offers no bridging mechanisms for operationalising tikanga principles within international benefit-sharing frameworks.

B. Polycentric Governance Architecture and Indigenous Authority

The BBNJ framework deliberately avoids establishing centralised decision-making authority, instead relying on normative power to mobilise existing institutions, frameworks, and bodies through orchestration rather than hierarchy.[11] This polycentric governance model creates both opportunity and risk for Indigenous co-governance. The flexibility allows arrangements like the Ngā Rohe Moana framework to operate within and across jurisdictional boundaries, but provides no mechanisms to resolve conflicts when Indigenous rights clash with scientific freedom or when multiple institutions assert competing authority.

This ambiguity is deliberate. The Agreement references both common heritage of humankind and freedom of marine scientific research principles, enabling each party to invoke their preferred principle without establishing mechanisms to resolve conflicts between them.[12]

For Indigenous peoples, this means the Agreement provides normative support but no enforceable protection when researchers assert scientific freedom trumps consent requirements or when States prioritise common heritage principles over Indigenous resource rights. The Conference of Parties can adopt recommendations from the Access and Benefit-Sharing Committee, but enforcement relies on State parties' domestic implementation.[13]

Comparative experience reveals this risk. The Crown frequently relegates Māori to junior partner status in freshwater co-governance arrangements. Transparency deficits arise where co-governance bodies lack obligations to publish meeting minutes or disclose meeting locations, undermining accountability principles essential for legitimate benefit-sharing.[14] If domestic co-governance structures already struggle with power imbalances despite formal equality, extending these frameworks to international MGR regimes where scientific and commercial interests wield substantial influence presents even greater challenges. The BBNJ Agreement's reliance on normative orchestration rather than hierarchical authority means Indigenous peoples must continuously assert their rights within multiple forums, facing resource asymmetries at each level.

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10 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023), art 14.

11 Rakhyun E Kim "The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance" (2024) 165 Marine Policy 106190 at 1.

12 Daniel Bodansky "Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement" (2024) 118 AJIL 299 at 309.

13 "Summary of the Resumed Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 20 February–4 March 2023" (2023) 25(250) Earth Negotiations Bulletin 1 at 7.

14 Nicolas Pirsoul and Maria Armoudian "Deliberative Democracy and Water Management in New Zealand: A Critical Approach to Collaborative Governance and Co-Management Initiatives" (2019) 33 Water Resources Management 4821 at 4827.

C. Jurisdictional Complexity: Migratory Species Between National and International Waters

A critical unresolved tension emerges around species that traverse jurisdictional boundaries. Official recognition exists that some taonga species migrate between New Zealand and ABNJ. No academic research examines the legal implications when species holding cultural significance and genetic resource value cross the boundary between New Zealand's Exclusive Economic Zone and Areas Beyond National Jurisdiction.[15] This gap is particularly acute given the Ngā Rohe Moana Act's territorially bounded customary marine title, extending up to three nautical miles seaward, and the broader concept of kaitiakitanga as obligations binding both individuals and communities over generations.[16]

Do hapū kaitiakitanga responsibilities follow taonga species into international waters? United Nations Convention on the Law of the Sea (UNCLOS) art 56 establishes coastal State sovereign rights over natural resources, whether living or non-living within the Exclusive Economic Zone (EEZ), whereas arts 136 and 137 declare the Area and its resources as common heritage of mankind.[17] The literature addresses these regimes separately but provides no framework for reconciling them when species, their genetic material, and Indigenous relationships with them transcend boundaries. Trans-jurisdictional frameworks demonstrate that legal personality can transcend territorial boundaries, with the Whanganui River establishing Indigenous legal systems operating across artificially imposed jurisdictions.[18] Whether similar frameworks can accommodate customary relationships extending from EEZ into ABNJ remains unresolved. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), art 26(3) requires States to legally recognise and protect Indigenous lands and resources in ways that respect the customs, traditions, and land tenure systems of the Indigenous peoples concerned, thereby establishing an international legal framework supporting co-governance implementation.[19] However, whether this extends to mobile marine species in international waters remains unexamined.

The practical implications are profound. Researchers may access genetic material from tohorā (whales) in ABNJ arguing common heritage principles apply, whilst hapū assert kaitiakitanga obligations require free, prior and informed consent regardless of jurisdictional location. If a whale population spends portions of its lifecycle within Ngāti Porou's customary marine title area and portions in ABNJ, do benefit-sharing obligations differ based on where samples are collected? Can consent requirements under s 74 of the Ngā Rohe Moana Act extend to research targeting migratory

15 Office of the Minister of Foreign Affairs "Agreement on the Conservation and Sustainable Use of Marine Biodiversity Beyond National Jurisdiction: Policy Approvals for Implementing Legislation and Approval to Ratify" (Cabinet Paper, November 2024) at [54.2].

16 Catherine J Iorns Magallanes "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand" (2015) VertigO Hors-série 22 at [8].

17 *United Nations Convention on the Law of the Sea* 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) arts 56 and 136–137.

18 Jacinta Ruru "The Flow of Laws: The Trans-Jurisdictional Laws of the Longest River in Aotearoa New Zealand" in Janice Gray, Cameron Holley and Rosemary Rayfuse (eds) *Transjurisdictional Water Law and Governance* (Routledge, London, 2016) 175 at 182–185.

19 Claire Charters "Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27" in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, Oxford, 2018) 395.

species beyond the EEZ? The BBNJ Agreement provides no resolution, creating implementation crises for species central to both Māori cultural identity and international biotechnology interest.[20]

D. Free, Prior and Informed Consent as a Bridging Principle

Despite these tensions, the FPIC requirement emerges as a critical bridging principle. Article 13 of the BBNJ Agreement mandates that Indigenous peoples and local communities must provide prior and informed consent or grant approval and involvement before their traditional knowledge associated with MGRs can be accessed, with such access occurring under mutually agreed terms. This provision was initially advanced collectively by Australia, Maldives, New Zealand, Norway, and Pacific Small Island Developing States.[21] It creates potential alignment with Treaty of Waitangi consultation obligations, but scholarship has not examined how domestic co-governance structures might operationalise these consent requirements in practice.

While the FPIC mechanism establishes theoretical safeguards, its implementation presents significant challenges. Article 13 allows State parties discretion in implementing traditional knowledge access provisions through various means including national laws, administrative measures, or policy measures, used individually or together without stipulating particular implementation approaches.[22] This flexibility allows States to adapt implementation to domestic constitutional arrangements including co-governance models, but risks creating fragmented approaches across jurisdictions and potential human rights implications where administrative measures may encroach upon Indigenous intellectual property rights if not carefully designed. Furthermore, the qualifying phrase "where available" in art 26's provision mandating that environmental impact assessments draw upon the best available science and scientific information as well as traditional knowledge of Indigenous people and local communities creates optional elements that could erode Indigenous knowledge authority.[23]

The consent mechanism must also contend with timing issues. Recommendations indicate that imposing payment requirements during in situ collection or research phases would create unreasonable obstacles to marine scientific research activities, whereas triggering such requirements upon commercial utilisation of MGRs represents a more reasonable framework.[24] This temporal sequencing may facilitate scientific research, yet it creates enforcement challenges when consent granted for research purposes leads to unexpected commercial applications decades later. Who holds authority to grant consent that binds future generations? How can FPIC operate meaningfully when the full scope of potential utilisation cannot be known at the time of collection? These questions remain unaddressed in both the BBNJ literature and Treaty jurisprudence.

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20 Daniel Bodansky "Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement" (2024) 118 AJIL 299 at 309.

21 Clement Yow Mulalap and others "Traditional Knowledge and the BBNJ Instrument" (2020) 122 Marine Policy 104103 at 6.

22 Fran Humphries (ed) *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement* (Springer, Cham, 2025) at 205–206.

23 Zakieh Taghizadeh "Intergenerational and Intra-generational Equity under the BBNJ Agreement: Advancing Accountability towards Sustainable Management of the Marine Environment" (2025) 75 Environmental Management 3688 at 3695.

24 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 14.

II. Structural Requirements for Authentic Co-Governance and Equitable Benefit Distribution

A. Moving Beyond Consultation to Genuine Shared Authority

A consistent finding across the literature is that consultation-based participation fails to achieve authentic co-governance or satisfy Treaty obligations. Existing RMA provisions inadequately enable Māori participation because the implementation of Te Mana o te Wai and other provisions for Māori involvement, including Objective D1, remains under the regional council direction and discretion without establishing clear mandates or governance and decision-making roles for Māori.[25] This demonstrates that discretionary consultation, even when statutorily mandated, does not create the substantive shared authority required for Treaty compliance.

Empirical evidence from the Mimiwhangata case study reveals that advisory committees established under s 56 of the Conservation Act 1987 provide insufficient decision-making authority for tangata whenua, with Te Uri o Hikihiki explaining that they were only offered the s 56 committee mechanism, which gave them a voice but one that would consistently be outvoted by the majority, while ultimately governing authority remained beyond their control.[26] Research reveals that fundamental local concerns regarding rights, authority, and control remain unresolved within the partnership framework, as existing governance mechanisms fail to adequately address them.[27]

This illustrates that partnership rhetoric without substantive transfers of authority fails to satisfy either Treaty principles or Indigenous aspirations for self-determination.

The Waitangi Tribunal has repeatedly documented Crown breaches despite formal commitments. The Tribunal's 2024 finding that the Crown breached Treaty principles through rushed policy development for Takutai Moana amendments, offering consultation to Māori likely to be inconsistent with the principles of the Treaty of Waitangi due to an expedited two-to-three-week timeframe with Cabinet approving substantive amendments before any Māori engagement, demonstrates that aspirational rights without enforcement mechanisms remain symbolic.[28]

The Tribunal found this breached tino rangatiratanga by exercising kāwanatanga without demonstrating that public rights and interests require additional protection beyond what the Act already provided.[29] Effective implementation of benefit-sharing arrangements under the BBNJ Treaty would need to address overlapping interests amongst multiple hapū. The Tribunal determined the Crown did not provide active and practical support for resolving overlapping interests.[30]

25 Lara Bernadette Taylor and others "Ngā Puna Aroha: Towards an Indigenous-Centred Freshwater Allocation Framework for Aotearoa New Zealand" (2021) 25 Australasian Journal of Water Resources 27 at 31–32.

26 Giles Dodson "Co-Governance and Local Empowerment? Conservation Partnership Frameworks and Marine Protection at Mimiwhangata, New Zealand" (2014) 27 Society & Natural Resources 521 at 530.

27 Giles Dodson "Co-Governance and Local Empowerment? Conservation Partnership Frameworks and Marine Protection at Mimiwhangata, New Zealand" (2014) 27 Society & Natural Resources 521 at 522.

28 Waitangi Tribunal *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at 47–50 and 67–68.

29 Waitangi Tribunal *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at 50–51 and 55–57.

30 Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 3.

B. The Ngā Rohe Moana Model: Structural Elements and Innovations

The Ngā Rohe Moana Act provides a tested framework incorporating several critical elements that distinguish it from consultation-based approaches. First, the Act establishes management arrangements as representative entities with any dealings with hapū required to occur through these designated structures rather than individual hapū members.[31] This creates a clear interface between Crown agencies and Māori customary rights holders, addressing the fragmentation that undermines accountability in other contexts.

Second, and most significantly, the Act confers substantive veto powers over resource consent processes. Within customary marine title areas, consent authorities are permitted to consider, process, or act on resource consent applications only when the customary marine title hapū has provided written permission or when activity constitutes an accommodated matter.[32] This fundamentally alters the normal Resource Management Act framework by embedding Māori authority directly into environmental decision-making. The permission requirement operates as a genuine consent mechanism rather than a consultative process, creating enforceable rights that cannot be overridden through balancing exercises or considerations of wider public interest.

Third, the protected customary activities framework prohibits consent authorities from granting resource consents if activities will produce adverse effects exceeding minor significance on protected customary activities, unless the hapū provides written approval.[33] This protects customary practices from displacement by development activities whilst preserving hapū authority to determine acceptable impact levels.

Fourth, the environmental covenant provisions obligate Gisborne District Council to ensure that resource management matters from the environmental covenant pertaining to customary marine title areas are recognised and provided for in key public documents.[34] This elevates hapū environmental values to mandatory consideration rather than discretionary factors to be weighed against competing interests.

The Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020 operationalises these provisions by formally recognising customary marine title with precise geographic coordinates extending up to three nautical miles seaward. It recognises multiple hapū as rights holders within defined areas (for example, 13 hapū in the Whangaokeno to Waiapu River area), and designating specific Takutai Kaitiaki Trusts as management arrangements representing hapū groups.[35] Recognising Indigenous relationships with lands and waters as legal rather than merely cultural requires acknowledging sophisticated governance systems predating colonial law.[36] Whether such recognition extends beyond territorial waters to accommodate migratory species relationships remains unresolved. This provides institutional models for receiving and managing benefits that could potentially be adapted for marine genetic resource contexts.

31 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 121(1).
32 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 74(1).
33 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, ss 41(2)–(3).
34 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 85(1).
35 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.
36 Jacinta Ruru "Seeing Indigenous Humanness" Australian Human Rights Institute <www.humanrights.unsw.edu.au>.

C. Allocation Frameworks: Lessons from Fisheries Settlements

The Māori Fisheries Act 2004 provides sophisticated precedents for allocating marine resource benefits amongst Māori. The Act establishes a dual criteria allocation system where settlement assets are distributed based on population percentages specified in sch 3 and registered coastline entitlements determined under s 11 and sch 6, providing a model for allocating MGR benefits based on both demographic representation and customary territorial connections.[37] The BBNJ Agreement's hybrid model, combining mandatory standardised reporting with voluntary mutually agreed terms for Indigenous communities, mirrors co-governance principles by balancing centralised oversight with localised decision-making autonomy.[38]

The fisheries framework demonstrates how benefits can be managed collectively in a manner that ensures distribution to individual iwi through legally enforceable requirements. Te Ohu Kai Moana Trustee Limited holds fiduciary duties to allocate and transfer the settlement assets to mandated iwi organisations, with s 130 imposing a mandatory obligation to allocate and transfer settlement assets.[39] This two-tier governance model, combining central collective management with binding distribution obligations, could inform how marine genetic resource benefits might flow through a central mechanism while ensuring iwi and hapū receive guaranteed shares.

Furthermore, the Act requires mandated iwi organisations to meet strict criteria including constitutional documents complying with tikanga-based kaupapa in sch 7, ratification by 75 per cent of adult iwi members, and registers of iwi members, ensuring transparency, accountability to iwi members, and adherence to tikanga-based governance principles.[40] Part 4 establishes that settlement quota cannot be sold except in limited circumstances requiring ministerial approval under ss 158 to 161 and 168, with transfers restricted to other mandated iwi organisations or Te Ohu Kai Moana Group entities, preserving collective Māori ownership and protecting benefits for future generations.[41] These inalienability protections demonstrate legislative mechanisms for ensuring intergenerational equity, a principle critically under-addressed in the BBNJ Agreement.[42]

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 established the foundational proportional allocation model by requiring the Crown to introduce legislation ensuring Māori received 20 per cent of all quota for species subsequently brought within the quota management system.[43] This forward-looking proportional entitlement, rather than fixed quantum settlement, could inform BBNJ benefit-sharing by establishing Māori rights to a specified percentage of future MGR benefits as new resources enter exploitation frameworks. Section 9 of the 1992 Act established the final settlement of all Māori commercial fishing claims, both current and future, while prohibiting courts and tribunals from examining the validity of these claims. Section 10, however, provides that non-commercial fishing claims remain subject to ongoing Treaty obligations binding the Crown in accordance with Treaty of Waitangi principles.[44] This bifurcated settlement model, extinguishing

37 Māori Fisheries Act 2004, ss 7–11.

38 Rometius Steel and Wei Wang "Unlocking the Global Commons: Legal Analysis of Benefit-Sharing for Marine Genetic Resources in the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1541331 at 9.

39 Māori Fisheries Act 2004, ss 34(c) and 130.

40 Māori Fisheries Act 2004, ss 12–18.

41 Māori Fisheries Act 2004, ss 158–161 and 168.

42 Zakieh Taghizadeh "Marine Genetic Resources as Common Heritage of Mankind under the BBNJ Agreement: The International Community toward a Pragmatic Benefit-Sharing Approach?" (2025) 34 Biodiversity and Conservation 131 at 148–150.

43 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Preamble.

44 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, ss 9–10.

commercial claims through comprehensive settlement and concurrently preserving Crown Treaty obligations for customary practices, could inform BBNJ implementation where commercial MGR rights might be settled through benefit-sharing arrangements while maintaining ongoing Treaty-based obligations for traditional knowledge and customary marine resource uses.

D. Power Asymmetries and Elite Capture Risks

Despite structural innovations, the literature documents persistent challenges in achieving genuine partnership. Existing power disparities also marginalise Indigenous legal and governance regimes by prioritising and normalising Western settler ontologies and epistemologies even within formally shared governance structures.[45] Scholarship identifies a key constraint to co-governance: settler state governments' unwillingness to share decision making authority with Indigenous peoples. This analysis suggests that genuine state-to-state authority sharing necessitates Indigenous peoples explicitly consenting to share authority over their ancestral water bodies with non-Indigenous peoples, rather than requiring the state to relinquish control.[46] The practical day-to-day operation of Indigenous-state co-governance arrangements has received inadequate scholarly attention, exposing a critical gap in understanding how co-governance works in practice compared to its theoretical conceptualisation.[47]

The Waikato River settlement required substantial renegotiation, with the 2008 Deed revised in 2009, reducing Māori representation on governance bodies and streamlining decision-making structures to address Crown concerns.[48] The shift from "Tupuna Awa" (River Ancestor) to "Te Awa Tupuna" (Ancestral River) reflects fundamental power relation changes, with elected tribal representatives displacing hereditary leaders as primary mediators between iwi and the Crown in natural resource management.[49]

Within co-governance structures, the Crown often relegates Māori to junior partner status, raising concerns about the potential emergence of a Māori neotribal elite whose interests may diverge from those of the broader Māori community.[50] Furthermore, the Crown's practice of unilaterally determining which groups it will engage with and which it will exclude creates exclusions that undermine the legitimacy and inclusiveness of collaborative governance.[51]

Transparency deficits where co-governance bodies are not required to make meeting minutes

45 M Parsons, K Fisher and RP Crease "Transforming River Governance: The Co-Governance Arrangements in the Waikato River Settlement" in M Parsons, K Fisher and RP Crease (eds) *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (Springer International Publishing, Cham, 2021) 285 at 287.

46 M Parsons, K Fisher and RP Crease "Transforming River Governance: The Co-Governance Arrangements in the Waikato River Settlement" in M Parsons, K Fisher and RP Crease (eds) *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (Springer International Publishing, Cham, 2021) 285 at 287.

47 M Parsons, K Fisher and RP Crease "Transforming River Governance: The Co-Governance Arrangements in the Waikato River Settlement" in M Parsons, K Fisher and RP Crease (eds) *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (Springer International Publishing, Cham, 2021) 285 at 287.

48 Marama Muru-Lanning *Tupuna Awa: People and Politics of the Waikato River* (Auckland University Press, Auckland, 2017) at 10–20.

49 Marama Muru-Lanning *Tupuna Awa: People and Politics of the Waikato River* (Auckland University Press, Auckland, 2017) at 10–20.

50 Nicolas Pirsoul and Maria Armoudian "Deliberative Democracy and Water Management in New Zealand: A Critical Approach to Collaborative Governance and Co-Management Initiatives" (2019) 33 Water Resources Management 4821 at 4827–4828.

51 Nicolas Pirsoul and Maria Armoudian "Deliberative Democracy and Water Management in New Zealand: A Critical Approach to Collaborative Governance and Co-Management Initiatives" (2019) 33 Water Resources Management 4821 at 4828.

public or disclose meeting locations contradict accountability principles essential for legitimate benefit-sharing.[52] The Waikato River Authority operates outside the scope of the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. Consequently, trustees have no obligation to publish meeting minutes, announce meeting locations, or conduct meetings publicly.[53] Although the Vision and Strategy under the Ngā Wai o Maniapoto (Waipa River) Act 2012 holds legal supremacy over conflicting policy documents, interviewees criticised the Waikato River Authority for opaque decision-making processes and for employing Western governance approaches instead of Māori deliberative decision-making processes grounded in extended marae-based discussions.[54]

This indicates that structural equality in representation does not automatically produce Indigenous-centred governance or tikanga-based deliberative processes that would be essential for authentic benefit-sharing arrangements.

III. Integration of Mātauranga Māori, Traditional Knowledge Protection, and International Compliance

A. The Legal Status of Tikanga Māori in Environmental Governance

Recent Supreme Court decisions demonstrate "tikanga Māori" (Māori law and cultural practices) as a source of the common law of New Zealand, moving beyond viewing tikanga as external customary law requiring discrete recognition tests.[55] The approach adopted emphasises understanding how Māori law applies within its fuller cultural context, enabling New Zealand courts to better reveal and understand Indigenous legal principles and processes at work, including engaging with Māori stories as legal texts.[56]

Tikanga's foundational values of whanaungatanga (interconnectedness) and kaitiakitanga (guardianship) offer a framework where integrating Māori worldviews into environmental policy would provide a promising start for developing solutions to address climate change and other environmental crises.[57] This methodological approach adopted by courts, treating tikanga as foundational rather than supplementary, differs significantly from approaches in international environmental law, where Indigenous knowledge systems are typically framed as "traditional knowledge" requiring protection but not necessarily integration as co-equal legal authority.[58]

52 Nicolas Pirsoul and Maria Armoudian "Deliberative Democracy and Water Management in New Zealand: A Critical Approach to Collaborative Governance and Co-Management Initiatives" (2019) 33 Water Resources Management 4821 at 4827.

53 Nicolas Pirsoul and Maria Armoudian "Deliberative Democracy and Water Management in New Zealand: A Critical Approach to Collaborative Governance and Co-Management Initiatives" (2019) 33 Water Resources Management 4821 at 4827.

54 Karen Fisher and Meg Parsons "River Co-governance and Co-management in Aotearoa New Zealand: Enabling Indigenous Ways of Knowing and Being" (2020) 9 Transnational Environmental Law 455 at 476.

55 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162 at 163.

56 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1 Legalities 162 at 163.

57 Trevor Daya-Winterbottom "Defining Our Legacy to All Future Generations" (2024) 54 Journal of the Royal Society of New Zealand 547 at 555.

58 Clement Yow Mulalap and others "Traditional Knowledge and the BBNJ Instrument" (2020) 122 Marine Policy 104103 at 6.

Māori cultural rights operate as cosmological frameworks where protecting the environment protects the cosmology, and vice versa, in reciprocal relationships that Western legal categories struggle to accommodate.[59] Genetic research thus impacts not merely material resources but entire intergenerational relational systems.

The BBNJ Agreement requires environmental impact assessments and monitoring activities to be based on the best available science and scientific information, as well as traditional knowledge of Indigenous Peoples and local communities when such knowledge is available.[60] This provision creates international legal expectations for incorporating mātauranga Māori equivalent knowledge systems; the qualifying phrase "where available" introduces discretionary elements that may undermine Indigenous knowledge authority.

The revised draft BBNJ text demonstrates increasing negotiator recognition that relevant traditional knowledge of Indigenous Peoples and Local Communities should complement the best available scientific information. This equal treatment of traditional knowledge and scientific information appears in art 5(i) as a general principle, art 16(1) concerning area-based management tools, and art 32(1) regarding environmental impact assessments.[61]

In practice, implementing this principle presents significant challenges. Although legislation recognises and incorporates tikanga, RMA planning documents remain grounded in Western legal and ontological frameworks. By contrast, Ngāti Maniapoto documents such as the Upper Waipā Fisheries Plan successfully articulate the multiple dimensions constituting the Waipā River through mātauranga frameworks.[62] Research revealed that actions addressing the care and protection of supernatural creatures and spiritual river dimensions fall outside the conventional scope of Western science-based management organisations, demonstrating the challenges Crown agencies face in operationalising Indigenous ontologies.[63] This suggests that legislative provisions mandating consideration of mātauranga Māori prove insufficient without institutional capacity and willingness to genuinely integrate knowledge systems that challenge Western scientific paradigms.

The Resource Management Act 1991 provides critical integration mechanisms. Section 8 mandates that all persons exercising functions and powers under the Act in relation to managing the use, development, and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).[64] Combined with the requirement in s 6(e) to recognise "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance, this establishes a constitutional framework necessitating BBNJ implementation legislation. This framework necessitates incorporating Treaty principles in benefit-sharing arrangements for marine genetic

59 Catherine J Iorns Magallanes "Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2016) 21 Widener L Rev 273 at 285–290.

60 Zakieh Taghizadeh "Intergenerational and Intra-generational Equity under the BBNJ Agreement: Advancing Accountability towards Sustainable Management of the Marine Environment" (2025) 75 Environmental Management 3688 at 3695.

61 Clement Yow Mulalap and others "Traditional Knowledge and the BBNJ Instrument" (2020) 122 Marine Policy 104103 at 6.

62 Karen Fisher and Meg Parsons "River Co-governance and Co-management in Aotearoa New Zealand: Enabling Indigenous Ways of Knowing and Being" (2020) 9 Transnational Environmental Law 455 at 478.

63 Karen Fisher and Meg Parsons "River Co-governance and Co-management in Aotearoa New Zealand: Enabling Indigenous Ways of Knowing and Being" (2020) 9 Transnational Environmental Law 455 at 479.

64 Resource Management Act 1991, s 8.

resources, particularly where such resources originate from or are culturally significant to areas within customary Māori interests.[65]

B. Free, Prior and Informed Consent and Benefit-Sharing Conditions

The BBNJ Agreement establishes comprehensive traditional knowledge protections. The Preamble affirms that nothing in the Agreement shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples, including those set out in the United Nations Declaration on the Rights of Indigenous Peoples.[66] Article 13 mandates that traditional knowledge held by Indigenous Peoples and local communities concerning marine genetic resources in areas beyond national jurisdiction can only be accessed with their free, prior and informed consent or approval and involvement, and that such access must occur on mutually agreed terms.[67] This creates potential alignment with Treaty of Waitangi consultation obligations, though substantial questions remain about operationalisation.

The Agreement establishes a two-part mechanism obligating States to implement both multilateral MGR collection procedures under art 12 and bilateral FPIC requirements under art 13. This may necessitate States amending existing Nagoya Protocol legislation to encompass MGRs in areas beyond national jurisdiction while upholding Indigenous data sovereignty principles.[68] Article 13's grant of discretion to implement through national laws, administrative measures, or policy measures, either individually or in combination without prescribing modalities, creates risks of fragmented approaches across jurisdictions and raises human rights concerns where administrative measures may infringe upon Indigenous intellectual property rights without careful design.[69] This flexibility, while allowing States to adapt implementation to domestic constitutional arrangements including co-governance models, risks creating inconsistent protection of Indigenous rights across different jurisdictions.

The temporal dimension compounds these challenges. If researchers obtain consent for non-commercial scientific research, does that consent extend to subsequent commercial applications? Recommendations exist to delay payment requirements until commercial utilisation of MGRs to avoid imposing unreasonable obstacles to MSR activities.[70] The study advocates for activating payment requirements at the point of commercial MGR utilisation rather than during in situ collection or research stages, arguing this represents a more balanced approach. It proposes a hybrid framework in which benefit-sharing arrangements are primarily mandatory, supplemented by voluntary elements.[71]

While this temporal sequencing may facilitate research, it creates enforcement challenges when

65 Resource Management Act 1991, s 6(e).

66 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023), Preamble.

67 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023), art 13.

68 Fran Humphries (ed) *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement* (Springer, Cham, 2025) at 205–207 and 212–213.

69 Fran Humphries (ed) *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement* (Springer, Cham, 2025) at 205–206.

70 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 14.

71 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 13–14.

the scope of future utilisation cannot be predicted at the time of initial collection. Furthermore, who holds authority to grant consent that binds future generations when kaitiakitanga obligations are intergenerational? The requirement in the Māori Fisheries Act for 75 per cent ratification by adult iwi members provides one accountability model, but whether this democratic approach aligns with tikanga-based collective decision-making processes remains contested.[72]

C. Data Sovereignty, Digital Sequence Information, and Database Governance

A critical unresolved tension concerns Indigenous data sovereignty for marine genetic sequence information. The BBNJ Agreement mandates tracking of digital sequence information (DSI) on such resources through clearing-house mechanisms with standardised batch identifiers, including information on geographical areas of collection, data management plans, and where practicable, DSI on such resources.[73] The Agreement mandates comprehensive notification at pre-collection, post-collection, and utilisation stages. A BBNJ standardised batch identifier is automatically generated for tracking purposes and must be assigned to marine genetic resources and their associated DSI. This identifier links physical samples in collections to corresponding database information, enabling retrieval of all three elements using a single identifier.[74]

Despite this tracking infrastructure, virtually no research exists examining how Māori data sovereignty frameworks can be operationalised when genetic sequences are shared through international databases designed for open access and maximum scientific utility. Open access to MGR samples and data, utilising globally recognised data standards (Darwin Core, GGBN, OBIS-ENV-DATA), represents a functioning Access and Benefit-Sharing (ABS) model currently in operation, as demonstrated through the ABYSSLINE case study in the Clarion-Clipperton Zone.[75] This approach prioritises data accessibility, museum curation of specimens with persistent identifiers, and integration with international databases, thereby ensuring benefits flow to research communities including those in developing states and potentially Māori research institutions.[76]

This open science model fundamentally conflicts with Indigenous data sovereignty principles where communities retain authority over how their knowledge and associated data are accessed, used, and shared. The regime demands full chain monitoring through notification to the Clearing-House Mechanism, standardised batch identifiers, and regular submission and review of Parties' implementation status reports, including traceability systems to link end products to the original MGRs.[77] For New Zealand, this indicates legislative adaptations must enable hapū to track MGR utilisation from collection through commercialisation, requiring integration between co-governance

72 Māori Fisheries Act 2004, s 14.

73 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023), art 12.

74 Arianna Broggiato and others "Monetary and Non-monetary Benefit Sharing under the BBNJ Agreement" in Fran Humphries (ed) *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement* (Springer, Cham, 2025) 159 at 164–165.

75 Muriel Rabone and others "Access to Marine Genetic Resources (MGR): Raising Awareness of Best-Practice through a New Agreement for Biodiversity beyond National Jurisdiction (BBNJ)" (2019) 6 Frontiers in Marine Science (Article 520) at 7.

76 Muriel Rabone and others "Access to Marine Genetic Resources (MGR): Raising Awareness of Best-Practice through a New Agreement for Biodiversity beyond National Jurisdiction (BBNJ)" (2019) 6 Frontiers in Marine Science (Article 520) at 2.

77 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 2 and 16.

databases and international clearing-house mechanisms. However, how can such tracking operate when researchers can download sequences from public databases without accessing physical specimens? Can FPIC requirements be meaningfully enforced when genetic information circulates globally?

A proposed dynamically updated marine collections registry would facilitate sample discoverability and sharing between collections, thereby enhancing marine scientific research opportunities. This could align with transparency principles potentially incorporated into New Zealand's domestic framework to ensure appropriate recognition and protection of both mātauranga Māori and scientific knowledge systems.[78] The proposed clearing-house mechanism could streamline processes by providing documentation, guidance, and links to existing platforms and databases relevant to MGR, including a global registry of cruises and information about which institutes hold collections, their availability, and how they could be accessed.[79] While transparency serves important scientific and accountability functions, it also facilitates unrestricted access that may undermine Indigenous authority over knowledge derived from taonga species. The tension between open science principles and Indigenous data sovereignty remains unresolved, with the literature identifying the problem but providing no bridging mechanisms that honour both scientific collaboration and Indigenous rights.

D. Intellectual Property Rights and Commercialisation Frameworks

Intellectual property protection of MGRs in ABNJ does not conflict with common heritage principles because IP rights attach to derived knowledge and information rather than the physical resources. Intellectual property claims apply to information generated through MGR utilisation, not to the resources themselves.[80] This distinction provides a framework for reconciling customary resource governance with IP regimes relevant to Ngāti Porou's co-governance model.[81] The exclusivity inherent in intellectual property rights may undermine non-monetary benefit utilisation goals, by prohibiting unauthorised use without the rights holder's permission, thereby preventing many developing countries from fully benefiting from the non-monetary benefit-sharing offered by MGRs in ABNJ.[82] This limitation applies equally to Indigenous peoples lacking biotechnology infrastructure to independently develop commercial applications from genetic sequences. The development and application of genetic resources are closely linked to intellectual property rights and proprietary technologies, making it unrealistic to expect nations or private entities to freely or indiscriminately share advanced biotechnologies.[83]

To address these tensions, proposals exist to amend the Agreement on Trade-Related Aspects of

78 Jane Eva Collins and others "Strengthening the Global Network for Sharing of Marine Biological Collections: Recommendations for a New Agreement for Biodiversity beyond National Jurisdiction" (2021) 78 ICES Journal of Marine Science 305 at 311.

79 Muriel Rabone and others "Access to Marine Genetic Resources (MGR): Raising Awareness of Best-Practice through a New Agreement for Biodiversity beyond National Jurisdiction (BBNJ)" (2019) 6 Frontiers in Marine Science (Article 520) at 17.

80 Qing Xu and Yongfeng Jin "Benefit Sharing of Marine Genetic Resources and Intellectual Property Protection under the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1631043 at 4–5.

81 Qing Xu and Yongfeng Jin "Benefit Sharing of Marine Genetic Resources and Intellectual Property Protection under the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1631043 at 4–5.

82 Qing Xu and Yongfeng Jin "Benefit Sharing of Marine Genetic Resources and Intellectual Property Protection under the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1631043 at 7.

83 Rometius Steel and Wei Wang "Unlocking the Global Commons: Legal Analysis of Benefit-Sharing for Marine Genetic Resources in the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1541331 at 4.

Intellectual Property Rights (TRIPS), art 30 to establish mandatory limitations on patent exclusivity where public interest is at stake, specifically restricting injunctive relief concerning patent rights over specific technical knowledge derived from the development of marine genetic resources in areas beyond national jurisdiction. Relevant circumstances include prevention, containment, or control of public health emergencies and ensuring access to essential medicines, diagnostic tools, and vaccines. This mechanism, requiring states to limit the exclusivity of intellectual property patent rights in the public interest, could inform New Zealand domestic legislation prioritising hauora (health) and collective wellbeing consistent with tikanga principles.[84]

Furthermore, advocacy exists for establishing a mandatory disclosure system for patent applications involving MGRs in ABNJ within the World Intellectual Property Organisation (WIPO) framework, referencing the 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge.[85] Such disclosure mechanisms could be adapted domestically to ensure transparency and enable Indigenous participation in benefit-sharing, potentially strengthening kaitiakitanga roles under co-governance models by enabling hapū to track when genetic resources connected to their rohe moana are being commercialised.

Fundamental questions remain. If genetic sequences from species in ABNJ show similarities to populations in Ngāti Porou's rohe moana, do hapū have intellectual property claims based on whakapapa connections? Can tikanga principles regarding collective ownership and inalienability of taonga be reconciled with Western patent regimes premised on individual inventors and limited monopoly periods? The Māori Fisheries Act's restrictions on settlement quota disposal provide one such example, preventing sale except in limited circumstances requiring ministerial approval with transfers restricted to other mandated iwi organisations. These mechanisms demonstrate how legislation can protect collective ownership and ensure benefits remain within Māori governance structures while permitting strategic inter-iwi transfers.[86] Whether these translate to genetic information contexts where value lies increasingly in digital sequences rather than physical specimens remains unexplored in the literature.

IV. Legislative Adaptations Required for BBNJ Implementation Through Co-Governance

A. Dedicated Implementation Legislation: A Marine Genetic Resources Act

Experience demonstrates that relying on framework environmental statutes without dedicated implementation legislation creates unacceptable delays: the Resource Management Act 1991 came into force in October 1991, yet rules giving effect to the National Policy Statement for Freshwater Management were not expected to be operative in all regions before 2040 – some 49 years, or nearly half a century, after the framework legislation commenced – illustrating this risk.[87] Furthermore,

84 Rometius Steel and Wei Wang "Unlocking the Global Commons: Legal Analysis of Benefit-Sharing for Marine Genetic Resources in the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1541331 at 9.

85 Rometius Steel and Wei Wang "Unlocking the Global Commons: Legal Analysis of Benefit-Sharing for Marine Genetic Resources in the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1541331 at 9.

86 Māori Fisheries Act 2004, ss 158–161 and 168.

87 Trevor Daya-Winterbottom "Sustainability, governance and water management in New Zealand" in Michael Kidd, Loretta Feris and Tumai Murombo (eds) *Water and the Law: Towards Sustainability* (Edward Elgar Publishing, Cheltenham, 2014) 167 at 196.

regional variation produces inconsistencies. Canterbury determines allocable flows using mean annual low flow, while the Waikato employs the one-in-five-year low flow (Q5). Additionally, the first-come, first-served allocation rule established in the Fleetwing decision creates significant compliance problems for New Zealand regarding its Agenda 21 obligations.[88] This suggests BBNJ implementation requires a dedicated Marine Genetic Resources Act incorporating mandatory national standards, specific benefit-sharing mechanisms, statutory co-governance provisions with tangata whenua, clear access permit criteria integrating Treaty principles, and compliance monitoring aligned with international obligations.[89]

New Zealand's dualist constitutional framework requires Parliamentary action to implement treaty obligations domestically. While the executive can bind New Zealand internationally, domestic law may require modification to fulfil those international obligations, and Parliament holds responsibility for implementing such legislative changes.[90] This means BBNJ benefit-sharing requirements cannot automatically apply through the Ngā Rohe Moana co-governance model without legislative connection. The Maritime Transport Act 1994 demonstrates that existing domestic frameworks can be designed to accommodate international obligations through provisions requiring decision-makers to administer New Zealand's participation in the conventions, with the Minister required to enable the implementation of New Zealand's obligations under international maritime agreements.[91] This suggests the Marine Genetic Resources Act should explicitly reference both BBNJ obligations and Treaty of Waitangi principles, creating a statutory duty to implement both frameworks in a manner that honours their respective requirements and provides a precedent for embedding international law obligations within domestic co-governance frameworks.[92]

Furthermore, unincorporated treaties increasingly influence domestic administrative decision-making through two mechanisms: the presumption of statutory interpretation consistent with international obligations, and treating treaties as mandatory relevant consideration for executive decision-makers, as established in *Tavita v Minister of Immigration*.[93] The Supreme Court's decision in *Zaoui v Attorney-General (No 2)* demonstrates the potential strength, and perhaps also the emerging dominance, of the presumption of consistency, providing a robust legal basis for BBNJ obligations to influence co-governance decision-making.[94] This means even if BBNJ provisions are not explicitly incorporated into the Ngā Rohe Moana Act, co-governance bodies exercising statutory powers may be legally required to consider New Zealand's BBNJ obligations

88 Trevor Daya-Winterbottom "Sustainability, governance and water management in New Zealand" in Michael Kidd, Loretta Feris and Tumai Murombo (eds) *Water and the Law: Towards Sustainability* (Edward Elgar Publishing, Cheltenham, 2014) 167 at 191.

89 Trevor Daya-Winterbottom "Sustainability, governance and water management in New Zealand" in Michael Kidd, Loretta Feris and Tumai Murombo (eds) *Water and the Law: Towards Sustainability* (Edward Elgar Publishing, Cheltenham, 2014) 167 at 196.

90 Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 33–34.

91 Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 57–58.

92 Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 58.

93 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 51–52.

94 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289; Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 53.

when making decisions about marine genetic resources. The maritime context features a particularly strong interpretive principle: national law in this area has been fundamentally shaped by international law, requiring courts to read national law consistently with related international law whenever feasible.[95] The Marine Genetic Resources Act should therefore clarify these interpretive obligations while establishing substantive standards that integrate both regimes.

B. Extending Customary Marine Title Authority to MGR Access and Benefit-Sharing

The Ngā Rohe Moana Act's permission rights framework under s 74, requiring customary marine title hapū to give written permission before resource consent applications can be processed, provides a tested mechanism for operationalising FPIC requirements.[96] Legislative adaptations could extend this permission authority to MGR collection within customary marine title areas, ensuring researchers must obtain hapū consent before accessing genetic resources. Several complexities emerge that require careful legislative design.

First, the Act's territorially bounded customary marine title creates jurisdictional limitations for species migrating between the EEZ and ABNJ. The Ngā Rohe Moana Order 2020 establishes defined areas with varying seaward extensions from the landward boundary of Ngā Rohe Moana: some extend 0.5 nautical miles, others 0.25 nautical miles, and most extend three nautical miles.[97] This geographic precision, extending Indigenous marine rights beyond the immediate foreshore into offshore waters, is significant for BBNJ implementation as marine genetic resources may be collected from these defined zones, raising questions about whether benefit-sharing obligations apply differently in areas under customary marine title versus areas beyond national jurisdiction.[98] Legislative amendments could establish that where taonga species traverse these boundaries, hapū consent requirements follow the species regardless of collection location. This would operationalise recognition that some taonga species migrate between New Zealand and ABNJ by establishing that whakapapa connections create consent obligations that transcend jurisdictional boundaries.[99]

Second, the permission framework would require adaptation to address temporal dimensions. Currently, s 74 operates at the resource consent application stage, enabling hapū to grant or withhold permission for specific proposed activities.[100] MGR benefit-sharing requires ongoing authority beyond initial collection, particularly given recommendations to delay monetary benefit-sharing until commercialisation. Recommendations suggest that payment requirements should not be imposed during in situ collection or research and development phases to avoid creating unreasonable obstacles to marine scientific research activities, with payment requirements instead triggered upon commercial utilisation of MGRs as a more reasonable approach.[101] Legislative provisions could require researchers to return to hapū for additional consent when shifting from

95 Bevan Marten "International Maritime Law and New Zealand Domestic Law" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 23 at 49.

96 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 74(1).

97 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

98 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

99 Office of the Minister of Foreign Affairs "Agreement on the Conservation and Sustainable Use of Marine Biodiversity Beyond National Jurisdiction: Policy Approvals for Implementing Legislation and Approval to Ratify" (Cabinet Paper, November 2024) at [54.2].

100 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 74(1).

101 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 14.

non-commercial research to commercial development, ensuring FPIC operates throughout the utilisation chain rather than solely at initial access.

This temporal framework could inform how the Ngā Rohe Moana model sequences benefit-sharing obligations, prioritising non-monetary benefits (data sharing, capacity building) during research while securing monetary returns at commercialisation.[102]

Third, the environmental covenant provisions under s 85, requiring Gisborne District Council to recognise and provide for matters in the covenant relating to resource management issues, could be extended to require recognition of hapū MGR management plans.[103] Such plans could identify which species are subject to prohibitions on genetic resource extraction due to their cultural significance, which require specific tikanga-based protocols for access, and how benefits should be distributed amongst hapū and sub-tribal entities. The mandatory consideration requirement in s 85(1) requires Gisborne District Council to ensure that key public documents recognise and provide for resource management matters contained in the environmental covenant for customary marine title areas. This would ensure management plans directly inform consent decisions rather than serving merely as non-binding guidance.[104]

C. Benefit Distribution Mechanisms Integrating Fisheries Precedents

The Māori Fisheries Act's dual criteria allocation system, combining population percentages specified in sch 3 and registered coastline entitlements determined under s 11 and sch 6, could be adapted to allocate MGR benefits amongst Māori based on both demographic representation and customary marine territorial connections.[105] MGR contexts present distinct challenges. Unlike fisheries quota, which are allocated to specific iwi based on their rohe moana connections, genetic resources may derive from migratory species with relationships to multiple iwi or from areas beyond any customary marine title. Legislative provisions could establish allocation criteria including:

First, where MGRs derive from species with established whakapapa connections to specific hapū within customary marine title areas, benefits flow primarily to those hapū through their designated management arrangements. The Ngā Rohe Moana Order 2020 already establishes Takutai Kaitiaki Trusts, specifically designating Potikirua ki Whangaokena Takutai Kaitiaki Trust, Whangaokena ki Onepoto Takutai Kaitiaki Trust, Te Papatipu o Uepohatu me te Papatipu o te Ngaere Takutai Kaitiaki Trust, and Nga Hapu o Waipiro Takutai Kaitiaki Trust as management arrangements representing groups of hapū with shared interests in geographically defined marine areas.[106] These collectively governed trusts provide an institutional model for receiving and managing benefits that could be adapted for distributing monetary and non-monetary benefits from marine genetic resources under BBNJ, ensuring benefits flow to properly mandated Indigenous governance entities rather than Crown agencies.[107]

Second, where MGRs derive from species with connections to multiple iwi, allocation could follow the fisheries model combining demographic representation with coastline entitlements. The fisheries framework demonstrates how benefits can be managed collectively for Māori interests

102 Wenlong Yu and others "Form Follows Function: In Pursuit of Solutions to the Unresolved Issues of the Benefit-Sharing Regime for Marine Genetic Resources under the BBNJ Agreement" (2025) 12 Front Mar Sci 1726523 at 14.

103 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 85(1).

104 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019, s 85(1).

105 Māori Fisheries Act 2004, ss 7–11.

106 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

107 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

while ensuring distribution to individual iwi through legally enforceable allocation requirements. Te Ohu Kai Moana Trustee Limited holds fiduciary duties to allocate and transfer settlement assets to mandated iwi organisations, with s 130 to allocate and transfer settlement assets to mandated iwi organisations.[108]

Third, where MGRs derive from areas beyond any customary marine title or from species without established whakapapa connections, benefits could flow to a central fund modelled on Te Ohu Kai Moana, with distribution to mandated iwi organisations following the fisheries precedent and ensuring collective management paired with binding distribution to iwi entities through legally enforceable allocation requirements.[109]

The inalienability protections under the Māori Fisheries Act, where pt 4 establishes that settlement quota cannot be sold except in limited circumstances requiring ministerial approval under ss 158 to 161 and 168, with transfers restricted to other mandated iwi organisations or Te Ohu Kai Moana Group entities, should extend to MGR benefits.[110] Legislative provisions could establish that benefit-sharing agreements cannot be alienated to non-Māori entities and that any transfers require ministerial approval and must remain within Māori governance structures. This inalienability framework, designed to preserve the fisheries settlement for future generations, offers a precedent for protecting marine genetic resource benefits under BBNJ from commercial exploitation or loss, ensuring long-term retention of benefits within Māori governance structures while permitting strategic inter-iwi transfers.[111]

Furthermore, the Act's mandated iwi organisation requirements under ss 12 to 18, requiring each iwi to establish entities meeting strict criteria including constitutional documents complying with sch 7 kaupapa, ratification by 75 per cent of adult iwi members, and registers of iwi members, could be adapted for MGR contexts.[112] This democratic accountability model may require modification to accommodate tikanga-based collective decision-making that operates through whanaungatanga and mana relationships rather than majority voting.

D. Enforcement Mechanisms and Remedies for Non-Compliance

The Marine Genetic Resources Act must establish monitoring and reporting requirements ensuring researchers notify the national clearing-house mechanism at pre-collection, post-collection, and commercialisation stages. This aligns with BBNJ Agreement art 12, which mandates notification to the Clearing-House Mechanism six months before collection, including information about opportunities for scientists from all States, particularly developing States, to participate in or be associated with the project. Upon collection, parties must report where digital sequence information and samples are deposited and provide standardised BBNJ batch identifiers.[113] These notifications should include information on iwi or hapū consultations, consent obtained, and benefit-sharing agreements concluded. Compliance auditing mechanisms should enable the Access and Benefit-Sharing Committee (or domestic equivalent) to verify that benefit-sharing obligations are met, with

108 Māori Fisheries Act 2004, ss 34(c) and 130.
109 Māori Fisheries Act 2004, ss 34(c) and 130.
110 Māori Fisheries Act 2004, ss 158–161 and 168.
111 Māori Fisheries Act 2004, ss 158–161 and 168.
112 Māori Fisheries Act 2004, ss 12–18.
113 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023), art 12.

requirements that researchers provide evidence of consent and benefit-sharing agreements before receiving permits for MGR collection or before patent applications can be granted.

Remedies for non-compliance should reflect both Western legal frameworks and tikanga principles. Intellectual property rights could be revocable for non-compliance with disclosure requirements, as proposed in advocacy for establishing a mandatory disclosure system for patent applications involving MGRs in ABNJ within the WIPO framework.[114] Legislative provisions could establish that patents based on MGRs accessed without proper consent or benefit-sharing are subject to revocation, with the Intellectual Property Office required to verify compliance before granting patents. Tikanga-based remedies may prioritise restoration of relationships through utu (reciprocity) rather than punitive damages. Kaitiakitanga creates obligations binding both individuals and communities over generations, suggesting that enforcement mechanisms must address not just immediate violations but long-term protection of mauri and intergenerational rights.[115] Legislative flexibility enabling hapū to determine appropriate remedies, including both financial compensation and relationship restoration measures, would better align with tikanga principles while ensuring substantive enforcement capability.

E. The Limited Extent of Transferability

The Ngā Rohe Moana model operates at a foundational but limited extent of transferability, which is a critical distinction between normative frameworks and operational mechanisms. The model's foundational contributions prove indispensable. First it establishes constitutional precedent that marine governance can embed Treaty partnership through enforceable co-governance rather than consultation. Second, it provides institutional templates, including management arrangements as representative entities,[116] Takutai Kaitiaki Trusts,[117] and environmental covenants creating binding obligations.[118] Third, it operationalises consent as determinative authority through s 74's permission framework.[119] These elements provide what new legislation cannot generate independently − constitutional legitimacy and tested institutional architecture.

However, limited transferability arises from incompatibilities that adaptation cannot overcome. The Act's territorial boundedness, with customary marine title extending a maximum of three nautical miles seaward,[120] contradicts governance needs for migratory species. Extending s 74 permission requirements to international waters would breach UNCLOS art 87's freedom of scientific research.[121] Similarly, frameworks protecting physical activities in defined locations prove structurally unsuited to governing digital sequence information circulating through international databases. These limitations necessitate purpose-built legislation: the Marine Genetic Resources Act must build upon co-governance architecture while developing novel statutory mechanisms

114 Qing Xu and Yongfeng Jin "Benefit Sharing of Marine Genetic Resources and Intellectual Property Protection under the BBNJ Agreement" (2025) 12 Frontiers in Marine Science 1631043 at 9.

115 Catherine J Iorns Magallanes "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand" (2015) VertigO Hors-série 22 at [8].

116 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

117 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

118 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

119 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

120 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

121 *United Nations Convention on the Law of the Sea* 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

suited to genetic resources in ABNJ. This positions the answer at "foundational but limited", which is beyond minimal yet short of moderate transferability.

Jurisdictional coordination mechanisms must address the challenge that MGR commercialisation may occur across multiple jurisdictions. If a Japanese company uses MGRs collected by American researchers in ABNJ to develop products sold in Europe, enforcement requires international cooperation. Legislative provisions could establish that New Zealand will seek reciprocal enforcement agreements with other BBNJ State parties, enabling mutual recognition of benefit-sharing obligations and coordinated remedies. Without anticipatory research developing enforcement frameworks before implementation begins, benefit-sharing obligations risk becoming mechanisms that replicate challenges of managing common-pool resources and benefit those who have existing capacity to appropriate.[122]

The Ngā Rohe Moana model can inform BBNJ implementation to a foundational but limited extent: providing constitutional precedent, institutional templates, and normative principles essential for Treaty-compliant benefit-sharing while requiring comprehensive new legislative architecture addressing fundamental incompatibilities. The foundational extent manifests through proven co-governance mechanisms, including management arrangements as representative entities,[123] consent-based permission frameworks,[124] collective benefit distribution through Takutai Kaitiaki Trusts,[125] and tikanga integration,[126] demonstrating that international obligations and Treaty commitments can be simultaneously honoured through institutional design. Yet limited transferability arises from three incompatibilities that adaptation cannot overcome: ontological tensions between common heritage frameworks treating MGRs as extractable commodities and kaitiakitanga principles centring relational responsibilities to marine ancestors; jurisdictional constraints when customary marine title's territorial boundaries encounter migratory species in ABNJ; and technological challenges governing digital sequences through physical resource frameworks. These necessitate purpose-built legislation drawing inspiration from, rather than transplanting, the Ngā Rohe Moana framework.

Simple transplantation of the Ngā Rohe Moana framework to marine genetic resource contexts proves inadequate due to three critical incompatibilities. First, the ontological tension between the BBNJ Treaty's common heritage framework treating MGRs as extractable commodities and tikanga Māori principles centring relational responsibilities to marine entities as living ancestors with mauri requires fundamental reconceptualisation of what constitutes 'benefits' and how they should be shared. How should benefits be conceptualised when tikanga may prohibit commodification of certain taonga species entirely, as emphasised by the recognition that kaitiakitanga represents a family relationship that is permanent and mandatory, binding both individuals and communities over generations, rather than the transactional or proprietary relationships characteristic of Western markets?[127] Legislative frameworks must therefore enable hapū to determine which species

122 Siva Thambisetty "The Unfree Commons: Freedom of Marine Scientific Research and the Status of Genetic Resources beyond National Jurisdiction" (2025) 88 MLR 300 at 316.

123 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

124 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.

125 Ngā Rohe Moana o Ngā Hapū o Ngāti Porou (Recognition of Customary Marine Title) Order 2020.

126 Robert Joseph "Stemming the Colonial Environmental Tide: Ecosystem-Based Management and Shared Crown-Māori Co-Governance for Sustaining Our Marine Coastal Estate in Aotearoa New Zealand – Summary Report" (National Science Challenge Sustainable Seas Ko Ngā Moana Whakauka and Te Mata Hautū Taketake, University of Waikato, December 2023) at 13.

127 Catherine J Iorns Magallanes "Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand" (2015) VertigO Hors-série 22 at [8].

remain outside benefit-sharing regimes entirely, prioritising protection of mauri and whakapapa relationships over maximising distributable benefits.

Second, the jurisdictional complexity of species traversing boundaries between customary marine title areas (extending up to three nautical miles seaward), the EEZ (where New Zealand has around 4,000,000 square kilometres of jurisdiction, approximately 20 times the size of New Zealand's land mass), and ABNJ demands legislative provisions that extend kaitiakitanga responsibilities across jurisdictional boundaries based on whakapapa connections rather than territorial control.[128] The Office of the Minister of Foreign Affairs' explicit recognition that some taonga species migrate between New Zealand and ABNJ creates potential alignment between international MGR benefit-sharing obligations and domestic co-governance arrangements for protecting culturally significant marine species. However, no academic research examines the legal implications when species holding cultural significance and genetic resource value cross the boundary between jurisdictional zones.[129]

Third, the challenge of Māori data sovereignty for digital sequence information circulating through international databases requires technical governance mechanisms not contemplated by existing co-governance frameworks. The BBNJ Agreement's standardised batch identifier requirements and clearing-house mechanisms create international transparency obligations. It remains unclear how Māori data sovereignty principles requiring community authority over knowledge access and use can be operationalised when genetic sequences are shared through international databases designed for open access and maximum scientific utility.[130]

Legislative adaptations addressing these challenges would require a dedicated Marine Genetic Resources Act incorporating: explicit recognition of both BBNJ obligations and Treaty of Waitangi principles as co-equal frameworks requiring integration rather than balancing; extension of customary marine title permission rights to MGR access with temporal provisions ensuring consent operates throughout utilisation chains from initial collection through research to commercialisation; benefit distribution mechanisms adapting fisheries allocation precedents (dual-criteria models combining demographic and territorial factors, centralised collection with mandatory distribution, and inalienability protections) while accommodating whakapapa connections that transcend territorial boundaries; Māori data sovereignty provisions establishing access protocols for digital sequence information while preserving scientific collaboration; and enforcement mechanisms combining Western legal remedies (patent revocation for non-compliance) with tikanga-based relationship restoration approaches prioritising utu over punitive damages.

The temporal urgency is acute. Cabinet has approved New Zealand's ratification of the BBNJ Treaty with implementing legislation requiring consultation with Māori during development, while

128 Bevan Marten "New Zealand Maritime Law and Context" in Bevan Marten (ed) *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2017) 1 at 3.

129 Office of the Minister of Foreign Affairs "Agreement on the Conservation and Sustainable Use of Marine Biodiversity Beyond National Jurisdiction: Policy Approvals for Implementing Legislation and Approval to Ratify" (Cabinet Paper, November 2024) at [54.2].

130 *Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* A/CONF.232/2023/4 (2023) art 12; Arianna Broggiato and others "Monetary and Non-monetary Benefit Sharing under the BBNJ Agreement" in Fran Humphries (ed) *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement* (Springer, Cham, 2025) 159 at 164–165.

policy development is only beginning.[131] Without addressing the identified gaps, implementation risks defaulting to Western frameworks that breach Treaty obligations or creating aspirational co-governance structures lacking genuine authority and enforcement. The Ngā Rohe Moana model demonstrates that authentic partnership is possible, but extending it to marine genetic resources requires legislative innovation that honours both international obligations and the constitutional relationship between the Crown and Māori established by Te Tiriti o Waitangi.

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131 Cabinet Foreign Policy and National Security Committee "Agreement on the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction: Policy Decisions and Approval to Ratify" (Cabinet Paper, 19 November 2024) FPS-24-MIN-0033.

From Fiction to Testimony: Prophet Song and the Historical Memory of the Dawn Raids

Mai i te Pakiwaitara ki te Whakaaturanga: Te Waiata Poropiti me te Maharatanga Hītori o ngā Huakitanga Ata Hāpara

I. Book Review

He Arotake Pukapuka

Associate Professor Patrick Barrett*

PROPHET SONG by Paul Lynch, Oneworld (London), 2023, 320pp, recommended retail price $24.99

Set in post-troubles Ireland, Paul Lynch's 2023 Booker Prize winning novel *Prophet Song* begins with officers from the newly created Irish secret police arriving at the Dublin home of Eilish Stack, a scientist and middle-class mother of four, to question her husband Larry, a senior figure in the teachers' union. The scene signals the beginning of Ireland's descent into authoritarianism and has echoes of New Zealand in the 1970s – dawn raids and the deliberate targeting of groups by government agencies. In Lynch's novel, we find out little about the new regime. Its leaders and their political ideology are never explained. The novel instead is interested in the consequences of democratic collapse and how quickly the certainties of everyday life break down. Protections provided by the law fail and Eilish's husband Larry is "disappeared". Irish society begins to fracture as the authoritarian playbook is implemented – propaganda campaigns, surveillance, suppression of public protest, militarised policing and, ultimately, armed conflict. We are not told how democracy fails – the lens remains focused on the household. Eilish continues living in the family home trying to manage daily tasks of work, school, food, caring for a father with dementia. It is through this partial but familiar lens of everyday life that we see the breakdown of democratic institutions.

It is a contemporary take on the global weakening of democratic norms and the associated upsurge in forms of authoritarianism – think civil service purges and the work of Immigration and Customs Enforcement (ICE) in the United States, or targeted crackdowns on Muslim populations in Modi's India, or Russia's suppression of opposition and anti-government protest and its violence in Ukraine. Lynch, however, doesn't tell us about government leaders or their ends, but directs

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attention to the experience of families facing the instruments of authoritarian government. Prophet Song, thus, enables us to identify with these family experiences – it brings it home in a way where it becomes difficult to say, "it couldn't happen here".

In the New Zealand context, C K Stead addressed a similar theme in the political thriller Smith's Dream about an everyman caught up in a dystopian police state, released as the film Sleeping Dogs in 1977. At the time it spoke to Muldoon's approach to governing, which included the scapegoating of Pacific peoples through disproportionate targeting in immigration policy. We have our own history of intimidating policing tactics and targeted enforcement operations.

Prophet Song, or the song of the prophet, is a novel about how quickly tyranny can emerge, erode taken-for-granted citizenship rights, and force people to flee their homes. It challenges us to be awake to threats that are all too real today – democratic erosion, information manipulation, surveillance, and the loss of institutional checks and balances. It's an urgent book, and Lynch's style conveys that. He writes in the present tense in long paragraphs without speech marks and makes heavy use of stream of consciousness, with the effect of conveying an energy and breathless urgency in the unfolding narrative, propelling the action forward for the reader just as Eilish is propelled into a terrifying uncertain future.

II. The Silent Echoes of the Raids: A Personal Reflection on the Dawn Raids and the Legacy of Those Left Behind

Ngā Pāorooro Puku o ngā Huakitanga Ata Hāpara: He Whakaaroaro Whaiaro mō ngā Huakitanga Ata Hāpara me ngā Tapuwae o te Hunga i Whakarērea ki Muri

Louisa Westerlund**

My family's story in Aotearoa New Zealand does not begin with quiet integration; it is marked by the heavy thuds of boots on floorboards, the glare of searchlights, and the terrifying bark of police dogs in the dead of night. For decades, the history of the 1970s Dawn Raids has been told primarily through immigration statistics or the stories of those deported. But there is another, quieter history that has remained locked within the hearts of our aiga: the story of those who were left behind. As a descendant of Pacific migrants who experienced this dark epoch, I write this as a personal reflection on the trauma of separation, the strength of our elders, and the absolute necessity of vigilance.

A. Shattered Sanctuaries: The Trauma of Separation

To understand the impact of the Dawn Raids, we must look at the aiga, the family unit. When the raids occurred, the emotional and physical disruption was catastrophic. Mornings were the hardest. Previously, daily life revolved around the lotu, morning family prayers where the aiga gathered in

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a tight circle to sing. But after a father, an uncle, or a brother was dragged away in their sleepwear, that circle was broken. We still gathered, but our voices rose thin, choked with tears. A father's deep bass, which once led our songs, was replaced by a deafening silence. His empty chair at the table sat like an open wound, a constant reminder of state intrusion.

This void stretched across generations, creating an internal pressure cooker of fear that strained family bonds. Children grew up with a confusing sense of loss, suddenly missing grandparents, the cultural anchors of the home. Grand aunties recall the heartbreak of children asking why Papa's warm hands weren't there, or why Nana's storytelling had suddenly ceased after they were deported. The trauma lingered in the eyes of the women left behind. They had to sweep up the debris of broken doors and shattered trust while hiding their tears, putting on a brave face to protect their children from the suffocating fear of the next knock.

B. The Struggle for Survival: Crowded Homes and Cold Hearths

With primary providers suddenly stripped away, those left behind navigated severe economic deprivation and housing instability. To survive, families relied heavily on extended aiga and friends, pooling scarce resources. This often forced families into crowded, substandard housing. Landlords, aware of our community's terror of authority, neglected their properties, knowing Pacific tenants were too afraid of deportation or police scrutiny to complain. Evictions were sudden and merciless, forcing families to pack their lives overnight and seek shelter in the already crowded living rooms of relatives. To pay rent and buy food, adults worked two or three jobs, leaving before dawn and returning after dark. This financial strain quickly forced teenagers to leave secondary school prematurely to work in freezing works and factories. They sacrificed their education to cover immediate living costs and to fulfil cultural commitments back in the islands. In our culture, supporting families back home is a sacred duty; failing to send money results in profound shame for the entire household. Consequently, the dream of completing secondary school or attending university was completely severed, locking a generation out of professional opportunities.

C. The "Household Lens" of State Intrusion

This devastating experience of state intrusion and the fracturing of domestic life is reflected in Paul Lynch's novel *Prophet Song*. What makes Lynch's narrative resonant with our history is its focus on the "household lens". It focuses on the daily struggle of a mother trying to keep her family together, managing school, food, and work amidst the wreckage of her domestic sanctuary. This was the reality for my family and many Pacific Peoples. They were not focused on the macro-politics of the Muldoon government but on the sheer survival of their families in a country that had suddenly turned hostile. In our case, the state chose to scapegoat Pacific Peoples through disproportionate immigration targeting. They recall how the relationship of trust with New Zealand institutions shattered. Brown-skinned people were routinely stopped on the street, at bus stops, or on their way to church, forced to prove their visa status simply because of their appearance. This racial profiling turned ordinary citizens and legal residents into suspects, fracturing the social fabric and sending a clear message that we did not belong.

D. The Silence in the History Books

When I studied history at secondary school, the curriculum covered the World Wars and the American Civil Rights Movement but completely ignored the Dawn Raids that had terrorised

Pacific communities. By excluding these experiences from the national narrative, the education system limited opportunities to confront state responsibility and left many Pacific students feeling that our history was somehow less worthy of recognition. It is this silence that makes writing our own stories so vital, especially now as the eyewitnesses to this era pass away.

E. Reconciliation and the Ifoga

On 1 August 2021, Prime Minister Jacinda Ardern delivered a formal public apology, participating in the traditional Samoan custom of the *Ifoga*. Watching the Prime Minister covered in a fine mat, seeking forgiveness with deep humility, was an incredibly emotional experience for my aiga. It was a formal validation of the trauma many Pacific Peoples had carried in silence for nearly fifty years. Many sat in that room acutely aware of the many elders who had passed away before they could hear the state admit its cruelty. This apology came too late for them, but was healing for those of us left behind. The "Tulī Takes Flight" scholarship was established as a form of redress for the harm caused to Pacific communities.

As a recipient of the scholarship to pursue tertiary study, I see first-hand how this initiative acts as a necessary form of educational redress. By funding academic pathways, the government is actively dismantling the structural barriers reinforced during the Dawn Raids, transforming a legacy of exclusion into one of opportunity. It allows us to reclaim professional spaces, ensuring our voices are represented in the systems that once targeted us. For my family, seeing me attend university is a collective victory, honouring the relatives who were denied these opportunities.

F. A Call to Vigilance

The Dawn Raids should not be remembered solely as an unfortunate episode from the past. They remain a warning about what can occur when state power, racial prejudice and political pressure converge. For me, this history is also about responsibility. Our elders carried experiences that many found difficult to speak about. Some have now passed away, taking parts of those stories with them. Recording what remains is one way of honouring them.

The silent echoes of the Dawn Raids remain within Pacific families. But silence does not have to be their legacy. Through education, scholarship, legal reflection and the continued telling of our stories, those experiences can become part of a fuller account of Aotearoa New Zealand's history. Remembering is not about remaining trapped in the past. It is about ensuring that the lessons of that past continue to shape how we understand justice, equality and the proper limits of state power.

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Hope and Courage: The Indigenous Voice in the Environment, Biodiversity and Climate Change

Te Tūmanako me te Māia: Te Reo Iwi Taketake i te Taiao, i te Kanorau Koiora me te Panonitanga Āhuarangi

Horiana Irwin-Easthope*

E Te Arikinui Kuini Ngā wai hono i te pō, tēnā koe i tō mana. Me mihi ka tika hoki ki tō Kāhui. Rau rangatira mā, hika mā, tēnā tātau. It is lovely to be with you all this morning.

When I was reflecting on this kaupapa[1] over the past few weeks and trying not to angst over the task of working out what to say, I went to the moana (the ocean). That is what I do to ground myself. That is where I go when I'm stuck. I am from the East Coast of the North Island. The metropolis of Tikitiki on my Ngāti Porou side, and the equally pumping Nūhaka on my Rakaipaaka and Kahungunu side. The moana is an integral part of who we are. It is our whakapapa; it is us.

I also made my 10-year-old son come with me on my walk to the moana. Rōpata Te-Kauru-o-Te-Rangi Easthope. *Our wildest dream*. [*Who will just be so chuffed that I am in the same room as "Kuini Ngā wai"; that is what our babies at our kura Whakatupuranga Rua Mano in Ōtaki call you*]. I would like to say that he was overjoyed to take a walk down to the moana with his māmā, but I bribed him with lollies. In any event, he was there with me. I like to test some of my thinking with him. He is pretty onto it but he is also very direct, so a good litmus test for ideas.

We talked about Papatūānuku, Tangaroa, Ranginui − our atua Māori. We talked about how the world is changing and the "once in a generation" storm, like Cyclone Gabrielle for us on the East Coast, is now happening every few years. We talked about how different industries, that we were often grandparented into, are just not working for us as Māori anymore (and are certainly not working for our planet). And then we talked about power, and the need for power to be shared, and held by us as Māori, particularly when we are talking about our taiao (our environment).

I've talked to Rōpata about the constitution before. It was in the context of the Treaty Principles Bill[2] and his general inquiry as to how something so ridiculously unnecessary (and, in his words, "just a bit weird"), could make its way onto the floor of the House of Representatives. His whakaaro (opinion) was that the word "constitution" wasn't a good word, he said it was weird. I get it. So, we

* Speech delivered by Horiana Irwin-Easthope (Ngāti Porou (Te Whānau a Putaanga), Ngāti Kahungunu, Rakaipaaka) Tumuaki | Director at Whāia Legal, a kaupapa Māori law firm, at the inaugural International Indigenous Judges Conference (and Hui ā Tau for Te Hunga Rōia Māori o Aotearoa / The Māori Law Society), Kirikiriroa/Hamilton, 25 October 2025. This speech was developed into this piece with assistance of Beth Murfitt (Ngāti Raukawa, Ngāti Huia), Pou Ture Matua | Senior Solicitor. This piece has intentionally retained its form as a speech.

1 The Indigenous voice in the environment, biodiversity and climate change.

2 Principles of the Treaty of Waitangi Bill 94—1, introduced into the New Zealand House of Representatives on 7 November 2024.

then talked about Matike Mai,[3] the ground-breaking constitutional change work led by Pāpā Moana Jackson and Professor Margaret Mutu. He liked that better. But by then, my time was running out, and we headed to the dairy for me to make good on my lolly bribe.

So, what I would like to speak about today is *hope* and *courage*. I hope Tā Joe, Justice Williams,[4] isn't thinking "ah Horiana, that is a bit abstract". But within those topics, is how we, as Indigenous peoples, can both use the legal tools within the current power structures within which we operate (the law being one of them) and how we might have the courage and imagination to design new systems. To have the courage to test new legal ideas through litigation and use the courts as one of the tools in the kete (basket).

In my view, our role as lawyers is to assist our clients, whānau, hapū and iwi, to both use the existing tools whilst simultaneously working to dismantle the current power structures that exist and reimagine our constitutional future. That is what I am here for. That is why I do the work I do.

Reflecting on some of the kōrero that we have heard over the past few days,[5] and some of the lack of regard for what we once thought were firm constitutional conventions over the past 18 months, it is very clear that we need better constitutional protections. We need constitutional change. We need governments to be non-partisan when it comes to our taiao (environment). And, before we get that, we are entitled to use the tools within the law as it stands to fight the system from within. As lawyers, we are trained to do that.

So, back to *courage*. Going to court takes courage. Courage on behalf of our whānau, hapū and iwi to test the status quo through the very structures that are perpetuating the status quo. To take the risk. I acknowledge our Waikato Tainui whānau here with us at the front with Te Arikinui Kuini Ngā wai hono i te pō, who have showed steadfast courage over the years to achieve what they have for their people. And to acknowledge that litigation is often a very (very) long, gruelling and expensive path. So, for our clients to go to court, it takes courage. We are seeing that now more with environmental litigation, which in part represents a frustration with the status quo and the lack of urgent action on climate change from successive governments. We have a very recent example from a few days ago where the current New Zealand Government gutted our once world-leading climate disclosure law, just months after officials showcased it to the United Nations as evidence of "significant progress" on climate action.[6] At times, it defies logic and rationality.

My prediction for the next wave of litigation that you as judges will be seeing, will be much more connected to place, and will be about the environment, as people get increasingly frustrated with the lack of government action.

Before coming to the recent example of the *Smith* litigation, I want to acknowledge a leading pioneer in environmental litigation from this rohe (region), Dame Ngāneko Minhinnick.[7] In 1982,

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3 Moana Jackson and Professor Margaret Mutu *He Whakaaro Here Whakaumu Mō Aotearoa: Matike Mai Aotearoa, Independent Iwi Working Group on Constitutional Transformation* (January 2016).

4 The Honourable Sir Joe Williams KNZM (Ngati Pūkenga, Waitaha and Tapuika), Justice of the Supreme Court of New Zealand – Te Kōti Mana Nui o Aotearoa.

5 At the inaugural International Indigenous Judges Conference and Hui ā Tau for Te Hunga Rōia Māori o Aotearoa / The Māori Law Society, 24−26 October 2025.

6 See Scott Simpson (Commerce and Consumer Affairs Minister) "Commonsense changes to boost capital markets" (22 October 2025) Beehive: the official website of the New Zealand Government <www.beehive.govt.nz>.; and Kirsty Johnston "New Zealand guts climate policy it bragged about on the world stage" (22 October 2025) Radio New Zealand <www.rnz.co.nz>.

7 Dame Ngāneko Minhinnick was a leading environmentalist and rangatira of Ngāti Te Ata (August 1939–June 2017). Moe mai rā e te māreikura.

Dame went to the Waitangi Tribunal in 1982 over pollution of the Manukau Harbour by the Māngere sewage treatment plant, the New Zealand steel mill at Glenbrook and other developments. That then led to the groundbreaking Manukau Harbour report,[8] penned by our own lifetime member, Tā Taihākurei Durie[9] [*who is with us here today; tēnā anō koe e te rangatira*]. Dame Ngāneko also led a case which resulted in the 1987 *Huakina* judgment of Justice Chilwell where his Honour held that "the Treaty is part of the fabric of New Zealand society."[10] A huge jurisprudential statement at the time, which remains cited regularly today. I acknowledge Dame Ngāneko's leadership and courage for bringing those cases to the Court.

The more recent example that I will focus on is the litigation brought by Mike Smith against both the New Zealand Government and the biggest emitters of greenhouse gases in New Zealand.[11]

Mike Smith (Ngāpuhi, Ngāti Kahu), an activist well-known to many of us, sued seven defendants who either were emitters of greenhouse gases or who supplied products that resulted in the emission of greenhouse gases when consumed.[12] Mr Smith claimed that the defendants' emissions contributed to climate change, which threatened customary land in which he had an interest, and other sites of cultural significance. He pleaded claims in public nuisance, negligence, and a further novel tort that sought to hold the defendant strictly liable for knowing contributions to climate change. Mr Smith did not seek damages; he sought two alternative injunctive remedies. The first, to require the defendants to reduce their emission to net zero emission by 2030 by linear reductions each year and, the second, to require the defendants to cease their public nuisance creating activities immediately. Mr Smith also relied on principles of tikanga Māori to "inform the legal basis of the pleaded causes of action and the development of the common law of New Zealand."[13]

The tikanga principles pleaded are that tikanga Māori has its own system of obligations and recognition of wrongs arising from those obligations, that such obligations are grounded in whakapapa (genealogical) and whanaungatanga (kinship) relationships; that these relationships include a connection to whenua (land and the environment) through whakapapa, giving rise to corresponding obligations of kaitiakitanga (loosely, to care for or nurture); and that breaching tikanga creates a hara or take (issue or cause) requiring utu (compensatory action) to restore ea (a state of harmony or balance).[14] A special acknowledgement to our own amazing Natalie Coates, who is a part of Mike Smith's legal team, alongside Davey Salmon KC and David Bullock. I've drawn on some of David's writing for the breakdown of Mr Smith's case.[15]

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8 Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau claim* (Wai 8, July 1985).

9 Sir Edward Taihākurei Durie (Ngāti Kauwhata, Rangitāne, Ngāti Raukawa) at the time was the Chief Judge of the Māori Land Court and Chair of the Waitangi Tribunal (and was the first Māori to be appointed a Judge and Chief Judge of the Māori Land Court).

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

11 See *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394; *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284; and *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134.

12 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394, Mr Smith's claim is set out at [5]−[16]. The defendants are: Fonterra Co-operative Group Ltd, Genesis Energy Ltd, Dairy Holdings Ltd, New Zealand Steel Ltd, Z Energy Ltd, The New Zealand Refining Company Ltd and BT Mining Ltd.

13 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [59].

14 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [60].

15 See David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85 MLR 1136 at 1159–1160; David Bullock "Climate change in the Supreme Court of New Zealand: Smith v Fonterra Co-operative Group Ltd" (2024) 98 ALJ 499; and David Bullock "Common Law Torts", in Douglas A Kysar, and Ernest Lim (eds) *The Oxford Handbook of Climate Change and Private Law, Oxford Handbooks* (New York, NY, 2026; online ed, Oxford Academic, 20 April 2026).

He further claimed that, under tikanga, environmental harm is a harm in and of itself, creating corresponding harm to those who have interests in the environment, including kaitiaki (loosely, those whose role it is to care for the environment) and mana whenua (again loosely, those with traditional authority in the particular environment). Where the environment has suffered damage, the principle of kaitiakitanga requires steps to be taken to restore balance, such as imposing rāhui. Finally, Mr Smith argued, tikanga Māori recognises that hara (in this context, environment-damaging wrong) has both a collective and an individual dimension as to those responsible for it and those who suffer it.

The defendants applied to "strike out" Mr Smith's claim. At first instance the High Court struck out the nuisance and negligence causes of action finding a lack of standing, directness and causation.[16] However, the Court allowed the "new" tort to proceed to trial on the basis that it was so novel the Court could not conclude the claim might not be established once evidence was heard.

All parties appealed to the Court of Appeal. The Court of Appeal dismissed Mr Smith's appeal and allowed the defendants' cross-appeals.[17] The appeal was determined on what was essentially non-justiciability reasoning. The Court held that "the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts".[18] It held that it was too difficult to define a class of plaintiffs or defendants, that the injunctive relief sought was untenable, and that tort claims in the courts amounted to "an inherently inefficient and ad hoc way of addressing climate change" which was "likely to result in arbitrary outcomes and ongoing litigation that lasts many years".[19] The problem of climate change was to be solved, the Court held, by national legislation and that tort litigation was not consistent with the "policy goals and scheme" of New Zealand's emissions reduction legislation.[20] It held "private litigation against a small subset of emitters … will not be effective to address climate change at a national level, let alone globally. It will be costly and inefficient. And it will be arbitrary in its application and impact".[21]

As to climate change, the Court's rule was limited to public law scrutiny of the government and did not include developing "a parallel common law regulatory regime that is ineffective and inefficient, and likely to be socially unjust".[22] It also considered that a legal inability to establish causation was fatal to the claim, holding that the nature of climate change meant "there is in fact no identifiable group of defendants that can be brought before the Court to stop the pleaded harm", and that an injunction would not prevent the pleaded harm.[23] Finally, the third cause of action, which proposed the creation of a new tort and which had survived strikeout at first instance, was struck out on the basis that, although novel, it was a "bare assertion … without any attempt to delineate its scope".[24] Specifically, the Court of Appeal found that tikanga did not assist in formulating a claim in tort.[25] To the contrary, the Court considered that "controlling climate change through regulatory

16 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 at [62]–[100].
17 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 at [12].
18 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [16].
19 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [27].
20 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [33].
21 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [33].
22 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [35].
23 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [92].
24 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [124].
25 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [82].

means [such as the CCRA] is consistent with kaitiakitanga".[26] In other words, legislative regulation was already consistent with the responsibility, according to tikanga.

The Supreme Court granted leave to appeal, and allowed Mr Smith's appeal.[27] The Supreme Court refused to strike out the claim, holding that in a case founded upon "seriously arguable non-trivial harm … the common law should lean towards receipt of the claim, and full evaluation based on evidence and argument over pre-emptive elimination".[28] The Supreme Court also rejected any notion of statutory pre-emption, relying on well-established common law authority, that while a statute may displace tort, the courts would be slow to reach that conclusion absent reasonably clear language or necessary implication.[29]

The Court recognised that Mr Smith's pleaded claim in public nuisance was legally tenable.[30] First, it was held that while liability in public nuisance is strict, a defendant will only be liable if the kind of harm suffered was a reasonably foreseeable consequence of the defendant's conduct, meaning there was a real risk of damage.[31] Second, the defendant's act or omission must substantially and unreasonably interfere with public rights, although the Court queried whether an unreasonableness requirement carried any weight.[32] Third, the tort does not depend on any particular person suffering damage, but to have standing a plaintiff must show that they have suffered some damage particular to them.[33]

Specifically, in relation to tikanga, the Supreme Court emphasised it was important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based.[34] Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.[35]

So, whatever the cause of action, the trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki acting on behalf of the whenua, wai and moana, as the Supreme Court says, "distinct entities in their own right".[36] The Court concluded by saying "In other words, addressing and assessing matters of tikanga simply cannot be avoided."[37]

My understanding is that trial preparation, for the ultimate trial against the emitters, is now underway. It may be that other iwi groups join the proceeding, giving further examples of how climate change is affecting their relationship with their taonga.

The Supreme Court is also currently considering the application for leave in the case against the

26 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] 2 NZLR 284 at [34].
27 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [190].
28 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [83].
29 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [95]–[99].
30 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [144]–[145].
31 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [110].
32 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [111].
33 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [112].
34 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [182].
35 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [182].
36 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [188].
37 *Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5, [2024] 1 NZLR 134 at [188].

Crown (being run as a separate proceeding).[38] If leave is granted, the Supreme Court will have the opportunity to revisit the Court of Appeal's judgment in striking out the claims against the Crown. So (hopefully) more to see here. There isn't the time to talk about the other cases either in the pipeline or recently determined. But there will be more, including in our specialist Environment Court. And courage will be required, from those bringing the cases, for those trying the cases and those hearing them.

Often, novel arguments quickly become orthodox. Hearing Dame Sian Elias talk about the *Huakina*[39] case reminded me of that. Dame Sian went from poring over texts about the Treaty of Waitangi, running an argument that was getting her laughed out of rooms with her Auckland colleagues − so being courageous, and then getting a judgment which quite firmly cemented the place of the Treaty in our common law again. We can't afford to be scared of the "novel"; as, quite often for us as Māori, those are our orthodox.

I am reminded of the words of my pāpā, Dr Apirana Mahuika (Ngāti Porou), when he said:

E tū ki te kei o te waka

Kia pakia koe e ngā ngaru o te wā

Stand at the stern of the canoe

And feel the spray of the future biting at your face

And now, with the spray of the future biting at our faces, I come back to *hope*.

Yesterday, I had the pleasure of listening to my sister cousin Tina Porou speak about her mahi in the taiao. It reminded me of a few things (1) how phenomenal Māori women are; (2) the importance of getting into the taiao, regularly; you can't protect it from a distance; you need to practice it; and (3) how the law can be used as one of the tools in the kete for change.

We have seen recent examples of how Aotearoa is using the law to help protect our environmental taonga, such as legal personhood in the context of Whanganui River,[40] Te Urewera[41] and Taranaki Maunga[42] (acknowledging our beautiful Titōhea aunty Liana Poutu); and the gains that were achieved for the Waikato River through the Waikato River settlement[43] by a number of the whānau that are sitting with us here in the front of the room. These are examples of using the law to further our relationship with our taiao, to embed further the Indigenous voice in those structures. We have those examples and change is happening as a result.

Tina also spoke about the importance of lawyers in the fight for the taiao. Particularly in the coming months and years; because we have a fight on our hands e te whānau. We need to lean in.

There are many ways to activate; litigation is just one tool in the kete, but the law isn't the kete. We need to connect with our mates; the artists, the dreamers, the divers, the hunters; the beautiful thing about our connection to the taiao is that it doesn't discriminate. Ko Hikurangi te maunga; that is us.

But in order to protect our whakapapa, our connection to place, it will take us all. So part of my hope for the future is, in our goal to protect our place, we connect more with each other. That

38 Appealing the Court of Appeal judgment in *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1.

39 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

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

41 Te Urewera Act 2014.

42 Te Ture Whakatupua mō Te Kāhui Tupua 2025 | Taranaki Maunga Collective Redress Act 2025.

43 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

whanaungatanga (as a verb), is at the heart of our taiao resilience. That, in our discussions and rebuilding of new structures, we have the courage to really be honest about what is not working for us anymore − perhaps some of our own tribal structures, growing global capitalism and bad behaviour. There will be things that need to be called out and I hope we are both ready to do that in a way that respects our whanaungatanga relationships and leads to real change.

That is also a cross-jurisdictional hope. My other prediction is that we will see more Indigenous communities sharing space and discussion about these issues; and how we can work together to protect our taiao. We have done this now for a long time, but the urgency that is literally smashing my homelands in Te Tairāwhiti every few years now, and will galvanise more urgent action and response.

Tuia ki te muka tangata; we are bound together by our indigeneity. In a very real way. I look forward to continuing to work alongside you all to both use our existing tools whilst simultaneously working to dismantle them. *Mai te po, ki te ao marama.*[44] Tēnā koutou katoa.

Post-script: Following the delivery of this speech, the Government has sought to legislate to prevent Mr Smith's claims against the emitters from going to trial. As at the time of finalising the article for publication, the Justice Select Committee is considering submissions on the Climate Change Response (Tort Liability) Amendment Bill. The Bill would remove tortious liability that would otherwise potentially exist at law; effectively preventing the Court from considering the same in Mr Smith's trial. The Bill has been widely criticised, with the New Zealand Law Society in its submission on the Bill noting "significant concerns" and "the important principle that Parliament should not generally interfere with particular cases before the courts".[45] The Supreme Court has also granted leave to Mr Smith in relation to his claims against the Crown.[46] The Supreme Court will hear Mr Smith's appeal against the Court of Appeal decision in *Smith v Attorney-General*[47] in August 2026.

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44 From the night to the world of light.

45 New Zealand Law Society "Submission to the Justice Committee on the Climate Change Response (Tort Liability) Amendment Bill 2026" <www.lawsociety.org.nz/assets/Law-Reform-Submissions/Climate-Change-Response-Tort-Liability-Amendment-Bill-9-July-2026.pdf>.

46 The Supreme Court granted leave in *Smith v Attorney General* [2025] NZSC 198 on 19 December 2025.

47 *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1.

Delivering a Low-Carbon Maritime Future: Shipping, Digitalisation, Decarbonisation and Renewable Energy

Te Tuku i te Ānamata o te Taha Moana Waro Iti: Te Mahi a te Kaipuke, te Matihikotanga, te Whakakorenga Waro me te Pūngao Whakahou

Jennifer Campion*

I. Introduction

Shipping occupies a central place in Aotearoa New Zealand's (NZ) economic and infrastructural landscape. As a geographically remote island nation, NZ relies heavily on maritime transport to support trade, supply chains and international connectivity. Shipping is also becoming increasingly important to climate and energy policy. It produces roughly three per cent of global greenhouse-gas emissions and is classified as a "hard-to-abate" sector.[1] International efforts to reduce greenhouse-gas emissions from maritime transport, together with domestic decarbonisation objectives, are creating pressure to reduce reliance on conventional marine fuels and accelerate the transition towards lower-emissions forms of transport.[2] In response, maritime electrification, shore-power infrastructure, hydrogen-based fuels and digital technologies are increasingly reshaping maritime

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1 Frauke Urban and others "Decarbonizing Maritime Shipping and Aviation: Disruption, Regime Resistance and Breaking Through Carbon Lock-In and Path Dependency in Hard-to-Abate Transport Sectors" (2024) 52 Environmental Innovation and Societal Transitions <https://doi.org/10.1016/j.eist.2024.100854>.

2 International Maritime Organization *2023 IMO Strategy on Reduction of GHG Emissions from Ships* (MEPC 80 Resolution, 2023); Ministry for the Environment *Te Hau Mārohi ki Anamata: New Zealand's Emissions Reduction Plan 2022−2025* (Ministry for the Environment, Wellington, 2022); He Pou a Rangi Climate Change Commission *Ināia Tonu Nei: A Low Emissions Future for Aotearoa* (2021); Junjie Dong and others "A Review of Law and Policy on Decarbonization of Shipping" (2022) 9 Frontiers in Marine Science <https://doi.org/10.3389/fmars.2022.1076352>; Henry Schwartz and Frauke Urban "Decarbonizing Maritime Shipping: A Comparative Analysis of Sustainable Energy Transitions in Finland and Sweden" (2026) 136 Energy Research & Social Science <https://doi.org/10.1016/j.erss.2026.104714>.

operations.[3] These developments are creating new connections between vessels, ports, electricity networks, fuel-supply systems and digital infrastructure.

As maritime transport becomes increasingly dependent upon integrated maritime, energy and digital systems, questions arise about how those systems are governed and how responsibility is allocated for their development, coordination and oversight. Maritime decarbonisation therefore increasingly depends upon coordinated action across interconnected systems rather than upon the adoption of individual technologies in isolation.[4]

The growing importance of these interconnections presents a challenge for existing regulatory frameworks. Maritime legislation, electricity regulation, hazardous-substances legislation, workplace-safety legislation and climate-change legislation each govern different activities and pursue different statutory purposes. This allocation of authority is both familiar and rational. Maritime safety, electricity reliability, risk management and worker protection remain important public objectives irrespective of wider decarbonisation goals.

Difficulties arise, however, where energy-transition objectives depend upon coordination across activities that are regulated separately and for different purposes. As digital technologies facilitate greater information-sharing, monitoring and operational coordination across institutional boundaries, these interdependencies become increasingly significant.

This article investigates the friction that arises when maritime decarbonisation depends upon coordination across interconnected maritime, energy and digital systems while legal authority remains allocated through specialised statutory frameworks designed to pursue distinct statutory purposes. It argues that maritime decarbonisation provides a useful case study of a broader public-law challenge: how legal frameworks organised around discrete activities and statutory purposes respond when transition objectives depend upon coordination across interconnected maritime, energy and digital systems. Digitalisation amplifies this challenge by increasing the interdependence of maritime, energy and digital systems through new forms of information-sharing, monitoring and operational coordination.[5] Drawing on contemporary New Zealand developments in maritime electrification, shore-power infrastructure and hydrogen-fuel development, the article examines how statutory frameworks allocate authority in the context of maritime decarbonisation. The significance of this friction extends beyond maritime decarbonisation itself, raising broader

3 See: Auckland Transport "Low-emission Ferries in Auckland" (2026) available at: <https://at.govt.nz/bus-train-ferry/ferry-services/low-emission-ferries-are-coming>; Energy Efficiency and Conservation Authority *Port Electrification Options Assessment* (EECA, Wellington, 2024); Nur Najihah Abu Bakar and others "Electrification of onshore power systems in maritime transportation towards decarbonization of ports: A review of the cold ironing technology" (2023) 178 Renewable and Sustainable Energy Reviews <https://doi.org/10.1016/j.rser.2023.113243>; Ministry of Business, Innovation and Employment *A Vision for Hydrogen in New Zealand: Green Paper* (2019); Selma Atilhan and others "Green hydrogen as an alternative fuel for the shipping industry" (2021) 31 Current Opinion in Chemical Engineering <https://doi.org/10.1016/j.coche.2020.100668>; Veronika Semchukova, Kevin Topolski and Zainul Abdin "Hydrogen Technology for Maritime Applications: A Review of Challenges, Opportunities, and Lessons from the Port Authority of New York and New Jersey" (2025) 216 Renewable and Sustainable Energy Reviews <https://doi.org/10.1016/j.rser.2025.115641>.

4 Mikael Lind and others "Decarbonizing the Maritime Sector: Mobilizing Coordinated Action in the Industry Using an Ecosystems Approach" (8 June 2022) UN Trade and Development (UNCTAD) <https://unctad.org/news/decarbonizing-maritime-sector-mobilizing-coordinated-action-industry-using-ecosystems-approach>.

5 Michael Papageorgiou "Digital Transformation in the Shipping Industry Is Here" (12 February 2021) KPMG <https://kpmg.com/gr/en/insights/2021/02/digital-transformation-shipping-industry-papageorgiou.html>; Pratham Agarwala, Sanjay Chhabra and Nitin Agarwala "Using Digitalisation to Achieve Decarbonisation in the Shipping Industry" (2021) 5(4) *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 161 <https://doi.org/10.1080/25725084.2021.2009420>.

questions of implementation, accountability and regulatory stewardship where transition outcomes depend upon decisions made across multiple institutions exercising authority for different purposes.

Part II examines maritime decarbonisation as a sustainability-transition challenge and explains why contemporary maritime developments increasingly depend upon interactions extending beyond conventional sectoral boundaries. Part III considers NZ examples of maritime electrification, shore-power infrastructure and hydrogen-fuel development. Part IV examines how statutory authority is allocated across these developments and explores how the allocation of authority according to distinct statutory purposes contributes to the friction identified in this article. Part V explores the implications of this allocation for implementation, accountability and stewardship. This leads into Part VI, which grapples with the ripple effects of maritime decarbonisation for public law. Finally, Part VII concludes this article, reflecting on authority's sufficiency.

II. Maritime Decarbonisation and Integrated Maritime-Energy Systems

A. Maritime Decarbonisation as a Sustainability Transition

Maritime decarbonisation is often discussed in terms of technological innovation.[6] Electric vessels, shore-power infrastructure, alternative fuels, battery technologies and digital systems are all visible examples of maritime decarbonisation policies and industry strategies being implemented. Even so, sustainability transition scholarship emphasises that decarbonisation involves more than the replacement of one technology with another.[7] Sustainability transitions occur through changes across technologies, infrastructures, institutions, markets, regulatory frameworks and patterns of behaviour that together shape the operation of socio-technical systems.[8] This perspective is particularly relevant in the maritime context because maritime transport does not operate independently of other sectors. Vessel operation depends upon ports, logistics systems, fuel-supply chains, communications infrastructure and regulatory institutions.[9] Electrification links maritime transport more closely to electricity generation and network infrastructure.[10] Hydrogen-based fuels depend upon production, storage, transportation and distribution systems extending beyond the maritime sector.[11] Digital technologies create new forms of coordination between vessels, ports, infrastructure operators and regulators.[12]

6 See, for example: Quazi Sakalayen and others "Maritime Energy Transition: Disruptive Technologies for Global Shipping Decarbonization" (2026) 18(2) Sustainability 763 <https://doi.org/10.3390/su18020763>.

7 Julius Wesche and Abe Hendriks (eds) *Introduction to Sustainability Transitions Research* (Cambridge University Press, Cambridge, 2026).

8 Laur Kanger and Johan Schot "Deep Transitions: Theorizing the Long-Term Patterns of Socio-Technical Change" (2019) 32 Environmental Innovation and Societal Transitions 7.

9 Maritime New Zealand "Port Operators and Operations" <www.maritimenz.govt.nz/commercial-operators/port-operators-and-operations/>.

10 Alessandro Franco "Future Ports as Energy Hubs: Integrated Framework for Renewable Energy Planning, Storage, and Sector Coupling" (30 July 2026) www.preprints.org <https://doi.org/10.20944/preprints202607.2243.v1>.

11 Vasiola Zhaka and Björn Samuelsson "Hydrogen as Fuel in the Maritime Sector: From Production to Propulsion" (2024) 12 Energy Reports 5249 <https://doi.org/10.1016/j.egyr.2024.11.005>.

12 International Maritime Organization "IMO to Develop Global Strategy for Maritime Digitalization" (18 March 2025); Pratham Agarwala, Sanjay Chhabra and Nitin Agarwala "Using Digitalisation to Achieve Decarbonisation in the Shipping Industry" (2021) 5(4) *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 161 <https://doi.org/10.1080/25725084.2021.2009420>. Jean-Paul Rodrigue, Theo Notteboom and Athanasios Pallis "Chapter 3.2: The Digital Transformation of Ports" in *Port Economics, Management and Policy* <https://porteconomicsmanagement.org/pemp/contents/part3/digital-transformation/>.

Maritime decarbonisation may be better understood as a systems challenge rather than as a series of discrete technological changes – one which expands the traditional scope of what are considered "maritime" activities. Electrification, hydrogen development and digitalisation each increase dependence on infrastructure, institutions and activities extending beyond the traditional boundaries of maritime transport. Successful decarbonisation hinges not only upon technological innovation but also upon coordination across the systems that support it.

B. From Activities to Systems

Existing legal frameworks generally regulate identifiable activities. Legislation assigns responsibility for particular activities, processes, assets and risks to institutions possessing relevant expertise and exercising authority for particular purposes. This approach has obvious advantages. Regulating activities rather than sectors ensures consistent, fair oversight based on what an entity does rather than what type of business it is or what sector it belongs to, which should prevent regulatory loopholes arising as technology and industries evolve. It also allows for more targeted regulation of activities that carry more risk. For example, activities involving maritime safety, electricity systems, hazardous substances and workplace risks each have specialised forms of regulation.[13]

Maritime decarbonisation challenges this approach because it relies on more than the effective regulation of individual activities. It also depends upon how those activities operate together. Electric-ferry projects require vessel certification, charging infrastructure, electricity-network capacity and operational integration.[14] Shore-power initiatives depend upon cooperation between ports, electricity providers and vessel operators.[15] Hydrogen-fuel systems require production, transport, storage, distribution, and end-use arrangements capable of functioning together.[16]

As a result, successful maritime decarbonisation depends upon coordination across multiple activities, institutions and forms of infrastructure. Responsibility for regulating individual activities may appear to be relatively clear in many instances, whereas responsibility for ensuring that those activities collectively support transition objectives is less obvious. This creates friction between regulatory frameworks organised around particular activities and transition objectives that depend upon coordinated action across them.[17]

C. Sustainability Transitions and the Allocation of Authority

The significance of this friction involving regulatory frameworks and transition objectives becomes apparent when attention shifts from technological change to governance. Sustainability transitions

13 Maritime Transport Act 1994; Electricity Industry Act 2010; Hazardous Substances and New Organisms Act 1996; Health and Safety at Work Act 2015.

14 Energy Efficiency and Conservation Authority *Port Electrification Options Assessment* (EECA, Wellington, 2024).

15 Energy Efficiency and Conservation Authority *Port Electrification Options Assessment* (EECA, Wellington, 2024).

16 Ministry of Business, Innovation and Employment *A Vision for Hydrogen in New Zealand: Green Paper* (2019); Organisation for Economic Co-operation and Development/International Transport Forum *Decarbonising Maritime Transport* (2018).

17 The distinction identified here can also be understood as a distinction between regulatory objects and governance objects. Regulatory objects are the activities, assets and risks around which legal authority is traditionally organised. Governance objects are the broader systems upon which policy outcomes increasingly depend. Maritime decarbonisation illustrates the difference. Ships, fuels, ports, electricity infrastructure and hazardous substances remain important objects of regulation, while successful decarbonisation depends upon how those elements operate collectively through interconnected maritime, energy and infrastructure systems.

increasingly depend upon decisions made by multiple public and private actors operating under different legal, institutional and commercial frameworks.[18] Decisions concerning vessel safety, energy infrastructure, network operation, fuel storage, environmental effects, investment and planning may all influence the success of maritime decarbonisation.[19] But where these decisions are being taken separately, under distinct regulatory regimes that have a primary focus on regulating activities and not decarbonising sectors (even if the regulation of those activities furthers this goal), who is responsible for ensuring that decarbonisation goals are occurring? Without an allocation of responsibility for outcomes, there is a risk that policy goals become aspirational instead of actualised.

This observation does not suggest that existing regulatory arrangements are deficient. Specialised regulation often reflects legitimate objectives including expertise, accountability and administrative effectiveness.[20] Indeed, the introduction of new technologies – especially those that carry risks – need dedicated regulatory frameworks. The challenge arises because maritime decarbonisation boils down to coordination across activities that sit within different regulatory frameworks and are pursued for different purposes. Under these circumstances, responsibility for particular activities may remain identifiable while responsibility for achieving wider transition objectives becomes more difficult to locate.

In NZ, contemporary developments including maritime electrification, shore-power infrastructure and hydrogen-based alternative fuels, illustrate how this friction between regulatory frameworks and transition objectives operates in practice.

III. Maritime Decarbonisation in Practice: Three New Zealand Examples

Recent developments in NZ provide useful illustrations of how maritime decarbonisation depends upon coordination across activities, institutions and infrastructure systems. Maritime electrification, shore-power infrastructure and hydrogen-fuel development each involve different technologies and regulatory settings.[21] Considered together, however, they demonstrate a common point: successful transition outcomes depend upon activities that extend beyond the traditional boundaries of maritime transport and beyond any single regulatory framework.

A. Maritime Electrification and Infrastructure Dependence

Maritime electrification is one of the most visible manifestations of maritime decarbonisation in NZ.[22] Recent developments include Auckland Transport's low-emission ferry programme and

18 Julia Black "Decentring Regulation" (2001) 54 Current Legal Problems 103; Colin Scott "Accountability in the Regulatory State" (2002) 27 Journal of Law and Society 38; Elinor Ostrom "Polycentric Systems for Coping with Collective Action and Global Environmental Change" (2010) 20 Global Environmental Change 550.

19 Julia Black "Decentring Regulation" (2001) 54 Current Legal Problems 103; Frank W Geels "The Multi-Level Perspective on Sustainability Transitions: Responses to Seven Criticisms" (2011) 1 Environmental Innovation and Societal Transitions 24.

20 Organisation for Economic Co-operation and Development "Regulating for Effectiveness" in *OECD Regulatory Policy Outlook 2025* (2025) <www.oecd.org/en/publications/2025/04/oecd-regulatory-policy-outlook-2025_a754bf4c/full-report/regulating-for-effectiveness_e4e30799.html>.

21 Auckland Transport "Low-emission Ferries in Auckland" (2026) available at: <https://at.govt.nz/bus-train-ferry/ferry-services/low-emission-ferries-are-coming>; EECA *Port Electrification Options Assessment* (2024); Ministry of Business, Innovation and Employment *A Vision for Hydrogen in New Zealand* (2019).

22 Auckland Transport "Low-emission Ferries in Auckland" (2026) available at: <https://at.govt.nz/bus-train-ferry/ferry-services/low-emission-ferries-are-coming>.

East by West Ferries' *Ika Rere*, NZ's first fully electric passenger ferry operating in Wellington Harbour.[23] These initiatives demonstrate that zero-emission marine transport is technically feasible on domestic routes and can deliver immediate reductions in operational emissions. However, scaling such innovations across the wider fleet will require substantial investment in vessels, charging infrastructure, and supporting electricity networks (for example, investments in shore-power infrastructure and grid upgrades).

At one level, electrification can be understood as a vessel-level decarbonisation initiative because its environmental benefits are commonly associated with replacing conventional marine fuels with electricity.[24] That said, the operation of an electric ferry relies on considerably more than the vessel itself: charging infrastructure, electricity-network capacity, port facilities, operational arrangements and digital systems all influence whether electrification can occur successfully.[25] Decisions concerning network investment, charging facilities, port operations and electricity-system management may therefore be as significant to the success of electrification as decisions relating to vessel design or certification.[26]

Electrification illustrates a broader feature of maritime decarbonisation. Transition outcomes depend not only upon technological choices but also upon the infrastructure systems capable of supporting them.[27]

B. Shore Power and Coordination Across Institutional Boundaries

Ports of Auckland's shore-power project illustrates a different aspect of the transition challenge. Shore power enables vessels to connect directly to the electricity network while berthed, reducing emissions associated with auxiliary engines and improving local air quality.[28] Starting initially with cruise vessels, Ports of Auckland's project aims to allow ships to plug into NZ's electricity grid while berthed rather than running their onboard diesel generators.[29] By replacing ship-generated power with largely renewable electricity, the project intends to reduce local air pollution, cut greenhouse-gas emissions, and support the port's long-term decarbonisation goals.

From a technological perspective, shore power is relatively straightforward. But from a governance perspective it depends upon coordination across several domains. Vessel operations remain subject to maritime regulation. Electricity supply forms part of a regulated electricity system. Infrastructure development may engage planning and environmental requirements. Port

23 Meridian Energy "Ika Rere: New Zealand's First Electric Ferry" <www.meridianenergy.co.nz/community-support/electric-ferry>.

24 See the discussion in: Content Marketing, "Advancing Ship Electrification: A Path to Decarbonisation and Operational Efficiency" (1 November 2024) Lloyd's List <www.lloydslist.com/LL1151255/Advancing-ship-electrification-A-path-to-decarbonisation-and-operational-efficiency>.

25 Lin Lin and others "Operational Challenges of ferry electrification: Scheduling under berth and charging limitations" (2026) 149 Sustainable Cities and Society <https://doi.org/10.1016/j.scs.2026.107815>.

26 Emin Güney and others "From Shore-Side Electricity to Sustainable Port Transformation: Emerging Technologies and Strategic Trends" (2026) 14(15) Journal of Marine Science and Engineering 1417.

27 Henry Schwartz and Frauke Urban "Decarbonizing Maritime Shipping: A Comparative Analysis of Sustainable Energy Transitions in Finland and Sweden" (2026) 136 Energy Research & Social Science <https://doi.org/10.1016/j.erss.2026.104714>.

28 Daniel, Hugo and others "Shore Power Deployment Strategies and Policies Including Alternative Fuels" (2025) 148 Transportation Research Part D: Transport and Environment <https://doi.org/10.1016/j.trd.2025.104999>.

29 Ports of Auckland "Ports of Auckland to Look at Plugging in Cruise Ships" (23 December 2016) <www.poal.co.nz/news-media/ports-of-auckland-to-look-at-plugging-in-cruise-ships>.

companies must also make decisions concerning infrastructure investment, operational priorities and asset management.[30]

The challenge is not simply that multiple actors are involved. Successful shore-power projects depend upon alignment between organisations exercising different functions and pursuing different objectives.[31]

C. Hydrogen and Regulatory Boundaries

Hydrogen presents a different set of challenges again. In the maritime sector, hydrogen is being explored as a potential zero-emission fuel for vessels that are difficult to electrify, particularly larger ships and longer-distance operations where battery weight, range, and charging requirements may be limiting. However, significant challenges remain, including the high cost of green hydrogen, fuel storage requirements, the development of bunkering infrastructure, and uncertainty over which alternative marine fuels will ultimately prove most viable.[32]

NZ is actively developing a hydrogen sector through government support, research partnerships, and pilot projects focused on producing green hydrogen from renewable electricity for use in heavy transport, industry, and potential export markets. Key initiatives include the *New Zealand Hydrogen Strategy*, regional hydrogen hubs, and demonstration projects such as the hiring and deployment of hydrogen-powered trucks and refuelling infrastructure to support decarbonisation goals.[33] In the maritime sector, NZ has begun exploring hydrogen through pilot projects such as Emirates Team New Zealand's hydrogen-powered *Chase Zero* vessel and wider industry efforts to evaluate hydrogen for future ferry and shipping applications.[34] While these initiatives demonstrate technical feasibility, large-scale adoption remains dependent on the availability of affordable green hydrogen and the development of specialised bunkering and refuelling infrastructure.

Unlike electrification, which strengthens links between maritime transport and existing electricity systems, hydrogen requires the development of production, storage, transportation, distribution and end-use arrangements capable of operating as a coherent supply system.[35] Hydrogen also engages a wider range of regulatory frameworks.[36] Depending on the activity in question, legal requirements may arise under hazardous-substances legislation, workplace-safety legislation, energy regulation, transport regulation, environmental legislation and maritime law.

30 Damman, Sigrid, Mari Wardeberg and Cecilia Gabrielii "Policies Shaping Energy Transitions in Ports and Harbours: A 'Whole Systems' Perspective from Norway" (2025) 125 Energy Research & Social Science <https://doi.org/10.1016/j.erss.2025.104101>.

31 Simon Bullock, Claire Hoolohan and Alice Larkin "Accelerating Shipping Decarbonisation: A Case Study on UK Shore Power" (2023) 9(7) Heliyon at 10 <https://doi.org/10.1016/j.heliyon.2023.e17475>.

32 Zhibing Zhou and Jin Tao "Hydrogen-Powered Vessels in Green Maritime Decarbonization: Policy Drivers, Technological Frontiers and Challenges" (2025) 12 Frontiers in Marine Science <https://doi.org/10.3389/fmars.2025.1601617>.

33 Ministry of Business, Innovation and Employment "Hydrogen" <www.mbie.govt.nz/building-and-energy/energy-and-natural-resources/energy-generation-and-markets/hydrogen>.

34 See information about NZ hydrogen projects at: New Zealand Hydrogen Council, "NZ Hydrogen Projects" <www.nzhydrogen.org/nz-hydrogen-projects>.

35 Sasmita Bal "Global Trends in Innovation Across Hydrogen Production, Supply and Demand Chains" (2025) 29 International Journal of Thermofluids <https://doi.org/10.1016/j.ijft.2025.101365>.

36 Ministry of Business, Innovation and Employment *New Zealand Hydrogen Regulatory Pathway* (2023) <www.mbie.govt.nz/dmsdocument/25671-new-zealand-hydrogen-regulatory-pathway>.

Existing regulatory frameworks address many of the risks associated with hydrogen production, storage, and use.[37]

Clearly, the significance of hydrogen is not that it is unregulated. Rather, hydrogen decarbonisation developments highlight the extent to which maritime decarbonisation centres on activities operating across established regulatory boundaries. Hydrogen systems require multiple activities, governed under different legal frameworks, to operate together in support of a common transition objective.[38]

Taken together, the examples discussed in this part demonstrate that maritime decarbonisation is reliant upon coordination across systems that extend beyond the traditional boundaries of maritime transport. The significance of that observation becomes clearer when attention shifts from the technologies themselves to the legal frameworks through which authority is allocated and exercised.

IV. Statutory Allocation of Authority and Responsibility for Transition Outcomes

Maritime electrification, shore-power infrastructure and hydrogen-fuel development are all subject to extensive legal oversight. Decisions concerning vessel operation, electricity infrastructure, hazardous substances, workplace risks and environmental effects are governed through established statutory frameworks administered by institutions possessing recognised areas of authority and expertise. The issue identified in this article is not an absence of legal authority; rather, the issue concerns the relationship between the way authority is allocated and the coordination required to achieve maritime decarbonisation as a transition objective.

A. Statutory Purposes and the Allocation of Authority

Existing regulatory frameworks generally allocate authority by reference to particular activities, risks, sectors and public interests. Maritime safety is governed principally through the Maritime Transport Act 1994 and associated Maritime Rules.[39] Electricity infrastructure and system operation are governed through the electricity-regulatory framework, including the Electricity Industry Act 2010.[40] Hazardous substances are regulated through the Hazardous Substances and

37 Ministry of Business, Innovation and Employment *New Zealand Hydrogen Regulatory Pathway* (2023) <www.mbie.govt.nz/dmsdocument/25671-new-zealand-hydrogen-regulatory-pathway>.

38 See generally: <www.irena.org/Innovation-landscape-for-smart-electrification/Power-to-hydrogen/17-Regulatory-framework-for-hydrogen-network>.

39 The Maritime Transport Act 1994 allocates authority primarily by reference to transport activities, maritime documents, and navigational safety risks. Section 36 empowers the Minister of Transport to make specialised maritime rules governing technical safety standards, while s 68 restricts operations to individuals and entities holding valid maritime documents. Local operational and navigational authority over specific regional waters and ports is explicitly allocated via s 33E, which defines the statutory functions and regulatory powers of regional harbourmasters.

40 The Electricity Industry Act 2010 establishes a comprehensive sector-specific framework that separates market regulation from system operations. Sections 15 and 16 define the overarching objectives and functions of the Electricity Authority, directing its regulatory jurisdiction toward industry participation, market efficiency, and security of supply. Real-time physical coordination of infrastructure and system operations is structurally isolated and assigned to the designated system operator under s 8, while detailed, legally binding technical and market rules are promulgated via the Electricity Industry Participation Code under s 32.

New Organisms Act 1996 (HSNO).[41] Workplace risks are addressed through the Health and Safety at Work Act 2015 (HSWA).[42] Climate-change legislation establishes a framework of emissions targets, emissions budgets and planning mechanisms directed towards long-term emissions reductions.[43]

While the frameworks collectively ensure maritime activities that fall within their scope are regulated, these frameworks pursue different statutory purposes. Maritime regulation, for instance, is directed principally towards safe maritime operations and navigation. Electricity regulation, however, focuses upon the reliable and efficient operation of electricity systems. Further, HSNO is concerned with managing the risks and adverse effects associated with hazardous substances. And yet, HSWA seeks to protect workers and others from harm.

The significance of these statutory objectives extends beyond administrative organisation. In public law, statutory purpose helps define the scope and direction of decision-making authority. Decision-makers are generally expected to exercise powers consistently with the purposes for which those powers have been conferred.[44] As previously stated, maritime and electricity regulatory aims are not inconsistent with maritime decarbonisation, but neither statute is directed primarily towards achieving maritime decarbonisation outcomes. Statutory purposes therefore shape not only who may make a decision, but also the considerations that may legitimately influence that decision and the objectives that decision-makers are expected to pursue.

This becomes important in the context of maritime decarbonisation. While decisions taken under maritime, electricity, hazardous-substances and workplace-safety legislation may all influence transition outcomes, those powers have generally been conferred to pursue sector-specific objectives rather than maritime decarbonisation itself. The question is therefore not simply whether institutions possess relevant powers. It is whether powers accorded for one purpose can be expected to support a transition objective that depends upon coordination across multiple statutory frameworks pursuing different purposes.[45]

The significance of this point is that coordination cannot necessarily be assumed or required

41 The Hazardous Substances and New Organisms Act 1996 delineates its regulatory authority by reference to specific risk profiles and the public interest in protecting environmental and human health. Section 4 explicitly confines the statutory mandate to managing the adverse effects of hazardous substances and new organisms. To mitigate these risks across the life cycle of dangerous goods, s 29 provides the direct legal mechanism for the Environmental Protection Authority (EPA) to assess, approve, and place strict controls on the importation, manufacture, storage, use, and disposal of regulated substances.

42 The Health and Safety at Work Act 2015 shifts the regulatory focus from specific activities to broad, risk-based operational environments. Section 30 establishes a strict risk-management framework requiring the proactive elimination or minimisation of workplace-specific hazards. Rather than tying enforcement solely to employment status or industry definitions, s 36 comprehensively allocates the primary duty of care and legal accountability to any Person Conducting a Business or Undertaking (PCBU), covering any activity within their operational control.

43 The Climate Change Response Act 2002 constructs a systemic framework geared toward long-term public interests rather than immediate sectoral or hazard-specific rules. Section 3 outlines the core purpose of the Act, which is to enable New Zealand to meet its international climate obligations and structurally transition to a low-emissions economy. Rather than micro-managing individual commercial activities, pt 1B establishes the high-level mechanisms for setting nationwide emissions budgets, establishing long-term reduction targets, and pt 1C mandating statutory adaptation and mitigation planning.

44 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50].

45 For the New Zealand approach to navigating intersecting and overlapping statutory regimes, see *Auckland Council v CP Group Ltd* [2023] NZSC 53, [2023] 1 NZLR 35, where the Supreme Court evaluated how distinct legislative purposes interact when cross-sectoral issues arise. Moreover, s 10(1) of the Legislation Act 2019 mandates that the meaning of legislation must be ascertained from its text and in the light of its purpose, reinforcing that sector-specific powers cannot be loosely stretched to encompass unlegislated, cross-framework transition objectives.

merely because it would assist the achievement of transition objectives. Institutions remain accountable for exercising authority consistently with their statutory mandates. A maritime regulator cannot ignore safety considerations to advance decarbonisation. Likewise, electricity-sector institutions cannot disregard system reliability because doing so may advance maritime transition objectives. Where transition outcomes depend upon the interaction of institutions exercising powers for different purposes, coordination becomes a governance necessity but not necessarily a legal obligation.[46]

This helps explain why maritime decarbonisation presents a distinctive governance challenge. The issue is not simply that multiple institutions are involved. It is that the relevant institutions exercise authority for different statutory purposes and remain accountable for the pursuit of those purposes. Coordination may therefore be necessary to achieve transition objectives, even where no single institution is legally responsible for achieving the transition itself.

Climate legislation demonstrates that legislatures can allocate responsibility for climate outcomes directly. Maritime decarbonisation, however, depends not only on climate legislation but also on decisions taken under sector-specific statutory frameworks whose primary purposes remain maritime safety, electricity reliability, hazardous-substance management and workplace safety.[47] The challenge therefore lies not in the absence of climate-related responsibilities, but in the relationship between those responsibilities and the wider network of statutory frameworks upon which maritime decarbonisation depends.[48]

This allocation of authority is both coherent and rational. Maritime safety remains an important public objective regardless of fuel source. Reliable electricity systems remain essential whether electricity is used for maritime transport or other purposes. Hazardous-substance regulation remains necessary even where hazardous substances are being used to support decarbonisation objectives. Existing regulatory frameworks therefore provide substantial oversight of many of the activities upon which maritime decarbonisation depends *but they do not ensure that the activities they regulate achieve decarbonisation outcomes*. In other words, maritime decarbonisation relies on coordination across activities governed under different statutory frameworks pursuing different statutory purposes. Vessel certification may affect the viability of maritime electrification. Decisions concerning network investment may affect charging infrastructure. Decisions concerning hydrogen production, storage and transportation may affect the feasibility of hydrogen-fuel deployment. But, although these decisions may collectively influence transition outcomes, they are made under

46 Regulators cannot compromise their primary statutory functions to achieve collateral public policy goals; doing so constitutes an abuse of discretion by taking into account irrelevant considerations or failing to consider mandatory relevant factors. See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) regarding the limits of what a decision-maker may legally consider under a specific statutory scheme. For a discussion of the relationship between inter-agency collaboration and statutory accountability, see also Public Service Commission, *Guidance: Inter-agency Collaboration and Joint Ventures under the Public Service Act 2020* (2021), noting that operational collaboration does not alter underlying statutory accountabilities.

47 For example, the Climate Change Response Act 2002 establishes a 2050 target (s 5Q), emissions budgets (pt 1B, subpt 2, especially ss 5W and 5X), emissions reduction plans (s 5ZG), monitoring and reporting obligations (ss 5ZK and 5ZL), and advisory functions for the Climate Change Commission (ss 5B and 5J). These provisions allocate responsibility for climate outcomes at a framework level, even though responsibility for many of the sector-specific decisions required to achieve those outcomes remains allocated through other statutory regimes (see s 5ZM, which explicitly limits the legal effect of the 2050 target and emissions budgets, clarifying that these framework elements do not invalidate or alter the exercises of statutory powers under other legislative regimes unless expressly provided).

48 See the discussion in Barry Barton and Jennifer Campion "Climate Change Legislation: Law for Sound Climate Policy-Making" in Donald Zillman and others (eds) *Innovation in Energy Law and Technology: Dynamic Solutions for Energy Transitions* (Oxford University Press, Oxford, 2018) 23−37.

statutory frameworks directed primarily towards sector-specific purposes rather than towards maritime decarbonisation itself.

The result is a mismatch between legislation organised around discrete activities and statutory purposes, and a transition objective that rests on coordination across those activities. Maritime decarbonisation depends upon coordination across activities regulated separately and for different purposes. Authority remains organised around the component activities of the transition rather than the transition objective itself.

B. Coordination and Institutional Responsibility

The source of the friction between regulatory frameworks and transition objectives becomes clearer when responsibility for activities is distinguished from responsibility for transition outcomes. Responsibility for the activities associated with maritime decarbonisation can generally be identified without great difficulty: maritime regulators are responsible for vessel safety and certification. Electricity-sector institutions are responsible for network operation and system management. Hazardous-substance regulation and workplace safety are allocated to specialist regulatory frameworks. Planning and environmental decisions may engage other institutions and decision-makers.[49] What is less clear is whether any institution possesses primary responsibility for ensuring that those activities collectively support maritime decarbonisation as a transition objective.[50]

This responsibility distinction helps to explain the friction identified throughout this article: statutory frameworks are generally designed to regulate activities, manage risks and pursue sector-specific objectives; whereas maritime decarbonisation depends upon coordinated action across multiple activities and institutions. The significance of this distinction is not merely conceptual. As maritime decarbonisation becomes increasingly dependent upon coordination across interconnected systems, questions concerning implementation, accountability and stewardship become more significant. The issue is not whether authority exists. It is whether authority allocated to discrete activities and statutory purposes can effectively support transition objectives that depend upon coordination across them.

V. Implementation, Accountability and Stewardship

The analysis so far has suggested that the principal challenge raised by maritime decarbonisation is not a lack of legal authority. Existing statutory frameworks provide extensive regulation of the activities upon which maritime decarbonisation is dependent. The challenge instead arises because transition objectives depend upon coordination across activities governed under different statutory frameworks pursuing different statutory purposes. What follows from this? This part considers three implications: implementation, accountability and stewardship.

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49 Maritime New Zealand administers vessel safety and certification under the Maritime Transport Act 1994, s 430; electricity network operations and system management are overseen by the Electricity Authority and Transpower (as the system operator) under the Electricity Industry Act 2010, ss 8 and 15; workplace health and safety is regulated by WorkSafe New Zealand under the Health and Safety at Work Act 2015, s 189; and hazardous substance controls are managed by the EPA under the Hazardous Substances and New Organisms Act 1996, s 11. Planning and environmental approvals engage local authorities exercising devolved regional and district powers under the Resource Management Act 1991 (although it is noted that this statutory framework is currently undergoing legislative reform).

50 New Zealand Productivity Commission *Low-Emissions Economy: Final Report* (August 2018) at 207.

A. Implementation and Responsibility for Transition Outcomes

Climate-governance scholarship has long recognised that the adoption of policy objectives does not itself guarantee their implementation; the more difficult challenge often concerns how institutions, policies and legal frameworks interact to produce the changes necessary to achieve those objectives.[51] Sustainability transitions are particularly demanding in this respect because they frequently require action across multiple sectors, institutions and regulatory domains simultaneously. As noted above, maritime decarbonisation illustrates this challenge. Responsibility for many of the activities associated with the transition can generally be identified without difficulty. Yet responsibility for those activities should not be confused with responsibility for achieving the transition itself.

This distinction matters because a transition may progress slowly, encounter obstacles or fail to achieve anticipated outcomes even where relevant institutions have successfully discharged the responsibilities assigned to them by legislation. The difficulty is not necessarily regulatory failure. Rather, it arises because implementation hinges on coordination across frameworks organised around different statutory purposes and administered by different institutions.

Maritime decarbonisation illustrates this broader implementation challenge. Long-term transition objectives frequently require mechanisms capable of connecting sector-specific decision-making to broader policy goals. Where such mechanisms are weak or absent, responsibility for implementation may become difficult to identify even when responsibility for particular regulatory activities remains relatively clear.

B. Accountability Beyond Individual Decisions

Questions of accountability occupy a central place within public law because they help ensure that public power can be scrutinised, justified and challenged.[52] Traditional accountability frameworks are generally organised around identifiable decision-makers exercising identifiable legal powers. Responsibility is ordinarily linked to institutions, statutory mandates and particular decisions.

Maritime decarbonisation does not displace these forms of accountability. Responsibility for many individual decisions remains relatively clear. Decisions concerning vessel certification can be attributed to maritime regulators. Electricity-sector decisions can be attributed to the institutions responsible for those functions. Hazardous-substance and workplace-safety decisions similarly remain subject to established mechanisms of legal and political scrutiny. The challenge arises because transition outcomes are not produced by a single decision, project or institution. Progress depends upon numerous decisions made over time by public and private actors operating under different statutory frameworks and pursuing different objectives. As responsibility becomes distributed in this way, identifying who should explain or justify the overall outcome becomes considerably more difficult.

This is not simply a practical difficulty. It reflects a deeper tension between accountability frameworks organised around discrete exercises of authority and transition outcomes that emerge from the cumulative operation of multiple governance arrangements. Questions such as why electrification is progressing slowly, why infrastructure investment has stalled or why hydrogen uptake remains limited may not yield answers attributable to any one institution or regulator.

51 Taryn Fransen and others "Taking Stock of the Implementation Gap in Climate Policy" (2023) 13 Nature Climate Change 752 <https://doi.org/10.1038/s41558-023-01755-9>; Michael Howlett "Moving policy implementation theory forward: A multiple streams/critical juncture approach" (2019) 34 Public Policy and Administration 405.

52 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, 2021) at [24.1]–[24.3].

Responsibility for outcomes may therefore become more diffuse even where responsibility for individual decisions remains clear.

C. Stewardship and Transition Governance

The accountability issues identified above point towards a broader question. If no single institution appears responsible for transition outcomes, who is responsible for overseeing the transition as a whole? Recent NZ regulatory-policy work has placed increasing emphasis upon stewardship as a responsibility extending beyond the administration of particular rules or statutory functions.[53] Stewardship directs attention towards the performance of regulatory systems over time, the identification of emerging challenges and the capacity of institutions to respond to changing circumstances. This perspective is particularly relevant to sustainability transitions. Maritime decarbonisation is not a discrete regulatory project capable of being completed through a single intervention. It is an ongoing process involving technological change, infrastructure development, institutional adaptation and evolving patterns of energy use. Stewardship shifts attention towards questions that are not easily allocated to any single statutory regime. Who monitors progress towards transition objectives? Who identifies barriers emerging across regulatory boundaries? Who maintains oversight of the wider transition? Who considers whether existing arrangements remain capable of supporting transition outcomes over time?

Of course, these questions do not displace existing regulatory responsibilities. Maritime safety, electricity reliability, hazardous-substance management and workplace safety remain important statutory objectives in their own right. But stewardship focuses attention on what remains once responsibility for individual activities has been allocated: responsibility for the performance of the wider transition. Viewed in this way, stewardship can be understood as a response to the friction identified throughout this article. Where transition objectives depend upon coordination across activities governed under different statutory frameworks, stewardship provides a way of thinking about responsibility for the performance of the wider system. Maritime decarbonisation suggests that these questions will become increasingly important as sustainability transitions come to depend upon coordination across interconnected systems.

VI. Public Law, Digitalisation and Responsibility for Transition Outcomes

The friction between regulatory frameworks and transition objectives identified in this article raises a broader public-law question. Public law is concerned with the allocation and exercise of authority. Statutes identify institutional responsibilities, confer powers, establish decision-making procedures and create mechanisms through which public power can be scrutinised and reviewed. Traditionally, authority is allocated by reference to particular institutions, activities and statutory purposes. Questions concerning who may make a decision, under what authority and for what purpose therefore occupy a central place within legal analysis.

Although public law has traditionally focused on identifying who has authority to make a

53 See: New Zealand Productivity Commission "Regulatory Institutions and Practices" (2014) at 79–83, which pioneered the expectation that regulators must proactively monitor, evaluate, and maintain the institutional health and performance of their entire statutory system. This systemic approach is further codified by the Ministry for Regulation under the Regulatory Standards Act 2025, which requires agencies to evaluate regulatory "stock" based on overall economic efficiency and long-term public interest rather than mere bureaucratic compliance.

decision and whether that authority has been exercised lawfully, sustainability transitions raise a related question: how public law should understand responsibility where policy success depends not upon a single decision-maker but upon the interaction of multiple institutions exercising different powers for different purposes. Maritime decarbonisation highlights a challenge that sits somewhat uneasily within this framework. As this article has shown, successful transition outcomes increasingly depend upon coordination across multiple activities, institutions and systems. Yet legal authority generally continues to be allocated through specialised statutory frameworks pursuing distinct purposes. Maritime decarbonisation therefore exposes a disconnect between legislation organised around specialised statutory purposes and transition objectives that depend upon coordination across activities governed under those purposes.

This challenge is not unique to the maritime sector. Similar issues arise across climate governance, energy transitions, infrastructure planning and environmental management.[54] In each context, long-term policy objectives frequently depend upon decisions made by multiple institutions operating under different statutory mandates and pursuing different objectives.

Much of the existing literature has approached these issues through concepts such as transition governance, polycentric governance and collaborative governance. These perspectives have drawn attention to the growing importance of coordination, interdependence and institutional interaction in addressing complex policy problems.[55] Maritime decarbonisation broadly supports these observations. The friction identified in this article does not arise because authority is absent. Instead, friction arises because transition goals increasingly depend upon synergy across systems. Put differently, successful transition objectives require coordination across systems governed through legal frameworks organised around distinct statutory purposes.

Digitalisation intensifies this challenge. Digital technologies increasingly connect vessels, ports, energy infrastructure and regulatory actors through shared systems of information, monitoring and coordination. For example, a shared digital platform for port energy management requires data input from automated vessels (governed by safety law), the national grid (governed by electricity law), and fuel-tracking systems (governed by hazardous-substances/environmental law). When these distinct systems are digitally bound together, a technical glitch, data-sharing dispute, or cybersecurity incident no longer impacts a single actor. Instead, the issue creates systemic operational and legal vulnerabilities across multiple regulatory jurisdictions simultaneously, with no clear "lead" regulator holding statutory authority over the entire digital network.

The public-law friction intensifies because digital systems require absolute data standardisation, interoperability, and automated decision-making. However, the legal powers governing the infrastructure remain fragmented under distinct enabling Acts.

The argument advanced here is not that authority should be centralised or that specialised regulatory frameworks should be displaced. Specialisation remains important. Expertise, accountability and administrative effectiveness continue to justify the allocation of authority according to particular functions and statutory purposes. The challenge is that sustainability

54 Harriet Bulkeley and Peter Newell "Governing Climate Change" (2nd ed, Routledge, 2015) at 45–52; New Zealand Productivity Commission *Better Urban Planning: Final Report* (2017) at 285–291.

55 Elinor Ostrom "Polycentric systems for coping with collective action and global environmental change" (2010) 20 Global Environmental Change 550; Chris Ansell and Alison Gash "Collaborative Governance in Theory and Practice" (2008) 18 Journal of Public Administration Research and Theory 543; Philipp Pattberg and Oscar Widerberg "Transnational multistakeholder partnerships for sustainable development: Conditions for success" (2016) 45 Ambio 42; Jeroen van der Heijden "Regulatory Governance" in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133 at 141–145.

transitions increasingly depend upon outcomes that no single institution can achieve independently. This means that transition objectives become increasingly dependent upon coordination across activities and institutions that have traditionally been governed separately.

Maritime decarbonisation provides a useful case study of a broader public-law question. How can legal frameworks organised around specialised statutory purposes support policy objectives that depend upon coordination across interconnected systems? As sustainability transitions become more common, that question will become increasingly difficult to avoid.

VII. Conclusion

Maritime decarbonisation is often presented as a technological challenge. This article has argued that it is equally a governance challenge. Maritime electrification, shore-power infrastructure and hydrogen-fuel development each depend upon coordination across multiple sectors, institutions and forms of infrastructure. Yet authority for the activities upon which these developments depend remains allocated through specialised statutory frameworks pursuing distinct purposes.

The issue identified in this article is not an absence of regulation. The activities associated with maritime decarbonisation are already subject to extensive legal oversight. Maritime safety, electricity infrastructure, hazardous substances, workplace risks and environmental effects all sit within established regulatory frameworks administered by institutions possessing recognised responsibilities and expertise. The challenge is that successful transition outcomes depend upon coordination across those activities. Maritime decarbonisation therefore exposes the limitations of legislation organised around discrete activities and statutory purposes when the policy objective being pursued is an energy transition that relies on coordination across them.

This friction between regulatory frameworks and transition objectives helps explain a number of the issues explored throughout the article. Questions of implementation arise because transition objectives depend upon decisions made across multiple statutory and institutional settings. Questions of accountability arise because responsibility for outcomes may be more difficult to identify than responsibility for individual decisions. Questions of stewardship arise because no single institution appears primarily responsible for overseeing the transition as a whole. The issue is not whether authority exists. It is whether existing allocations of authority are capable of supporting transition objectives that depend upon coordinated action across multiple frameworks simultaneously.

Digitalisation is likely to make these issues increasingly significant. As digital technologies create new forms of interdependence between maritime, energy and infrastructure systems, transition outcomes will become increasingly dependent upon coordination across activities and institutions that have traditionally been governed separately. Maritime decarbonisation therefore provides a useful case study of a broader challenge confronting contemporary public law: how legal frameworks organised around specialised statutory purposes can support policy objectives that depend upon coordination across interconnected systems.

As sustainability transitions become more common, that challenge is likely to become increasingly important. Maritime decarbonisation suggests that greater attention may need to be given not only to the allocation of authority for particular activities, but also to the governance arrangements required to achieve coordinated transition outcomes across interconnected systems.

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From Victim to Transgressor: Ethical Incoherence in the Dismissal of Lynda Tabuya

Mai i te Pārurenga ki te Kaitakahi: Te Parurenga Matatika i te Pananga o Lynda Tabuya

Navneel Sharma and Catherine Mahima Singh*

I. Introduction

Tina Turner's 1984 album *Private Dancer*, and the eponymous song, portray the life of a woman who dances intimately for strangers while concealing her inner self.[1] It tells an interesting story about a fine line that divides independence and objectification because, while the dance is a way to survive, it is at the same time a process of commodification. What is hidden behind the lyrics of the song is the struggle that takes place between the performer and the observer, with the body of the former acquiring a certain meaning that she does not possess.

This idea extends beyond the world of music and finds clear expression in contemporary politics. Not only are women who hold public offices judged on their professional behaviour, but they are also frequently subjected to greater scrutiny with regard to their physicality, private lives, and morality.[2] Herein lies the dilemma that the visibility so necessary for the functioning of democracy may turn into a form of surveillance, limiting individual autonomy through public scrutiny.[3]

These conflicts are well exemplified by the case of Lynda Tabuya, who was formerly appointed as the Minister for Women, Children, and Social Protection of Fiji. In December 2024, Tabuya was stripped of her ministerial position after the distribution of an intimate video clip, which was initially disseminated in a private space without her consent.[4] While the creation of the video clip was done with consent,[5] its unauthorised distribution turned the private act into a public scandal. The legal implications raised in the case involve how intimate visual content is regulated under

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1 Tina Benitez-Eves "Meaning Behind the Song: 'Private Dancer' by Tina Turner" (23 May 2023) Americal Songwriter <www.americansongwriter.com>.

2 Beata Grabowska "Perspective Chapter: The Female Body as Sites of Power" in Dennis S Erasga and Michael Eduard L Labayandoy (eds) *Feminism – Corporeality, Materialism, and Beyond* (IntechOpen, 2003).

3 "The Double-Edged Sword of Visibility: How Media Scrutiny Shapes Political Decision-Making" (13 August 2025) NAVDC <www.navdc.com>.

4 "Video of Fiji MP dancing naked leaked to PM" *Otago Daily Times* (online ed, Dunedin, 31 December 2024).

5 "Video of Fiji MP dancing naked leaked to PM" *Otago Daily Times* (online ed, Dunedin, 31 December 2024).

the Online Safety Act 2018 (Fiji), considering the existing laws on privacy, consent, and harms in cyberspace.

This article asserts that the case of Tabuya illustrates an essential connection between law, ethics, and gender in modern-day governance against the backdrop of the Online Safety Act 2018 (Fiji) and its capacity to regulate such a situation. The article further analyses the problem through two ethical schools of thought: deontological ethics, with a particular regard to Kant's idea of the inviolability of dignity and non-violation of a human being; and virtue ethics, which focuses on individual qualities and moral judgments, supplemented by a feminist approach to objectification of women and control over their bodies and lives.

II. Deontology and Virtue Ethics

The circumstances that led to the termination of Tabuya require an understanding of the legal rights that apply to privacy and the impact of technology on individuals in the context of Fiji's legal system. The Online Safety Act 2018 (Fiji) gives an explicit explanation of what is meant by the term "intimate visual recording", which refers to photographs, videos, or images that are taken while someone expects privacy.[6] This would involve instances in which the individual is either nude or partially unclothed, taking part in a sexual act or engaging in private behaviours like dressing or undressing.[7] Notably, the statutory interpretation of the term goes beyond secretive recordings to include images that have been sent through electronic devices.[8] The form of the Act shows the key legal difference that exists between the creation and the distribution of recordings. Although it is possible to create such a recording in an environment that is personal and consensual, its unauthorised distribution will amount to the very mischief for which the statute aims. It is, therefore, clear that the legal injury is not in the intimate nature of the materials themselves, but rather in their exposure after they have been created.

Moreover, such a legal approach aligns with principles drawn from feminist legal theory, which has long argued that violations of privacy, particularly through acts of sexualised exposure, constitute forms of gendered domination. Catharine MacKinnon has emphasised that sexual exposure is not merely a personal affront but a structural practice reinforcing domination and subordination, situating women's bodies as objects of scrutiny and control within patriarchal systems of law and power.[9] Likewise, Martha Nussbaum's influential account of objectification identifies exposure as a paradigm in which a woman's body is reduced to an instrument of another's pleasure and evaluation, thereby denying her subjectivity and autonomy.[10] According to the available information, Tabuya's actions may be regarded as acts performed under conditions in which the individual can reasonably expect his/her actions to be kept confidential. It is only the latter act that constitutes a criminal offence, not the first.[11] The only reprieve is when consent is obtained by the subject of the intimate visual recording.[12]

Against this legal background, the executive response takes on a different character. In Fiji, Ministers assume office by taking an oath to uphold the Constitution and to serve with honour,

6 Online Safety Act 2018 (Fiji), s 2(a)(i).
7 Online Safety Act 2018 (Fiji), s 2(a)(i)(A)–(C).
8 Online Safety Act 2018 (Fiji), s 2(b).
9 Catharine A MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, 1989) at 215.
10 Martha C Nussbaum "Objectification" (1995) 24(4) Philosophy and Public Affairs 249 at 257–258.
11 Online Safety Act 2018 (Fiji), s 25.
12 Online Safety Act 2018 (Fiji), s 25(3).

dignity and integrity.[13] The oath encapsulates the elevated moral expectations of public office and the ethical standards that underpin legitimate governance. Tabuya's dismissal, effected by the Prime Minister pursuant to section 92(3)(b) of the Constitution of the Republic of Fiji, was justified as necessary to preserve public confidence.[14] However, the decision was taken in the absence of any judicial determination of misconduct or public inquiry, and Tabuya was subjected only to her political party's internal disciplinary process.[15] Parliament at the time of the incident did not have a Ministerial Code of Conduct that could serve as an instrument for decision-making involving an individual's acts and their accountability to the State. A bill was only proposed in 2025.[16] The Prime Minister publicly justified the dismissal on the basis that the circulation of the video brought disrepute to the government, describing it as a "public disgrace" that required immediate action.[17] He further indicated that the government would not concern itself with investigating how the material entered the public domain,[18] leaving that matter to Tabuya and law enforcement agencies. Tabuya had lodged a complaint with the Fiji Police Cyber Crime Unit,[19] however no criminal case at the time of the publication of this article has been filed.

The political reaction redirected the issue from being about a possible violation of statute to a matter of protecting political reputation. Within the feminist framework, this development holds great significance. According to Sandra Bartky, such a response is a demonstration of the discipline imposed by the public eye wherein women's bodies serve as battlegrounds for upholding social norms.[20] The shift from an issue of invasion of privacy into a matter of public morality shows the regulatory role of exposure and the resultant disproportionate impact on women in the public sphere. This development leads to the normative question of whether the damage to reputation, which arises from a wrong inflicted upon the individual, is sufficient to hold the individual accountable for their actions.

This is precisely where ethical reasoning comes into play. There seems to be an ethical rationale behind the argument, but there does not appear to be any distinction made between various theories of morality upon which such reasoning is based. Rather, the reasoning seems to be influenced by the principles of deontology and virtue ethics, though it lacks the rigour to hold the theory together. In order to properly analyse the ethics involved, it is imperative that we first discuss these ethical theories before relating them to the situation at hand. In instances wherein a Minister has been removed from executive position, particularly in the face of a lack of independent inquiry and in the continued absence of a formal code of ministerial conduct, such a decision, and inquiry into it, demand assessment with a critical eye to both constitutional and more general notions of morality.

13 Constitution of the Republic of Fiji 2013, sch Oath for Ministers.

14 Jone Salusalu "PM Rabuka Fires Minister Tabuya Over Viral Nude Video" *Fiji Sun* (online ed, Suva, 26 December 2024).

15 Lice Movono and Doug Dingwall "Fiji PM Sitiveni Rabuka dismisses Lynda Tabuya as minister after explicit video circulates online" *ABC News* (online ed, Sydney, 27 December 2024).

16 Lavenia Lativerata "Fiji AG Tables New Code of Conduct Bill Aimed at Strengthening Public Office Integrity" (10 March 2025) MaiTV Fiji <www.maitvfiji.com>.

17 Australian Broadcasting Corporation "Rabuka dismisses Lynda Tabuya from ministerial role" (radio program, 26 December 2024) Pacific Beat <www.abc.net.au>.

18 Lice Movono and Doug Dingwall "Fiji PM Sitiveni Rabuka dismisses Lynda Tabuya as minister after explicit video circulates online" *ABC News* (online ed, Sydney, 27 December 2024).

19 Meriona Mili "Tabuya Lodges Complaint with Police after Leaked Video" (27 December 2024) Fiji One News <www.fijionenews.com.fj>.

20 Sandra Lee Bartky *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge, New York, 1990) at 65.

Ethical arguments are required to yield an analysis in or through which to evaluate whether such state-level activity embodies recognisable principles of good governance or perhaps a disturbing tendency to valorise individual dignity for purposes of political opportunism.

This article proposes that the rationale behind the dismissal of Tabuya was an evident failure in ethical clarity as a product of the conflation of deontological ethics and virtue ethics principles. For instance, the assessment of reputational harm in the context of the violation of privacy led the state to conflate the notions of wrongdoing and victimhood in such a manner that the response lacked ethical clarity in principle. Through an assessment of deontological and virtue ethics principles in a comparative context against other Commonwealth nations' examples of public accountability for private-life scenarios involving potential public leaders, such as women in public service roles, this article proposes that this case serves as an evident product of the danger conflating ethical principles in practice.

A. Deontology Ethics

Deontology, which was primarily developed by philosopher Immanuel Kant, is based on the theory that what is ethical in an action depends on the fulfillment of a person's duty and moral law, irrespective of the consequence of the action. The core aspect of deontology is the "categorical imperative",[21] where people should act based on the principles that are applicable to all people, and they should treat others with respect and consider them as ends in themselves.[22] In this view, the morality of the act is determined by the consistency of the act with duty. According to Kant, acts that are done out of convenience or for purposes of self-aggrandisement are not morally legitimate since they do not acknowledge the inherent dignity of persons. The problem with deontological arguments, however, as feminist philosophers such as Carole Pateman have argued, is that abstract notions of autonomy tend to ignore the social context in which autonomy is achieved. According to Pateman, the division between public and private spheres serves not only to marginalise women in terms of moral autonomy, but also to judge women's private lives publicly.[23]

With this in mind, it becomes clear that the Tabuya scandal is not about the lack of autonomy but about the disregard for it. Deontology requires focusing one's efforts on identifying the location where the wrongdoing has occurred. In such a case, when the statutory framework identifies the non-consensual release of the intimate information as the source of the problem, it only makes sense that the state's duty be focused on providing protection to Tabuya while investigating those who committed this offence. Moreover, removing Tabuya due to the fact that she could harm the reputation of the organisation only makes matters worse from an ethical perspective since it seems that this woman was viewed merely as a tool used by the state to avoid political backlash. Indeed, according to Kantian ethics, it is unacceptable to treat people like this because, in essence, they should always be viewed as ends in themselves and never as a means to achieve other goals. In the context of feminism, such an oversight becomes more pronounced as a result of the continued prevalence of gender norms that allow invasions of women's privacy to be viewed as acts reflecting their personal moral failings. This represents a further injustice, because not only is the original injustice perpetuated, but it is redefined in a way that continues structural trends of blame against women.

21 Immanuel Kant *Groundwork of the Metaphysics of Morals* (Mary Gregor (translator), Cambridge University Press, 1997) at 37–38.

22 Immanuel Kant *Critique of Practical Reason* (Mary Gregor (translator), Cambridge University Press, 1997) at 84–85.

23 Carole Pateman *The Sexual Contract* (Stanford University Press, 1988) at 118–119.

B. Virtue Ethics

The virtue ethics perspective offered by Aristotle is not based on absolute laws or results but centres on character formation and practical reasoning. According to Aristotle, virtues are dispositions formed by choice, falling between excess and deficiency in relation to oneself, and being determined by reason in line with the judgement of the practically wise person (*phronimos*).[24] The key point is that morality is better grasped by means of virtues such as prudence, temperance, and integrity, leading people to conduct themselves well.[25] Contemporary interpreters have taken Aristotle's ideas further. Alasdair MacIntyre asserts that the Aristotelian school of virtue ethics offers a consistent rival to fragmented modern morality theories. In his book "After Virtue," he emphasises that moral assessment cannot be separated from the coherence of one's biography and the consistency of one's character.[26] Thus, both Aristotle's writings and MacIntyre's interpretation suggest that virtue ethics focuses on the relationship between actions and virtuous traits.

In contrast to deontology, virtue ethics evaluates whether one's actions show persistent qualities that are pertinent to holding a position in the public sector. Personal conduct is considered ethically significant only if it shows a lack of character that affects one's ability to make sound judgements or inspire confidence. There is no indication of a lack of character on the part of Tabuya. On the contrary, the ethical dilemma seems to stem from the public exposure of Tabuya's body, not from a misjudgement regarding her job.

The feminist approach to this issue is not new. According to Judith Butler, visibility in the public space is not a neutral act but a normative practice that makes some bodies more susceptible to regulation and punishment.[27] In this way, women's behaviour in the public domain may be taken to suggest their moral qualities when there is no correlation at all. Additionally, virtue ethics can be applied to assess the actions of the state as a moral agent. From a prudent standpoint, an adequate answer would necessitate a clear demarcation between victimisation and culpability. The decision to take immediate action without any inquiry and the prioritisation of reputation indicate a flaw in *phronēsis*, which refers to practical wisdom.[28] Likewise, the lack of moderation highlights a problem with *sōphrosynē*, which translates to temperance.[29] A feminist approach would identify these defects as more than just philosophical shortcomings; rather, they represent an institutional propensity to control women's behaviour morally while overlooking the systemic factors contributing to their subjugation.[30]

It is important to place the Tabuya incident within a more comparative and normative context, wherein one can analyse the approaches taken by various jurisdictions. The link between personal morality, public accountability and institutional integrity cannot be restricted to one single jurisdiction because it is an issue that recurs in all political jurisdictions that follow democratic values and principles. Through considering events surrounding Chua Soi Lek, an official from Malaysia, Barnaby Joyce, an Australian political figure, and Michael Fallon, a British politician, there seems to be a tendency for private affairs to become a cause for public ethical concern because

24 Aristotle *Nicomachean Ethics* (Terence Irwin (translator), 2nd ed, Hackett Publishing, 1999) bk II, ch 6, 1106b36–1107a2.

25 Aristotle *Nicomachean Ethics* bk II, ch 6, 1106b36–1107a2.

26 Alasdair MacIntyre *After Virtue* (3rd ed, University of Notre Dame Press, Notre Dame (Indiana), 2007) at 154–155.

27 Judith Butler *Bodies That Matter: On the Discursive Limits of "Sex"* (Routledge, New York, 1993) at 21–22.

28 Aristotle *Nicomachean Ethics* bk VI, ch 5, 1140b20–1141a8.

29 Aristotle *Nicomachean Ethics* bk III, ch 10, 1118a24–1119a21.

30 Alasdair MacIntyre *After Virtue* (3rd ed, University of Notre Dame Press, Notre Dame (Indiana), 2007) at 154–156.

of their impact on public dignity, credibility, and operations. The purpose of these cases is not only to serve as simple descriptions but also allow one to utilise the ethical theories before the Tabuya incident is reviewed in better context.

III. International Case Examples

A. Chua Soi Lek – Malaysia

Dr. Chua Soi Lek, an important figure in Malaysia's politics, a member of the Malaysian Chinese Association, and a former Minister for Health, became involved in a major case of leaked pornographic videos. In January 2008, Dr. Chua Soi Lek admitted to being the male in one of those sexually explicit videos that were circulated anonymously in Johor.[31] In his statement, he confessed, "I am the man in the tape. The girl is a personal friend."[32] He also claimed that he was not the one who made the recording and that perhaps it was made by another person, maybe a political rival.[33] The video recordings in question, which lasted between forty-four and fifty-six minutes, featured scenes of sexual activity within what appeared to be a hotel room and were allegedly captured through a closed-circuit camera.[34] The incident caused much political embarrassment for the ruling government coalition, as Dr. Chua was a Cabinet member of the administration of Prime Minister Abdullah Ahmad Badawi.[35] At first, Dr. Chua refused to accede to public and political pressure to resign, claiming that it was up to the Prime Minister to decide on his tenure. He repeated his apology to his family, political party, and government.[36] However, on 2 January 2008, Dr. Chua resigned from his ministerial position as well as his parliamentary seat, admitting that he had become a political liability to the government.[37] The case presents a scenario where ethics can be assessed from conflicting perspectives, such as deontology and virtue ethics, with each representing an interpretation of the concept of moral responsibility in the public domain.

Deontology, as a perspective on ethics, is primarily concerned with moral duties, rules, principles, and actions rather than results. It suggests that a moral action is one whose performance can be generalised and applied universally without contradictions. As a theory of ethics, deontology suggests that those in positions of power and influence owe something more than their own private interests. The role of a Cabinet Minister cannot be that of a citizen; it must reflect wider obligations. In such a case, even though the sexual intercourse took place in the privacy of his own quarters, it is the disclosure that followed which resulted in damage to public trust, that led to a clash of interests between personal and professional responsibilities. From this standpoint, Dr. Chua's refusal to step down from his post would seem contrary to the principle of deontology because it entails a breach of duty. If in fact he was a target of unauthorised surveillance, deontology does not consider this a relevant issue since it concentrates on the performance of the office-bearer rather than on whether

31 ABC News "Malaysian minister admits to sex video" *ABC News* (online ed, Sydney, 1 January 2008).
32 ABC News "Malaysian minister admits to sex video" *ABC News* (online ed, Sydney, 1 January 2008).
33 Al Jazeera English "Sex video claims Malaysia minister" *Al Jazeera* (Online ed, Doha, 2 January 2008).
34 Gulf News "Malaysian minister rejects calls to quit over role in sex video" *Gulf News* (Online ed, Dubai, 1 January 2008).
35 ABC News "Malaysian minister admits to sex video" *ABC News* (online ed, Sydney, 1 January 2008).
36 Al Jazeera English "Sex video claims Malaysia minister" *Al Jazeera* (Online ed, Doha, 2 January 2008).
37 NBC News "Malaysian minister rejects calls to quit over role in sex video" *NBC News* (online ed, New York, 1 January 2008).

he was a victim of some wrongs. Under deontology, once trust is lost and the scandal has erupted, the office-bearer is obliged to resign despite who was at fault for making the tape.

However, virtue ethics, based on the Aristotelian philosophy, changes the emphasis from obedience to principles to virtue. Instead of posing questions like "What rule was broken?", it poses questions such as "How does this reflect the morality of the person?" The key notion in this ethical theory is that of *phronesis*. By this standard, the actions of Dr. Chua can be seen as problematic in terms of practical wisdom and self-control. The inability to foresee the possible ramifications of one's own actions when serving in a public office suggests that there might be a lack of practical wisdom on the part of the individual. On the other hand, Dr. Chua's public acknowledgment and apology can be viewed as an indication of truthfulness and responsibility, which are attributes of a virtuous character. It should be noted that virtue ethics provides room for moral improvement. Dr. Chua's political redemption, involving his political comeback to lead the Malaysian Chinese Association, can be considered an example of character rehabilitation.[38]

Nonetheless, both theories run the risk of neglecting an important aspect in the given scenario. A feminist theoretical perspective draws attention away from the issue of the moral character of the individual in question and highlights issues concerning the structures of power, privacy, and sexual policing. The act of filming and circulating video footage without the consent of the parties involved is a very serious matter because of the autonomy of the individuals concerned. From this perspective, the ethical consideration is expanded. While the former takes into account the principle of duties and the latter the principle of virtues, a feminist approach considers the circumstances in which the harm was inflicted. Assuming that there really was no consent for the recording, it appears that what was unethical was not the act itself but its violation of confidentiality and personal information, possibly used to coerce someone out of politics. This provides a more nuanced perspective on the earlier judgment, which would imply that while it is essential to hold public servants accountable, individual rights cannot be compromised in the process.

Conclusively, the Dr. Chua case brings out the conflict between personal morality and professional conduct. From a deontological point of view, resignation would have been the most appropriate course of action for maintaining professionalism and integrity in the organisation, while virtue ethics provides an insightful explanation that takes into consideration the possibility of mistakes and redemption. In contrast, the feminist approach introduces another dimension that considers the involuntary disclosure and the imbalance of power relations, moving away from the person who committed the mistake and putting some of the blame on the situation and people involved.

B. Barnaby Joyce – Australia

Former Deputy Prime Minister of Australia Barnaby Joyce became part of the political scandal in early 2018 when it emerged that he had been having an affair with one of his ex-staff members in his ministerial office.[39] The scandal highlighted issues relating to the breach of the Ministerial Code of Conduct, which prohibits ministers from engaging in sexual relationships with staff under their jurisdiction because of the potential for abuse of power.[40] Further, sexual harassment allegations made the situation more complicated, as Joyce denied these allegations. Ultimately, no legal action

38 "Chua Soi Lek: From Scandal to MCA Presidency" *Malay Mail* (online ed, Kuala Lumpur, 21 October 2018).
39 "Australia deputy PM Barnaby Joyce quits amid pressure over affair" *Al Jazeera* (online ed, Doha, 23 February 2018).
40 Commonwealth of Australia, Code of Conduct for Ministers, cl 5.10.

was taken against him for breaching the Ministerial Code of Conduct, but it was seen as an ethical problem for public service.[41]

Under this paradigm, the actions taken by Joyce are considered a violation of his duty. In his position as one of the leaders in the executive, he was required to observe the code of conduct, as well as maintain the integrity of public institutions. Having an affair with a subordinate resulted in a conflict of interest, both real and apparent, which threatened to erode trust in the fair use of his power.[42] Thus, Joyce's decision to postpone his resignation can be considered a violation of his professional ethics.

Unlike Deontology, Virtue Ethics provides a new perspective of evaluation, changing the emphasis from action to the person's character. Based on Aristotle's philosophy, Virtue Ethics does not seek answers to the question "What ought we to do?" but rather "What sort of persons ought we to become?" It focuses on developing virtues that include practical wisdom (*phronesis*), self-restraint (*sōphrosynē*), and excellence (*aretē*).[43]

From this perspective, Joyce's behaviour shows a flaw in several critical virtues associated with leadership. His participation in a romantic relationship within a clear hierarchical structure indicates a lack of *phronesis*, as he failed to foresee the repercussions of his actions for both his reputation and the institution.[44] It also suggests a failure of *sōphrosynē*, since this virtue is based on self-restraint which is an essential element of integrity and respectability. Although an apology offered by him later might show his remorse, virtue ethics sees an important distinction between being sorry and showing virtuous qualities in one's behaviour in general. However, according to Aristotle's approach, people have a chance of redemption since they can develop virtue by practicing it consistently.[45]

Additionally, a feminist ethical approach adds another layer of insight, especially regarding power relations and structural disadvantages that may be hidden within other models of ethics. Feminist ethics does not view the power relations within an organisation, such as that between the minister and his subordinate, as merely a matter of choice and duty, but considers the role played by gendered power relations and structural inequalities in shaping such relationships. Given this framework, the actions described in relation to Joyce should not simply be viewed as personal faults but rather as examples of structural disadvantages that are created within political organisations.[46]

Again, when taken as a whole, a more thorough assessment begins to emerge. Deontology establishes a straightforward and rigid standard based on one's duty, which views Joyce's conduct as unethical because he failed to fulfil his basic duties. The virtue ethics perspective examines flaws in character but leaves room for redemption. On the other hand, feminist ethics further complicates the situation by shedding light on the structural nature of the misconduct, specifically the presence of imbalances of power in the process of ethical decision-making. Even though these theories have different priorities, they all lean towards viewing Joyce's behaviour as unethical.

41 G Chan "Barnaby Joyce sexual harassment allegation: Catherine Marriott speaks out" *The Guardian* (online ed, London, 18 September 2018).

42 Immanuel Kant *Groundwork of the Metaphysics of Morals* (Mary Gregor (translator), Cambridge University Press, 1997) at 37–38.

43 Aristotle *Nicomachean Ethics* (translated WD Ross, Batoche Books, 1999) NE II.1–2, VI.5, 1140a24–b12.

44 Aristotle *Politics* (Benjamin Jowett (translator), Batoche Books, 1999) bk III, ch 4, 1280b4–20.

45 Aristotle *Nicomachean Ethics* NE II.1–2, VI.5 at bk II, 1103b–1104a.

46 Eva Bermúdez Figueroa, Valerija Dabetić, Raquel Pastor Yuste and Zara Saeidzadeh "Gender and Structural Inequalities from a Socio-Legal Perspective" in Dragica Vujadinović, Mareike Fröhlich and Thomas Giegerich (eds) *Gender-Competent Legal Education* (Springer, Cham, 2023) at 95 and 97–100.

C. Michael Fallon – United Kingdom

In 2017, Sir Michael Fallon resigned from his position as the United Kingdom's Secretary of State for Defence after allegations of inappropriate sexual behaviour were levelled against him, including an incident where he allegedly touched a journalist's knee during a formal dinner.[47] This resignation formed part of a larger backdrop of rising allegations of misconduct in Westminster, and it is this collective phenomenon that sparked the debate on ethical accountability and ministerial standards.[48]

From the deontological perspective, the actions of Fallon were a violation of the moral duty inherent to public office, which includes the duty to act with integrity, respect, and propriety.[49] As a senior cabinet minister, his actions compromised the decorum expected of one entrusted with safeguarding national defence. Within this framework, the ethical transgression lies not solely in the act itself but in the violation of duty and the consequent erosion of public confidence in governmental authority.[50]

Conversely, when examined through the lens of virtue ethics, the episode underscores deficiencies in the moral character of the agent rather than a mere transgression of external norms. From an Aristotelian perspective, the exercise of public virtue necessitates the cultivation of *sōphrosynē*, *phronesis* and *aretē*.[51] The actions of Fallon, therefore, may be seen as an indication of a lack of self-restraint and prudential judgement, which are virtues that are critical in the ethical exercise of political power. The subsequent resignation of Fallon may be viewed as a limited expression of *phronesis*, where there was a recognition of the dissonance between his actions and the moral expectations associated with the position of high political office. However, in both ethical theories, the actions of Fallon were damaging to the integrity of his position and contributed to the erosion of public trust in the moral leadership of the political establishment.[52]

From the feminist ethics point of view, one cannot see such an interaction as completely independent or harmless; instead, the incident reveals persistent power dynamics in political organisations, where informal power may be abused by male leaders at the expense of female subordinates.

From this point of view, the behaviour of Mr. Fallon becomes a case when even minor actions can contribute to the existing cultural pattern of disrespectful behaviour towards females. Feminist ethics calls attention to the role of authority, gender, and hierarchical relationships in such settings, especially taking into consideration the traditional male dominance of the political environment of Westminster. In this context, there is more to the situation than simple ethical misconduct. Thus, against the background of both ethical theories discussed above, the decision of Fallon to resign assumes different meanings. On the one hand, his decision to resign shows a certain level of accountability. On the other hand, the fact of the resignation demonstrates increased expectations from public servants regarding proper behaviour.

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47 BBC News "Michael Fallon Resigns as Defence Secretary after Behaviour Allegations" (1 November 2017) BBC News <www.bbc.com>.

48 BBC News "Michael Fallon Resigns as Defence Secretary after Behaviour Allegations" *BBC News* (online ed, London, 1 November 2017).

49 Jeremy Waldron "Accountability and the Concept of a Profession" (1992) 65 NYU L Rev 143 at 151.

50 Immanuel Kant *Groundwork of the Metaphysics of Morals* (Mary Gregor (translator), Cambridge University Press, 1997) at 4:421-23:400.

51 Aristotle *Nicomachean Ethics* (WD Ross (translator), Batoche Books, 1999) NE II.1–2, VI.5.

52 Richard Bellamy *Political Ethics and Public Office* (Oxford University Press, 2020) at 92–94.

In order to examine the Tabuya case, it is important to distinguish between deontological and virtue-ethical approaches to ethics. The former is based on the idea of the sanctity of the person, which presupposes certain duties towards them. In contrast, the latter assesses the morality of the individual as an agent. If the two approaches are mixed up, there is a danger that the victim of an act of duty violation will be perceived not as someone who has had his or her rights violated but as a person of questionable morals. Feminist theory comes in at this decisive point in the discussion. The critique made by feminist ethics is that the institution attempts to deflect the burden of moral concern from the wrongness of the transgression to the integrity of the individual wronged. It is not considered an incidental mistake but an inherent part of a process whereby women come under increased moral scrutiny, despite the actual transgression being a violation of a duty owed to them.[53] Thus, feminism does not negate either deontological or virtue ethics because it addresses their misuse and shows how a conflation of duty and character is used as a means of victim blaming and perpetuation of injustice structures, especially within institutional contexts dominated by men. It turns out that what looks like a mere confusion of ethical terms actually functions as a mechanism of gender oppression.

What emerges is that conceptual coherence is vital for maintaining institutional legitimacy. As ethical deliberation is divorced from its normative underpinnings, it does not represent a commitment to rights and duties but rather an attempt at reputation management through the performance of "virtue". Feminist scholarship makes it evident that reputation judgements are not equally available to everyone, as they rely on existing notions of gender, power, and respectability. The outcome is the erosion of public confidence and a move towards opportunism, in which ethical considerations are secondary to image considerations, contradicting the very essence of constitutionalism and human rights.

IV. Lynda Tabuya

Lynda Tabuya's case highlights the complexity of legality and ethics in relation to issues of privacy, consent, digital violation, and political responsibility. Unlike regular political scandals involving sexual misconduct or harassment, the case of Tabuya emerged due to the unauthorised distribution of an intimate video clip. According to Tabuya, the video had been distributed without her consent in respect of a "personal and private moment".[54] This is important because this case shifts the focus of the investigation to privacy and consent rather than personal ethics and misconduct.

This poses a pressing question from the perspective of Fiji's legal regime. The Online Safety Act 2018 (Fiji) criminalises the harmful use of digital communications, which includes the non-consensual distribution of sexually explicit material, and intends to offer redress for individuals victimised by online bullying. Yet the overlap between this Act and crimes related to the production of sexually explicit material, especially considering that these offences rely on the concept of criminal-law consent and distribution, is a subject that has not been fully theorised publicly. In the case of Tabuya, the lack of focus on addressing the legal harm suffered by her highlights a problem not so much with the legal provisions themselves but with their prioritisation.

From the deontological viewpoint, this displacement is important. Deontological ethics considers whether an action is moral based on whether one follows his/her obligations and recognises that

53 Catharine A MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, 1989) at 237.

54 ABC News Australia "Fijian minister sacked over non-consensual explicit video speaks out" (YouTube, 27 May 2025) <www.YouTube.com>.

people are ends in themselves. It places great emphasis on the obligation of respecting people's autonomy, dignity, and privacy. In this scenario, the main obligation being violated is the one being violated by those individuals who released the information without consent. In the case of Tabuya, she is the one whose rights are being violated, not the one violating them.

Nevertheless, the act of sacking Tabuya seems to have been motivated more by the fear of political reputational damage brought about by the distribution of the information than by the violation of any professional obligation by Tabuya. This resulted in a distortion of the process of ethical decision-making, which entails substituting perceived impropriety for the commission of wrongdoing. As per the principles of Kantian ethics, persons cannot be used merely as tools for achieving specific goals, especially when they do not transgress any ethical requirement. In this case, the sacking of Tabuya may well have amounted to a second attack on her.

Virtue ethics offers a distinct lens through which to assess ethical conduct, focusing not merely on rules or outcomes but on the character traits embodied in one's actions. From this perspective, Tabuya's condemnation of the circulation of nude images on social media as a form of cyber-violence may be understood as an expression of moral courage and integrity, reflecting a commitment to virtues such as honesty, prudence, and respect for her own dignity. However, there is also another dimension brought out by virtue ethics. Public service is associated with prudence and etiquette, and a minister may be evaluated not only for their behaviour but also for whether their behaviour reflects poorly on the role. This leads to the age-old philosophical dilemma in virtue ethics: to what degree does one's private life, specifically those actions that are legal and mutually agreed upon, affect one's evaluation in public affairs? The issue becomes more acute in the case of Tabuya, since the intrusion into her personal life did not happen by choice but through an invasion.

It is precisely at this point that a feminist ethics standpoint becomes crucial. The feminist approach emphasises the role played by power dynamics and social expectations in not only creating the harmful conditions but also responding to them. *The non-consensual distribution of intimate images is increasingly recognized as a form of gender-based sexual violence that disproportionately impacts women, serving to reinforce patriarchal power dynamics and perpetuate systemic oppression*.[55] In this way, the Tabuya case cannot be comprehended in terms of individual ethical considerations alone; rather, it needs to be analysed in light of a larger reality where women in the public arena are under constant surveillance regarding their physicality and sexuality. In light of such considerations, the approach that the state takes in responding to the problem of violence can be described as a manifestation of structural discrimination. Focusing on reputation at the expense of enforcing laws that would safeguard the rights of victims, as well as recognising their dignity as victims, the state's response runs the risk of reproducing the exact dynamic that feminist ethics aims to reveal, namely, that of blaming the victim for her suffering and punishing her instead.

Examples from other Commonwealth jurisdictions make it apparent how unique this case of ethics violation is. Michael Fallon stepped down in the United Kingdom after accusations of sexual misconduct with a journalist proved to be true, representing an evident case of unethical behaviour. Barnaby Joyce was also investigated for his alleged sexual relationship with a staffer, bringing up issues of conflict of interest and abuse of authority. In Malaysia, Chua Soi Lek resigned amid a sex scandal related to consensual sexual acts. In all the cases mentioned above, the ethics violation stemmed from the personal behaviour of the office holder. Unlike those individuals, Tabuya was

55 Lorraine J Hayman "Accounting for the Harms of Image-Based Sexual Abuse in Ireland's Harassment, Harmful Communications and Related Offences Act" (2024) 26(7) *Journal of International Women's Studies* art 13 at 3.

not the perpetrator but rather a victim of an infringement of her ethical rights. Considering the case through such a lens can be seen as nothing more than a gross misunderstanding of ethics. This is because it equates a person being wronged with someone who has done something wrong, thereby ignoring issues of deontological concern with respect to rights on one hand and feminism on the other.

V. Recommendations

This problem highlights not only a dispute over politics, but a broader issue of ethical inconsistency, legal priority, and gender sensitivity in the governmental system of Fiji. This calls for an approach which goes beyond mere norms to structures.

First, the Fiji Government should enact a Ministerial Code of Conduct that clearly articulates the distinction between (a) private actions that amount to a breach of public trust and (b) lawful private actions that do not. Importantly, the code must include the circumstances in which an individual is subjected to the non-consensual disclosure of intimate material, treating these incidents as a violation of the rights of the office-bearer, rather than a matter of moral conduct. The current contents of the Code of Conduct Bill 2025 (Fiji) do not, in essence, provide for the regulation of the private affairs of a minister. Its structure indicates a much more limited and perhaps purposeful approach. The Bill is concerned with public integrity, not personal morality. It regulates how power is exercised, not how individuals live outside that exercise.

Second, the removal of ministers on ethical grounds ought to go through an independent and fair process. The delegation of such powers to the Prime Minister[56] poses dangers to the principles of constitutionalism and paves the way for the abuse of power. An independent body would ensure that such decisions are evidence-based and in line with natural justice.

Third, the government must also embrace a victim-oriented perspective in its legal system. In instances involving any form of digital violence, the implementation of the Online Safety Act 2018 (Fiji) should be given priority in instituting a process for identifying and punishing offenders rather than dealing with the reputation of victims. This aligns with the State's commitments to values of human dignity and respect for the individual under the Constitution of Fiji.[57]

The fourth issue pertains to the urgency of ethical literacy among those in positions of power. Politicians need to be able to differentiate between deontological issues (rights/obligations) and virtue-based issues (character/perception). Otherwise, ethical discourse will be manipulated into something which cannot be argued effectively on either principle or justice.

Fifth, related to this point is the need to incorporate a feminist perspective on governance into institutional processes. This requires an appreciation of how gendered expectations can affect societal surveillance and ensuring that women are not unfairly punished for the wrongs done to them.

Finally, transparency in the decision-making processes of executives is important. Trust cannot be created through tokenism:[58] it can only be created by providing a sound rationale that

56 Constitution of the Republic of Fiji 2013, s 95(3)(a).

57 Constitution of the Republic of Fiji, s1(e).

58 Tabuya was later welcomed back into Cabinet and given an alternate Ministerial portfolio with no public apology made to her from the Prime Minister. See: Inoke Rabonu "Fired then rehired: Tabuya makes Cabinet comeback" *Fiji Sun* (online ed, Suva, 4 August 2025).

demonstrates the commitment of the decision-maker to legality and ethics. When decisions involve constitutional officials, their normative foundation should be explained.

VI. Conclusion

The Tabuya case highlights the key weakness in the current governance structure, where the mistake of equating exposure to wrongdoing and victimisation with moral degradation is common practice. This is not only a conceptual mistake but also a structural problem that has grave consequences for justice, equality, and democracy. Good governance goes beyond simply managing public perceptions. It entails dedication to ethical principles, consistency in morality, and reverence for human dignity.

An ethics of care, on a feminist understanding, extends this analysis still further by insisting that any form of governance must always attend to the needs of its stakeholders in terms of real experience. This is important because ethical legitimacy does not lie simply in virtue or in rule. In order for public institutions to remain legitimate in an age that is characterised by vulnerabilities and heightened levels of visibility, they should avoid falling into the trap of governing based on a show of morality. On the contrary, they must remember that accountability is anchored in wrongdoing and not revelation; it is about obligation and not appearance; and it is about justice and not convenience.

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The Chinese Poll-Tax in New Zealand
Te Tāke Pōti Haini i Aotearoa

Siew Mei Ou Yang and Justin Lee*

In 1881, the New Zealand government established a £10 poll-tax which was levied against all Chinese entering New Zealand. The tax was imposed to discourage Chinese from coming to New Zealand. The tax was raised to £100 in 1896, and it was not abolished until 1944. In 2002, the government formally apologised to the Chinese people who paid the poll-tax and embarked on a reconciliation process with the New Zealand Chinese community. This article examines the historical and policy reasons leading to the establishment of the tax, analyses the legislation by which it was imposed, and provides an account of subsequent actions taken by the New Zealand government to effect reconciliation with the Chinese community. Previous accounts of New Zealand's Chinese poll tax have been published, but not from a legal perspective; this article aims to contribute to filling that gap in the literature.

I. Introduction

This article examines the poll-tax levied by New Zealand on Chinese immigrants and is divided into four main parts.

Part II sets out the origins and history of the poll-tax. It describes the attitudes that led to anti-Chinese immigration legislation in New Zealand, such as the Chinese Immigrants Act 1881, which first provided for the £10 poll-tax on Chinese arriving in New Zealand. Part II also sets out the reasons why a poll-tax was used to prevent Chinese immigration rather than a more direct policy such as total exclusion of Chinese from New Zealand.

Part III is an analysis of the Chinese Immigrants Act 1881. Issues arising from imposition of the tax, such as evasion and special rules, are examined together with relevant case law. Part IV contains a similar analysis of amendments to the Chinese Immigrants Act and subsequent poll-tax imposing legislation, including the Immigration Restriction Act 1908, which provided for imposition of the poll-tax after the repeal of earlier legislation.

Part V gives an account of events arising after the repeal of the tax, in particular the formal apology made by the government in 2002 to the Chinese people who paid the poll-tax, as well as actions taken by the government after the apology to effect reconciliation. Finally, a discussion as to whether these actions provide a satisfactory conclusion is provided in part VI.

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II. Origins and History of the Poll-Tax

This part of the article sets out attitudes behind anti-Chinese immigration legislation in New Zealand and examines policy reasons leading to establishment of the poll-tax. Legislative processes giving rise to the Chinese Immigrants Act 1881 and its subsequent amendments are also described. Finally, the Chinese response to the poll-tax and the circumstances of the repeal of the poll-tax are briefly highlighted.

A. Background: Arrival of the Chinese

In 1861, gold was discovered in New Zealand and thousands of miners from the Australian goldfields came to the country. By 1865, the gold-rush slowed and goldfields in Otago and Dunedin found themselves suffering a decline in business activity. The Dunedin Chamber of Commerce tried to remedy this situation by inviting Chinese miners from Victoria to Otago to fill the gap left by the departing European miners.[1] This was in the face of opposition from many European miners, who argued that the introduction of the Chinese would result in unnecessary competition, driving even more Europeans out of Otago.[2]

Lulled by the Otago Provincial Council's promise to extend to the Chinese "the same protection that other residents receive",[3] the first 12 Chinese miners arrived in 1866 and were soon followed by others. This marked the beginning of a sharp increase in the numbers of Chinese arriving in New Zealand. By 1867, there were 1,270 Chinese miners in Otago. By late 1869 there were over 2,000. The Chinese from Victoria were supplemented by others coming directly from China, and the total number of Chinese in New Zealand reached 5,000 in 1881.[4]

On the whole, the Chinese co-existed well with the other residents of New Zealand until the abolition of provincial councils in November 1876, which coincided with an emerging generation of rather anti-Chinese local and national leaders, in line with the opinions of many European miners. Between 1877 and 1879, these leaders aired their anti-Chinese views to a New Zealand public suffering the effects of economic depression, looking for a scapegoat to blame for their miseries.[5]

By the late 1880s, gold was depleting and many Chinese began to seek employment in other areas, moving from rural jobs in the South Island to urban occupation in the North Island. This move was seen as an attempt to compete with European traders, and combined with an existing dislike toward the Chinese race, anti-Chinese sentiment reached a fever pitch in the 1890s.[6] This resulted in the enactment of a range of anti-Chinese statutes designed to reduce the number of Chinese entering New Zealand, prevent Chinese from being naturalised in New Zealand, and discriminate against Chinese living in the colony.

One of the first actions taken by the New Zealand Parliament was to pass the Chinese Immigrants Act 1881, imposing a tax of £10 upon every Chinese entering New Zealand.[7] This poll-tax was

1 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 2.
2 James Ng "The Sojourner Experience: The Cantonese Goldseekers in New Zealand, 1865−1901" in Manying Ip (ed) *Unfolding History, Evolving Identity: The Chinese in New Zealand* (Auckland University Press, Auckland, 2003) at 17.
3 "The Chinese Question" *The Otago Witness* (Dunedin, 30 September 1865) at 13−14.
4 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 2.
5 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 27−29.
6 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 2.
7 Chinese Immigrants Act 1881, s 5.

coupled with a passenger restriction allowing only one Chinese passenger per 10 tons of cargo.[8] In 1896 the tax was raised to £100 for every Chinese, and the passenger restriction tightened to one passenger per 200 tons of cargo.[9]

Australia and Canada both imposed similar taxes on Chinese, but they repealed them in 1903 and 1923 respectively,[10] whereas New Zealand retained the tax until 1944.[11] During the period in which the poll-tax was levied, it produced revenues for the New Zealand government of approximately £308,080.[12]

B. The Basis for Anti-Chinese Immigration in New Zealand

New Zealand was not the only British colony to adopt anti-Chinese immigration legislation. Australia and Canada introduced similar legislation establishing poll-taxes restricting entry of the Chinese. The basis of such discriminatory legislation arose from several deeply held beliefs.

The first belief was that of European racial supremacy, particularly that the Anglo-Saxon race was innately superior and the best race to rule the world.[13] This belief formed the basis of the British attempt to "civilize" the world and spread Anglo-Saxon culture via colonisation. The second belief was that the Chinese were particularly inferior and uncivilised.[14]

> By the late nineteenth and early twentieth centuries Chinese were being viewed by Europeans as inferior, ridiculous, immoral, cruel, uncivilised, inscrutable and dangerous. They were said to be carriers of disease and believed to be unable to laugh or feel pain.

These two beliefs were in themselves sufficient to fuel anti-Chinese sentiment and provoke a desire to minimise Chinese immigration in the other colonial nations of Australia and Canada. However, New Zealand also had a third belief: that it had a profound role to play in populating the Pacific with British stock.[15] To achieve this mission, the country was to be kept "pure" and free from the taint of "inferior races". Sir George Grey, then Premier of New Zealand, explained in an official memorandum:[16]

> If they allow themselves to be in any degree embarrassed by foreign races, or if a mixed breed of an inferior degree of civilization is allowed to spring up here, not only the welfare of the other races who surround them will be imperiled, but their own future will be greatly endangered.

C. The Use of a Poll-Tax to Restrict Chinese Immigration into New Zealand

The policymaking intent was to restrict the number of Chinese in New Zealand or exclude the Chinese from New Zealand completely. It is thus necessary at this point to explain why the first anti-Chinese immigration legislation took the form of a poll-tax rather than a total exclusion or some other means of restriction.

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8 Chinese Immigrants Act 1881, s 3.
9 Chinese Immigrants Act Amendment Act 1896, ss 2 and 4.
10 George Hawkins "Poll tax apology marks a new beginning" (13 February 2001) Beehive.govt.nz <https://www.beehive.govt.nz>.
11 Repealed by Finance Act 1944, s 10.
12 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 40-41.
13 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 5.
14 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 6.
15 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 7.
16 George Grey "Memorandum on the Immigration of Chinese in the Colony" [1879] I AJHR D3 at 2.

Under the New Zealand Constitution Act 1852, Britain granted New Zealand a limited form of self-government. Bills passed by the New Zealand Parliament had to be sent to the Governor for Royal Assent. The Governor, as representative of the Crown, had the power to veto Bills passed by the legislature, and would do so if a Bill contravened English law or compromised Imperial matters. The issue of Chinese immigration was an Imperial matter as it involved Britain's foreign affairs. A Bill passed in New Zealand entirely excluding the Chinese from the country would have been denied Royal Assent as it would have resulted in a breach of treaties between Britain and China.[17]

The treaties entered into between Britain and China were direct results of the Opium Wars fought between the Chinese and the British in the mid 1800s. Britain won, and forced China to enter into the 1842 Treaty of Nanjing and the 1858 Treaty of Tianjin, opening up ports of China to British trade and ceding Hong Kong to Britain. In addition, arts V and IX of the 1860 Convention of Peking gave the subjects of the two signatory parties, China and Britain, reciprocal rights to travel to, enter, and settle in each others' countries.[18] An immigration policy of total exclusion would have been a clear violation of the treaties.

The poll-tax allowed for Royal Assent, whilst effecting the purpose of exclusion by making it as difficult as possible for Chinese to enter New Zealand.

The next issue is to consider why a tax was used to restrict immigration rather than some other method such as the requirement to pass a reading test which was introduced in 1908,[19] or a permit system which was introduced in 1920.[20] The idea of using a poll-tax to restrict immigration was first devised in California, which passed an Act in 1855 requiring all non-naturalised immigrants to pay an entry fee of fifty dollars.[21] A poll-tax specifically targeting Chinese was first successfully enacted in the Australian colony of Victoria, where the Chinese Immigration Act 1855 (Vic) imposed a £10 poll-tax on all Chinese immigrants.[22]

Although the Victorian poll-tax was given Royal Assent, it was still in breach of British Treaty obligations to China. The Home Government's position on the issue in 1861 is aptly described below.[23]

> While feeling that anti-Chinese legislation was "highly objectionable in principle" and most inopportune in practice, Her Majesty's government could not "shut their eyes to the exceptional nature of Chinese immigration and the vast moral evil which accompanies it."

Ultimately, although the Crown would not grant British colonies the right to totally exclude the Chinese, it was sympathetic to their purposes and allowed the enactment of such discriminatory legislation.[24]

17 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 9.
18 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 9.
19 Immigration Restriction Act 1908, s 42.
20 Immigration Restriction Amendment Act 1920.
21 Its name was "An Act to discourage the Immigration to this State of Persons who cannot Become Citizens Thereof".
22 Chinese Immigration Act 1855 (Vic), s 4. Britain's colonies in Australia were adminstered separately until federation on 1 January 1901. See Parliamentary Education Office "The Federation of Australia" <https://peo.gov.au>.
23 Charles Price *The great white walls are built: restrictive immigration to North America and Australasia, 1836−1888* (Australian University Press, Canberra, 1974) at 87.
24 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 12.

1. Arguments in support of the poll tax

Advocates of the poll-tax maintained that every nation had the right to determine the composition of its own population. If a nation wished to exclude a particular class or type of immigrant that it felt was injurious to general welfare, then it was perfectly justified in doing so. The rationale for exclusion was, as previously explained, that most European colonists believed Chinese to be an undesirable class of immigrant for the British colonies: they were "at odds" with existing colonials and would "bring only downfall and ruin".[25]

William Hutchinson, the MP who introduced a Private Member's Bill in 1880 that eventually led to the imposition of the poll-tax submitted:[26]

> the Chinaman [is] an undesirable immigrant for the colony. The Chinaman, however docile, however imitative, and however industrious he might be, in so far as he knows nothing about free government, [is] unfitted to take any part of the government of a free country

In 1888, John Ballance, MP for Wanganui (and later, from 1891 until 1893, Premier of New Zealand) reiterated the case in Parliament:[27]

> [The Chinese] are of such a character as not to by any possibility, be able to coalesce with us, they will always live apart, their ideas are not ours, their modes of life are not ours, and altogether, I think that if we had a very considerable number among us, and yet living apart from us, it would be an extremely undesirable addition to our population.

It is evident that arguments supporting the introduction of the poll-tax were motivated by racial prejudice and the belief that the Chinese should be excluded as much as possible from New Zealand.

Claims that the poll-tax would violate treaties between China and Britain were dismissed, by way of the argument that if China was inundated with "half a million Irishmen, Scotsmen or Englishmen", Chinese authorities would not hesitate to abolish any existing treaty.[28] The fact that at this stage, the Chinese population in New Zealand was only about 5,000 was conveniently ignored.[29]

2. Arguments against the poll tax

There were two groups who argued against the poll-tax. The first group posited that the entry of Chinese into New Zealand should be restricted, but not via a poll tax. The second group argued that the tax was unjust, cruel, unfair, and in violation of law, religion, and morality.[30] Both groups' arguments are addressed below.

The first group advocated for a total exclusion of Chinese from New Zealand, and argued that a poll-tax would be ineffective in achieving this goal. For instance, GB Barton of Tuapeka stated in reply to questions submitted to him by the Select Committee into Chinese immigration in 1871 that a poll-tax would not succeed:[31]

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25 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 21.

26 (8 July 1880) 36 NZPD 91. William Hutchinson, 1820–1905, was born in Scotland, migrated to New Zealand in 1866, worked as a journalist and represented various constituencies in the New Zealand Parliament from 1879 to 1896, initially as an independent, then as a Liberal.

27 (29 May 1888) 60 NZPD 284.

28 (8 July 1880) 36 NZPD 91 at 91.

29 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 2.

30 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 22.

31 GB Barton "Ad Interim Report (No II) of the Chinese Immigration Committee" [1871] II AJHR H5a at 15.

> Special taxation upon Chinese is undesirable in itself, for two reasons: it is unjust on the face of it, and it has not been found to succeed elsewhere. It has been abandoned in Australia, and there is nothing to show that it would answer the purpose in New Zealand … A capitation tax would neither drive them out of the country, nor prevent them from coming into it.

The second group opposed the poll-tax on moral and legal grounds, arguing that it was unjust, unfair, and in violation of the Treaties between China and Britain. De Renzie Brett, a member of the Legislative Council, argued against the introduction of the tax in 1881:[32]

> I say this Bill … is not dictated by justice, equity or Christian benevolence … we are acting towards [the Chinese] in a most cruel way; in direct violation of a treaty between Great Britain and China … Immigrants of all nationalities arrive here without any impediment. Why should you exclude the Chinese – the people of a country which two thousand years or more ago was the most civilized in the world?

During the debate prior to the initial passing of the £10 Chinese poll-tax, James Wallis, MP for Auckland City West, stated:[33]

> We are bound to respect the Treaties which have been made between Great Britain and China which provide for reciprocity in this matter. Now, undoubtedly the Treaty of Pekin, made in 1860, did provide that there should be free ingress and egress in connection with the Chinese Empire and the British Empire. We forced that treaty upon the reluctant Chinese, although they opposed it, and were justified in opposing it because the treaty was in complete violation of their own national law.

Despite this protest, arguments that the poll-tax violated treaties were dismissed, and any arguments that the poll-tax was immoral likely had little effect amidst the heavy anti-Chinese sentiment.

D. Legislating of the Chinese Immigrants Act 1881

The first calls for legislation to restrict Chinese immigration by means of a poll-tax originated in gold-mining areas. In 1861, well before the first Chinese gold-miners were invited to New Zealand, Francis Dillon Bell, MP for Wallace, asked whether the government would legislate in the event of an influx of Chinese into Otago. The government replied that they saw no need to do so.[34]

In 1865, the Dunedin Chamber of Commerce invited Chinese miners to Otago to replace departing European miners. By 1869, close to 2000 Chinese miners had arrived, and remaining Europeans renewed their calls for a restrictive poll-tax.[35] One of their leaders, Thomas Luther Shepherd, MP for Dunstan, claimed that "injurious results would accrue to the province unless stringent measures were adopted to prevent the further influx of Chinese". He proposed "a poll-tax of 50 pounds a head … and a heavy duty on rice".[36]

Calls for restriction from the Otago gold-mining community continued, and the Arrowtown Miners Association circulated a petition against the further introduction of Chinese. In response

32 (29 June 1881) 38 NZPD 243. De Renzie Brett (1809–1889) was born in Ireland. He joined the British Army and served during the Indian Rebellion of 1857 and the Crimean war. He migrated to New Zealand in 1865 and was appointed to the Legislative Council in 1871. The Legislative Council was the upper house of the New Zealand Parliament. It was established by the Constitution Act 1852, membership was by appointment by the Governor, and it was abolished in 1952. See PJ Perry "Brett, De Renzie James" (1993) Te Ara <https://teara.govt.nz>.

33 (17 June 1881) 38 NZPD 124.

34 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 27.

35 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 17.

36 "The Chinese Difficulty" *The Otago Witness* (Dunedin, 19 November 1870) at 9.

to this cause, Charles Edward Haughton, MP for Wakatipu, raised the question of restrictive legislation in the House of Representatives. The government again rejected the proposal, but following further pressure from Haughton, formed a Select Committee to investigate the issue of Chinese immigration. Convened in 1871, the committee conducted an investigation into all aspects of Chinese immigration in New Zealand and concluded that the Chinese presence was not prejudicial to the country and that no action against them or their entry should be taken.[37]

No further pressure was put on the government to restrict Chinese immigration until 1878. The advocates for restriction were European gold-miners from the West Coast, many of whom had recently arrived from Victoria and New South Wales, where anti-Chinese poll-taxes had already been enacted. Having been exposed to anti-Chinese discrimination both in culture and legislation, these new European miners strongly supported restrictions on Chinese arrival into New Zealand.[38]

Two other factors contributed to the pressure put on the government to legislate. First was the onset of a severe economic depression in 1878 which affected New Zealand for the next ten years. By 1880, effects of the depression were keenly felt by the working classes, who sought to blame the Chinese for their miseries.[39]

> A recurring pattern throughout the history of the British colonial nations was the coinciding of an economic downturn with an upsurge of anti-Chinese agitation. At these times it was the Chinese who were blamed for the economic misery being suffered.

Second was the 1881 Inter-Colonial Conference, prompted by a mass movement following the anti-Chinese seamen's strike of 1878. In the conference, Australia and New Zealand agreed to legislate uniformly on Chinese immigration.[40] One of the recommendations was that a £10 tax should be imposed on all Chinese immigrants, which the New Zealand government adopted.

In contrast with early anti-Chinese activists in Otago, the West Coast anti-Chinese movement was better organised and had the support of anti-Chinese MPs in Parliament, namely the West Coast MPs Richard Reeves, Richard John Seddon, and the Premier (and former Governor) Sir George Grey.

In 1878, Reeves requested a Bill restricting Chinese immigration be introduced, and attempted to persuade the House of Representatives to pass a motion to prohibit further Chinese immigration into New Zealand.[41] The House of Representatives was divided on the issues, and eventually Reeves withdrew his motion and appealed directly to Grey. Grey responded by writing a memorandum to Parliament on the Chinese immigration issue in 1879.[42] That year, Grey introduced a Bill based on the Victorian Chinese Immigration Act 1855, providing for a poll-tax of £10 and a passenger restriction of one Chinese passenger for every ten tons of cargo.[43] However, Grey's government was defeated in 1879, and the Bill fell through.

In 1880, William Hutchison, MP for Wellington City, introduced a private member's Bill almost identical to the previous session's Grey Bill. Although the Bill was strongly supported by Reeves,

37 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 27.
38 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 27.
39 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
40 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
41 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
42 "Memorandum on the Immigration of Chinese in the Colony" [1879] I AJHR D3.
43 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 28.

Grey, and Seddon, the opposition was still strong enough to persuade Hutchison to allow the Bill to sit until the next session.[44]

In 1881, the government decided to revive both Grey's 1879 Bill and Hutchison's 1880 Bill. Although the Legislative Council protested that this decision violated British traditions and "involved surrender to working class agitation",[45] the Bill was duly passed. The Chinese Immigrants Act 1881 followed the Victorian Act and imposed a £10 tax on all Chinese immigrants.[46] It also imposed a passenger restriction of one Chinese passenger to every 10 tons of cargo,[47] although Hutchison had attempted to raise the passenger restriction from 10 to 50 tons.[48]

In 1888, the number of Chinese passengers permitted on entering ships was reduced to one per 100 tons of cargo.[49] In 1893, Richard Seddon became Premier. For three consecutive years he introduced a comprehensive "anti-Asiatic Bill" which raised the poll-tax to £100 and extended the imposition of the tax to all "Asiatics", defined in the Bill as any native of any part of Asia, islands adjacent to Asia or in Asiatic seas, and their descendants.[50] In 1896, the Asiatic Restriction Bill was passed, but denied Royal Assent.[51] Seddon responded by introducing the Chinese Immigrants Act Amendment Act 1896 which raised the poll-tax to 100 pounds and decreased the number of Chinese passengers permitted to one for every 200 tons of cargo.[52]

Anti-Chinese societies such as the Anti-Chinese Association and the Anti-Chinese League also pressured the Seddon government to pass further anti-Chinese immigration legislation. These societies were founded in 1894 and 1895 respectively, and were dedicated to keeping the Chinese out of New Zealand. The Anti-Chinese Association wanted either the total exclusion of Chinese, East Indians and "Coolies", or a raise of the poll-tax to £100 – the latter a shared goal with the Anti-Chinese League. In 1907, two more anti-Chinese societies were formed: the Anti-Asiatic League and the White Race League.[53] These societies again called for further restrictions, wanting the tax raised from £100 to £1,000. Other groups, such as the Wellington Trades and Labour Council, supported this proposal, while the Auckland Trades and Labour Council suggested that the tax be increased to £200 instead.[54] By this stage, anti-Chinese sentiment had reached such intensity that the general opinion in New Zealand was that the Chinese should be excluded by any means possible. The government responded by passing the Chinese Immigrants Amendment Act 1907, which made no change to the poll-tax, but introduced an English reading test as a condition of entry.[55]

Although Premier Joseph Ward favoured the total prohibition of Chinese Immigration, he knew

44 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 28.
45 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
46 Chinese Immigrants Act 1881, s 5.
47 Chinese Immigrants Act 1881, s 3.
48 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
49 Chinese Immigrants Act Amendment Act 1888, s 4.
50 Asiatic Restriction Act 1896.
51 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 29.
52 Chinese Immigrants Act Amendment Act 1896, ss 2 and 4.
53 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 25−26, 30.
54 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 30.
55 Chinese Immigrants Amendment Act 1907, s 3.

that this would not receive Royal Assent. Increases in the poll-tax were also thought to potentially have an inverse effect:[56]

> the greater the poll-tax, the longer the Chinese would have to stay in New Zealand in order to [sufficiently] pay back the syndicates … If the poll-tax were to be raised to 500 pounds, the Chinese who came would have to remain in the country all their life.

In 1908, the government passed the Immigration Restriction Act 1908, which consolidated all existing restrictions into one Act. Thereafter, the poll-tax was preserved in the Immigration Restriction Amendment Act 1920, until its eventual repeal in 1944.[57]

E. The Chinese Response To The Tax

The Chinese in New Zealand did not quietly accept the poll-tax. They sought amendment or repeal of legislation, and protested against the injustices and indignity suffered as a result of the tax. As the Chinese in New Zealand had no official representation prior to the appointment of the first Chinese Consul in 1909, they could only protest laws passed against them by public petition. Each of the immigration restriction Acts passed between 1881 and 1908 were petitioned against by Chinese arguing for fairness, even-handedness in immigration, and treaty rights.

In 1883, after the Chinese Immigrants Act 1881 was passed, a group of Wellington Chinese petitioned Parliament, requesting that Chinese immigrants be free from the poll-tax until the number of Chinese in New Zealand reached 7,000.[58] In August 1888, the Chinese Immigrants Act Amendment Act 1888 was passed, s 4 decreasing the number of Chinese passengers permitted from one per 10 tons of cargo to one per 100 tons of cargo. Subsequently, 21 Auckland Chinese residents petitioned Parliament protesting any legislation imposing restrictions on immigration of Chinese to the Colony.[59] In 1895, Sun Kwong Lee and seven other Chinese of Wellington, representing themselves and other Chinese, petitioned Parliament requesting that the poll-tax be reduced and no further laws discriminating against Chinese in New Zealand be passed. They based their petition on rights established under the treaty between China and Britain, discrimination, and injustice:[60]

> … in the treaty entered into between Great Britain and China provision is made for the subjects of the Chinese Nation to enter, settle and trade in any colony or dependency of Great Britain … foreigners from other nations are permitted to come and settle in New Zealand without being compelled to pay the unjust poll-tax of 10 pounds which your petitioners are now obliged to pay: and your petitioners consider it will be most unjust and unfair to your petitioners to compel them to pay any higher tax than that which your petitioners now have to pay.

Following the appointment of the Chinese Consul in 1909, there were no further petitions from individual Chinese. In 1920, the Immigration Restriction Amendment Act 1920 was passed, introducing a permit system of immigration but retaining the Chinese poll-tax. Both China and

56 Ng Bickleen Fong *The Chinese in New Zealand: a study in assimilation* (Hong Kong University Press, Hong Kong, 1959) at 26.

57 Finance Act 1944, s 10.

58 Thomas Kelly "Petition Of John Ah Tong and Other Chinese" [1883] III AJHR I-1 at 4.

59 Arthur Seymour "Petition of Chinese residents (21) of Auckland" [1888] III AJHR I-1 at 3.

60 John Joyce "Petition of Sun Kwong Lee and others of Wellington" [1895] IV AJHR I-1 at 8; "To The Honourable The Speaker and Members of the House of Representatives in Parliament Assembled" *The New Zealand Times* (Wellington, 19 August 1895) at 1.

the Chinese Consul in Wellington protested this anomaly. The Consul stated that the Chinese did not object to a restriction of numbers, but "they do object to the poll-tax, which they regard as inhumane and barbarous".[61]

F. Repeal of the Poll-Tax

Two factors were decisive in the eventual repeal of the poll-tax. The first was the election of the first Labour government in 1935. This government, led by Michael Joseph Savage, put into action its "socialist-inspired principles of equality and social justice by abolishing other discriminatory legislation against the Chinese."[62] The second factor was the Second World War. As New Zealand became increasingly involved in the Pacific war after 1939, it became known to New Zealanders that China had been fighting the Japanese since 1937, changing public perceptions. "Chinese New Zealanders had gone from being the 'Yellow Peril' to 'our brave allies'."[63]

In 1944, the Labour government introduced the Finance Act 1944, which abolished both the poll-tax and passenger restrictions on Chinese. The Minister of Finance, Walter Nash, summarised the government's attitude to the tax and reasons for abolishing it:[64]

> While the law provides that a poll-tax shall be levied on Chinese coming into the country, the tax has not been collected for some years. We now propose to abolish the poll-tax, together with a number of other restrictions. We have no more right to ask the Chinese to pay a poll-tax than we have to ask the Japanese, the Germans, the Spaniards, or the Norwegians.

This comment is surprising when noting that New Zealand was in midst of a war against the Japanese and Germans. Nash then concluded by briefly acknowledging the injustice that had been done to Chinese New Zealanders for the 62 years that the poll-tax had been in force:[65]

> I do not know of anything more pleasing from the Government's point of view … than the removing of the blot on our legislation. We are merely saying that the Chinese are as good as any other race, and that we will not in future countenance any discrimination against them.

New Zealand was the last of the poll-tax imposing countries to abolish the tax. Australia had repealed its final remaining poll-tax in 1903 and Canada in 1923.[66] New Zealand retained the tax until 1944. During the period the poll-tax was levied, it generated approximately £308,080 for the New Zealand government.[67]

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61 (14 September 1920) 187 NZPD 910.

62 Alongside the poll-tax, Chinese were also denied social welfare benefits and were prohibited from bringing their families into New Zealand. For more examples of anti-Chinese discrimination see Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 36; Ng Bickleen Fong *The Chinese in New Zealand: a study in assimilation* (Hong Kong University Press, Hong Kong, 1959) at 31.

63 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 36.

64 (13 December 1944) 267 NZPD 724. Walter Nash (1882−1968) was MP for Hutt Valley from 1929 until his death. He became Minister of Finance in 1935, and as a result of that, the third ranked minister in the government. He helped to nationalise the Reserve Bank, and negotiated numerous agreements for trade and loans overseas. He became Prime Minister in 1957, and inherited a balance of payments deficit that led to the "black budget" of 1958 which increased taxes on beer, tobacco and petrol. See Barry Gustafson "Nash, Walter" (1998) Te Ara <https://teara.govt.nz>.

65 (13 December 1944) 267 NZPD 724 at 725.

66 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 36.

67 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 41.

III. The Chinese Immigrants Act 1881

The Chinese Immigrants Act 1881 initially imposed a poll-tax of £10 upon each Chinese arriving in New Zealand and a passenger restriction of one Chinese passenger to 10 tons of cargo.[68] Subsequent amendments to the Act tightened the passenger restriction to one Chinese passenger per 200 tons of cargo, and increased the poll-tax to £100.[69]

The poll-tax and tightened cargo restrictions were preserved after the repeal of the Chinese Immigrants Act 1881 by the Immigration Restriction Act 1908, which also added a further reading test requiring a Chinese to read an English-language passage of 100 words before being allowed to land in New Zealand.[70]

The Chinese Immigrants Act 1881 and the subsequent Immigration Restriction Act 1908 did not merely provide for the imposition of a poll-tax. They also addressed exemptions and penalties, and imposed obligations upon persons other than the Chinese to make it easier to collect the tax. The legislation is therefore examined according to its charging provision, definitions, penalties, exemptions, provisions for tax evasion and other legal obligations imposed.

A. Charging Provision

The charging provision was contained in s 5 of the Chinese Immigrants Act 1881:

> Before making any entry at the Customs, and before any Chinese shall be permitted to land, the master shall pay to such Collector or other principal officer ten pounds for every such Chinese; and no entry shall be deemed to have been legally made, or to have any legal effect, until such payment shall have been made.

Thus, the obligation to pay was imposed upon the master of the ship rather than upon the Chinese passengers themselves. The assumption is that the master of the ship would have protected himself financially by passing the full burden of the tax onto his Chinese passengers, charging them extra fees or an increased fare to reflect the tax. Charging the master a sum for all passengers simplified collection of the tax, whilst still indirectly imposing its burden on the Chinese passenger. Once the tax had been paid, s 7 provided for a certificate of payment to be given by the customs officer to each Chinese passenger.

Section 5 provided that a failure to pay the poll-tax rendered the entry of a Chinese individual into New Zealand illegal. It was unclear from the statute whether positive payment of the tax would result in an absolute right for the Chinese to enter and remain in New Zealand. This question was indirectly addressed in *R v WM Bannatyne*.[71] In that case, three Chinese seamen deserted ship. No poll-tax was paid for them initially, as they were expected to remain on the ship when it arrived in New Zealand. Poll-tax was subsequently paid on their behalf, and the issue was whether the sum paid could be recovered. It was held that the poll-tax could be recovered, as it was not payable under the Chinese Immigrants Act Amendment Act 1888, which totally prohibited Chinese seamen from landing and remaining in New Zealand. In obiter, the Court commented that prior to the

68 Chinese Immigrants Act 1881, s 5.
69 Chinese Immigrants Act Amendment Act 1896, ss 3 and 4.
70 Immigration Restriction Act 1908, s 42.
71 *R v WM Bannatyne & Co* [1901] 20 NZLR 232.

Chinese Immigrants Act Amendment Act 1888, payment of the tax would have resulted in an absolute right for a Chinese to enter and remain in New Zealand.[72]

B. Definitions

As provided by s 5, liability to pay lay with the master of the vessel, and the total amount payable was determined by the number of Chinese on board times the £10 tax payable for each Chinese. It is thus important to consider what is meant by "master", "vessel", and "Chinese", to identify who would have been liable to pay the tax, and how much they would have to pay. Definitions were set out in s 2.

> Master means the person, other than a pilot, for the time being in actual command of any such vessel.

The intention of the Act was to impose liability on the commander of any vessel arriving in New Zealand, which had Chinese persons on board. In most cases, the person in command of the vessel would be the captain. The use of "actual command" however, meant that any persons with actual command over ships would be held liable, not just captains by title.

> Vessel is defined as any ship or other seagoing vessel of whatsoever kind or description

This definition provided that the tax would be payable by a master of a "seagoing vessel". Presumably this meant that masters of smaller boats would not be liable for the tax if they had Chinese on board. This allowed for Chinese in New Zealand to go offshore, work on fishing boats, and return without having to pay the tax. Chinese who happened to be offshore in such non-seagoing vessels when the Act came into effect would also not be subject to the tax.

> Chinese means any person born of Chinese parents, and any native of China or its dependencies, or of any island in the China seas, born of Chinese parents.

This definition was very broad, and also appears inclusive of any person who was born of Chinese parents, but naturalised in some country other than China, such as Britain, Australia or even New Zealand. A New Zealand-born Chinese who left New Zealand for China and then subsequently returned to New Zealand could also fall under this definition.

Sections 13 and 14 of the Chinese Immigrants Act 1881 narrowed the scope of the tax. They provided that Chinese who were already in the Colony at the time the Act was passed would be exempt from the tax, and certificates of exemption could be obtained, allowing them to leave and return to New Zealand without having to pay the poll-tax. There was, however, no mention of the status of Chinese who were born in New Zealand after the passage of the Chinese Immigrants Act 1881. It is likely that Parliament did not contemplate such a situation, as there were very few Chinese women in the Colony at that time: at the time the Act was passed, there were nine Chinese women in New Zealand and 4,995 Chinese men.[73]

There were several other problems with this definition of "Chinese". First, the definition was circular. To determine whether a person was Chinese under the Act, one would have to determine whether they had Chinese parents. This would require a return to s 2 to determine whether their parents were Chinese, then the parents' parents, ad infinitum.

Second, the definition was geographically vague. The phrase "any island in the China seas"

72 *R v WM Bannatyne & Co* [1901] 20 NZLR 232 at 246.

73 Wong Liu Sheung "The Moulding of the Silent Immigrants: New Zealand Born Chinese (NZBC)" (paper presented at Auckland University of Technology Chinese Centre, Auckland, 15 May 2002) at Appendix 1.

included the islands of Hong Kong, Macau, and Taiwan, even though Hong Kong was a British colony (until 1997) and Macau a Portuguese colony (until 1999). There were also indigenous Taiwanese of Malay-Polynesian descent rather than ethnic Chinese. The phrase "any island in the China seas" would also have included some islands of the Philippines, whose people were predominantly not of Chinese ancestry. As the section also included the words "born of Chinese parents", it is unclear whether a native of those Philippines islands without Chinese parentage would have been considered Chinese. If Chinese parentage was required, then the definition provided by the Act was circular.

Section 12 provided for two justices of the peace to "decide upon their own view and judgment whether any person charged before them is a Chinese within the meaning of this Act" if there was any doubt. As there were no guidelines provided to the Court beyond the definition described above as to how to go about ascertaining whether a person was a "Chinese" within the meaning of the Act, it is possible only to speculate as to what the Courts would have based their decisions on. Presumably physical appearance, language spoken and place of origin would have been deciding factors. It seems likely that such decisions, if there were any,[74] would have been based simply upon the physical appearance of the person before the Court.

C. Penalties

Penalties for a failure to pay the poll-tax were imposed by the Chinese Immigrants Act 1881 upon both the master of the ship and the Chinese passenger.

Section 6 made it an offence for the master of a ship to evade paying the tax, but only if he had the "intention" of doing so. If it could be shown that an honest mistake had occurred and there was no intention to evade tax, no penalty would be imposed. Section 6 also provided that the penalty for evasion was a fine on the shipmaster of not more than £20 for each Chinese who had been landed or permitted to land, where the master had intended to evade paying the tax on their behalf. In addition, the ship would "be forfeited, and may be seized, condemned, and disposed of".[75]

Section 9 provided for penalties imposed on the Chinese passenger in respect of which no tax had been paid:

> If any Chinese shall enter or attempt to enter the colony without paying or having paid for him the sum of 10 pounds aforesaid, he shall, besides such sum, be liable to a penalty not exceeding 10 pounds, and may be apprehended and taken before any Justice of the Peace, who may take sufficient bail … or remand him … until such Chinese shall produce a certificate of payment as aforesaid.

Unlike s 6, s 9 imposed strict liability: so long as a Chinese entered without paying the tax, he was liable, regardless of intention. This harsher standard was in face of the fact that there was no actual liability on the Chinese to pay, as formal liability lay with the master of the ship.

It is interesting to consider the position of a Chinese who paid the amount of the tax to a rogue shipmaster or Customs officer who then either absconded with the sum or denied having ever received it. Section 5 provided that the tax must be paid to the Collector or some other principal of Customs, and no entry by a Chinese was legally made until the tax had been paid. Thus a Chinese who had paid his tax money to the master of the ship as he was supposed to but who had been defrauded as a result, would still have been liable for the s 9 penalty.

74 It has not been possible to find any early decisions on the meaning of "Chinese".

75 Chinese Immigrants Act 1881, s 6.

Section 12 provided that penalties payable under the Act could be recovered in a summary manner upon the prosecution by an officer of Customs, and s 10 empowered the Governor to remit the whole or any part of any penalty payable under the Act. A refund of penalties paid would thus be possible if it could be shown that the customs officer or ship master had been prosecuted for theft or fraud. However, it was likely difficult for a Chinese person to prove that fraud had occurred in the absence of other witnesses or evidence, and unfamiliarity with the English language certainly brought no benefit. Strong anti-Chinese attitudes held by Europeans could have affected the weight given to the evidence of a Chinese person in Court, especially if the crime was alleged to have been committed by a European.

D. Exemptions

The Chinese Immigrants Act 1881 set out several exemptions. As previously mentioned, s 13 provided that Chinese already present in New Zealand at the time the Act was passed could apply for a certificate exempting them from payment, and s 14 provided that certificates could be granted in the case of a temporary absence from New Zealand, where the Chinese applying for the certificate had been a bona fide resident of New Zealand at the time the Act was passed.

There were also exemptions for Chinese seamen. Section 5 exempted the master of the ship from his obligation to pay tax in relation to any Chinese crew members, unless the Chinese crew intended to land and remain in New Zealand, in which case the poll-tax would be payable.

E. Other Obligations

Apart from the obligation to pay the tax, the master of the ship also had to observe a passenger restriction of one Chinese passenger for every ten tons of cargo under s 3. The penalty for failing to observe this restriction was a fine of £10 for each additional Chinese passenger.[76] Under s 4, the master of the ship also had to provide a list of the names and various identifying information of Chinese passengers on board. The failure to provide such a list would attract a penalty of up to £200. Presumably this section was intended to make it easier to administer the tax, as the sum collected could be compared with information on the list.

IV. Subsequent Legislation

The Chinese Immigrants Act 1881 was amended in 1888 and in 1896 before being repealed and replaced by the Immigration Restriction Act 1908. These amendments changed the legal status of Chinese seamen arriving in New Zealand and refined the definition of "Chinese". The Chinese Immigrants Act Amendment Act 1896 amended s 5 of the Chinese Immigrants Act 1881 to increase the tax payable from £10 to £100 per person.[77] Thereafter, no further changes were made to this section, and it was preserved in subsequent legislation until the tax was repealed in 1944.

76 Chinese Immigrants Act 1881, s 3.

77 Chinese Immigrants Act Amendment Act 1896, s 2.

A. Definitions

In 1888, an amendment to the Chinese Immigrants Act sought to clarify the position of naturalised Chinese by providing that "Chinese" did not include Chinese naturalised in New Zealand:[78]

> Chinese means any person born of Chinese parents, and any native of China or its dependencies, or of any island in the China seas, born of Chinese parents; but does not include Chinese naturalised in New Zealand.

The definition of "Chinese" then remained unchanged and was incorporated into s 2 of the Immigration Restriction Act 1908 when the Chinese Immigrants Act 1881 was repealed. It was the subject of litigation in the 1919 case of *Lum v AG*,[79] where the status of New Zealand-born Chinese in relation to the poll-tax was raised. The plaintiff and his wife were both Chinese not naturalised in New Zealand. They wanted to take their six New Zealand-born children back to China to receive education, and the issue was whether a £100 poll-tax would have to be paid for each child when they returned from China. As the children were expected to be away in China for a minimum of 5−6 years, re-entry certificates were of no use as they expired after four years.

The crux was thus the legal status of New Zealand-born Chinese children: whether Chinese born in New Zealand were British subjects and therefore "British", or whether they were "Chinese" and subject to the Immigration Restriction Act 1908. The Supreme Court, comprising Stout CJ, Cooper, Sim and Herdman JJ, unanimously held that the children would not be subject to the poll-tax, but for different reasons.

Stout CJ held that the children were British subjects under s 1(1) of the British Nationality and Status of Aliens Act 1914 (UK), which provided that "any person born within His Majesty's dominions and allegiance" was a British subject. He then held that the meaning of "naturalised" in s 2 of the Immigration Restriction Act was broad and included the case of a natural-born subject.

Stout CJ then held that the facts of the case did not fall within the object of the legislation, as the children already in New Zealand were not immigrants, and not covered by the statute's purpose of preventing Chinese from landing in New Zealand. He then commented that even if the Immigration Restriction Act 1908 was somehow applicable, the legislature could not have intended to discriminate between Chinese naturalised in New Zealand and Chinese in New Zealand who were British subjects by birth, to the disadvantage of the latter.[80]

Cooper and Sim JJ agreed with Stout CJ that the children were British subjects by way of birth in New Zealand. An application of the Immigration Restriction Act to the children would have affected their rights to freely enter and leave New Zealand, and the rights of British subjects were not to be extinguished except by express words or necessary implication. Both Justices held that the s 2 definition did not satisfy either of these conditions, and it was not legislative intent to discriminate against British subjects.[81]

Cooper J then addressed the issue of whether the children were "natives of China"[82] and thus subject to provisions of the Act. He held that plaintiff Lum and his wife were domiciled in New Zealand, and that the children were natives of New Zealand – not "natives of China" under the Act. Cooper and Sim JJ addressed the s 2 meaning of "born of Chinese parents", limiting it to

78 Chinese Immigrants Act Amendment Act 1888, s 2.
79 *Lum v AG* [1919] NZLR 741.
80 *Lum v AG* [1919] NZLR 741 at 746.
81 *Lum v AG* [1919] NZLR 741 at 747 and 751.
82 Immigration Restriction Act 1908, s 2.

"persons born of Chinese parents outside New Zealand". They held that this was consistent with legislative intent, namely, to prevent immigration of Chinese who were born outside New Zealand and who had not been naturalised in New Zealand.

Herdman J held that the legislature had not dealt with natural-born British subjects as it did not see it necessary for purposes of the Act. He held that the children were natural-born British subjects, and did not fall within the Act.

It was thus unanimously held that the children were British subjects and not "Chinese" under the Immigration Restriction Act 1908. They would not suffer the £100 burden on re-entry to New Zealand.

B. Penalties

Penalties for failure to pay the poll-tax were imposed upon both the master of the ship and the Chinese passenger.[83] The Chinese Immigrants Act Amendment Act 1888 increased the penalty from £20 to £50 for each Chinese passenger in respect of whom the master of the ship had not paid the tax.[84] Additionally, it became an offence "to permit or suffer any Chinese to escape from a vessel"[85] before the tax had been paid, applying a strict liability standard. The 1888 Act also imposed an additional penalty: any Chinese passenger who did not pay the s 9 penalty could be imprisoned for up to twelve months.[86] The burden of proof lay with the defendant Chinese to show they were exempt from the tax.

In 1908, the penalty for a Chinese who had not paid the tax was increased from its original sum of £10 to £100.[87]

C. Exemptions

Section 5 of the Chinese Immigrants Act 1881 exempted the master of the ship from his obligation to pay tax in relation to Chinese crew members, unless the Chinese crew intended to land and remain in New Zealand, in which case the tax would be payable. This exemption was amended in 1888:[88]

> The penalties and restrictions imposed by the said Act as amended by this Act [shall not be applied to] … any Chinese … crew of any vessel arriving in any port in New Zealand, and no such Chinese … crew shall be discharged and landed from such vessel within the colony, or … go on shore, except in the performance of his duties in connection with such vessel, and every Chinese so discharged and landed shall be liable to a penalty of twenty pounds.

Cases that involved this amended exemption are *WM Bannatyne & Co v Carter*[89] and *R v WM Bannatyne*,[90] which both arose from the facts as follows. Three Chinese seamen deserted their ship in New Zealand. The plaintiffs, agents of the ship, and the defendant, Collector of Customs, both assumed that the poll-tax was payable under these circumstances. Although the defendant did

83 Chinese Immigrants Act 1881, ss 6 and 9.
84 Chinese Immigrants Act Amendment Act 1888, s 5.
85 Chinese Immigrants Act Amendment Act 1888, s 5.
86 Chinese Immigrants Act Amendment Act 1888, s 6.
87 Immigration Restriction Act 1908, s 34.
88 Chinese Immigrants Act Amendment Act 1888, s 8.
89 *WM Bannatyne & Co v Carter* [1900] 19 NZLR 482 (SC).
90 *R v WM Bannatyne & Co* [1901] 20 NZLR 232.

not actually demand payment, the plaintiff paid tax for the three Chinese seamen to the defendant before obtaining clearance to leave the country. The plaintiff then sought to recover the tax paid. An issue arising from the case was whether the poll-tax was payable for the three deserted Chinese crew.

Stout CJ held that s 8 of the Chinese Immigrants Act Amendment Act 1888 absolutely prohibited Chinese members of crew from landing and remaining in New Zealand, unless in performance of their duties in connection with the vessel. Any Chinese seaman who had landed outside of performance of his ship duties had already committed an offence by the mere fact of landing.[91] No payment of the tax could grant such a seaman the right to remain in New Zealand, so there was no liability on the master to pay it.

Stout CJ then held that the tax paid by the plaintiff could be recovered as there had been no legal obligation to make the payment. However, the payment could only be recovered from the Crown and not the defendant, as he had been obliged to pass the money on. The plaintiff then sought to recover the sum of the poll-tax from the Crown in the case of *R v WM Bannatyne*.

In this second case, Stout CJ again held that the payment of £300 was recoverable from the Crown. The Crown appealed and the Court of Appeal affirmed the decision of Stout CJ in *WM Bannatyne & Co v Carter* and agreed that s 8 of the Chinese Immigrants Amendment Act 1881 abolished any liability on the master of a vessel to pay poll-tax for a Chinese crew member.

D. Tax Evasion

As with other taxes, the Chinese poll-tax prompted attempts to evade and avoid payment. Ship masters could avoid payment by trans-shipping Chinese into other vessels prior to reaching port. Section 5 of the Chinese Immigrants Act 1881 provided that the poll-tax was payable by the master of a "vessel", as defined in s 2:

> … any ship or other seagoing vessel of whatsoever kind or description

Ship masters could thus avoid paying the tax by arranging for a small boat not falling within this definition to ferry Chinese passengers to shore. The tax would not be payable by the master of the small boat as it would not be a "vessel", neither would it have been payable by the master, as his ship would no longer have any Chinese on board. The 1888 legislation dealt with the problem of trans-shipping by providing that the trans-shipping vessel and any Chinese onboard it were still subject to all obligations under the Chinese Immigrants Act 1881, including the obligation to pay the poll-tax.[92]

The Chinese themselves could evade tax in two ways: first, by buying a Certificate of Exemption from a returning Chinese, and second, by obtaining the naturalisation papers of a Chinese returning permanently to China.[93] Sections 13 and 14 of the 1881 Act provided that Chinese who were in the Colony at the time the Act was passed could apply for a Certificate of Exemption. Although the certificate denoted the holder's name, a newly arrived Chinese who had purchased a certificate from a returning Chinese could pass himself off as the certificate holder. A Chinese who obtained the naturalisation papers of a Chinese returning permanently to China could also evade the tax, as naturalised Chinese were exempted from paying the tax.[94]

91 *R v WM Bannatyne & Co* [1901] 20 NZLR 232 at 492.
92 Chinese Immigrants Act Amendment Act 1888, s 7.
93 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 33.
94 Chinese Immigrants Act Amendment Act 1888, s 2.

The traffic in these papers was considerable. An Internal Affairs memo of 18 March 1923 summed up the situation.[95]

> The Customs Department here has experienced … difficulty from time to time and there are in this Department a number of Chinese Naturalisation papers which have been confiscated … The motive is of course obvious, viz, to evade payment of the poll-tax.

The Customs Department attempted various methods to prevent evasion. As early as 1883, Customs officials were told to issue certificates of exemption only to Chinese who could prove they had been resident in New Zealand prior to the passing of the 1881 Act, and to deliver the certificate to the applicant only as they were leaving the country. This was to prevent them being used, "for purposes other than for which they are issued."[96]

In 1886, the Customs Department decided that Customs officials should retain possession of certificates of exemption from returning Chinese to prevent them being sent back to China to be used again by Chinese not entitled to them.[97] In 1887, a physical description of the holder was noted on certificates to aid identification.[98]

In 1900, Chinese returning from overseas were required to deposit the amount of the poll-tax until they could be identified as the legitimate certificate-holder, with proof of original payment of the tax.[99] In 1903, the requirement of proof of original payment was dropped entirely due to significant difficulties and delays.[100]

The traffic in naturalisation certificates required a different solution, as demanding proof of identity from someone who had taken the trouble to become a naturalised citizen of New Zealand was somewhat impolitic. Following a recommendation by the Minister of Internal Affairs, the government simply ceased granting letters of naturalisation to Chinese in 1908.[101]

E. Passenger Restrictions

Apart from the obligation to pay a poll-tax, the master of the ship also had to observe a passenger restriction of one Chinese passenger to every ten tons of cargo. The penalty for failing to observe this restriction was a fine of £10 for each additional Chinese passenger carried by the ship.[102]

In 1888, the number of Chinese passengers that a ship was permitted to carry was reduced to one passenger for every 100 tons of cargo, and the penalty for breach increased from £10 to £100 for each passenger carried in excess.[103] In 1896, the number of passengers was further reduced to one for every 200 tons of cargo.[104] Thereafter, there were no further amendments to this restriction.

95 Archives New Zealand "Chinese – General question of naturalisation" (18 March 1923) IA1/1 116/7.
96 Customs Department memo 5 June and 23 July 1883.
97 Customs Department memo 21 July 1887.
98 Customs Department memo 20 October 1887.
99 Customs Department memo 15 May 1900.
100 Customs Department memo 6 October 1903.
101 Nigel Murphy *The Poll-tax in New Zealand: A research paper* (Office of Ethnic Affairs, Wellington, 2002) at 33.
102 Chinese Immigrants Act 1881, s 3.
103 Chinese Immigrants Act Amendment Act 1888, s 4.
104 Chinese Immigrants Act Amendment Act 1896, s 4.

F. Reading Test

Section 42 of the Immigration Restriction Act 1908 provided for an additional restriction upon the Chinese in the form of a reading test of 100 English words:

> It shall not be lawful for any Chinese to land in New Zealand until it has been proved to the satisfaction of [a Customs officer] that such Chinese is able to read a printed passage of not less than one hundred words of the English language selected at the discretion of such [Customs officer].

As with the poll-tax itself, the English reading test was applied to Chinese only; no comparable measure was applied to any other group.

The statute did not provide any guidelines for the level of difficulty of the test, and it could vary based on the officer administering it. Customs officers could effectively lower the chances of a Chinese entering New Zealand by administering a more difficult test. Under s 42, any Chinese dissatisfied with the decision of the officer administering the test could appeal to a Magistrate, who would administer a further reading test. The Magistrate's decision was final. The Act was again silent as to how the Magistrate was to administer the test, and to the standard of reading required.

Any master of a ship who landed or permitted to land in New Zealand any Chinese who had not fulfilled the requirements of this section was liable to a fine of £50.[105] This placed an extraordinary duty upon the master of the ship, who had to ensure that his Chinese passengers, on top of being able to pay the tax, were also able to comprehend an English language passage of indiscriminate difficulty.

Section 42(1)(c) provided that any Chinese who failed the test would be liable for the same penalties and procedure as if he had failed to pay the poll-tax. Thus a Chinese who had arrived in New Zealand having paid his poll-tax could still be denied entry and penalised for failing an English test set at an arbitrary standard, placing an additional risk on them. This would have further limited numbers of Chinese thinking of emigrating to New Zealand.

V. The Aftermath of the Poll-Tax: Government Apology and Compensation

After the repeal of the poll-tax in 1944, no attempt was made by Chinese New Zealanders or anyone else, to persuade the government to apologise for its past actions or compensate those affected by the tax. By the 1990s, few New Zealanders, other than those who had paid the tax or their descendants, even knew of the poll-tax's existence. The government's discriminatory actions towards the Chinese were buried and forgotten.

In 1991, the Wellington branch of the New Zealand Chinese Association discussed the possibility of seeking an apology from the government at its annual general meeting. Opinions were divided as to whether past hurts should be brought up, and whether Chinese would suffer backlash from white New Zealanders if an apology was delivered.[106] No conclusion was reached, but the Association approved further research into the poll-tax, resulting in the 1994 publication of a research paper on the poll-tax by Nigel Murphy.

105 Immigration Restriction Act 1908, s 42(1)(b).

106 David Fung "The Tragi-comedy of the NZ Chinese Poll-Tax Issue: Background to the NZ Government's Apology" (2000) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/David-Fung-explains-the-background.html>.

After this publication, the Association considered it unfavourable to press the matter further, as an influx of Asian migrants had spurred fresh hostility towards the Chinese:[107]

> Such accusations as the Chinese were flaunting their wealth, driving their BMW's hazardously, talking in their own language too loudly and sticking with their own, abusing the social welfare system, plundering our coastal marine resources, taking jobs from New Zealanders, introducing vices and triads and not making any contribution to the welfare and economy of this country, were made.

At subsequent New Zealand Chinese Association (NZCA) meetings, the Wellington Chinese Association continued to press the matter, and in 2001, the New Zealand Chinese Association made formal contact with George Hawkins, Minister of Ethnic Affairs, regarding the possibility of an apology for the poll-tax. The Minister asked the Association to make a submission before Christmas 2001, in anticipation that Prime Minister Helen Clark would provide a response in early 2002. However, for unknown reasons, the nature and substance of the Prime Minister's announcement was not revealed to the public or other Chinese organisations in New Zealand. Secretive communications occurred between George Hawkins, the NZCA executives, and various local branches of the New Zealand Chinese Association.[108]

In its submission, the New Zealand Chinese Association recommended public acknowledgement by the New Zealand government that the establishment of the poll-tax against the Chinese had been wrong and discriminatory. The Association also recommended that the government provide funds and resources for New Zealand Chinese generally, in aim of restoring and maintaining any lost heritage, culture, and language. The Association suggested that such funds and resources be granted to a foundation or trust controlled or significantly influenced by their organisation. Importantly, it was made clear that the Association did not wish to seek individual compensation for those who had paid the poll-tax, aiming to benefit not only New Zealand Chinese, but the New Zealand community as a whole.[109]

Word of the Association's submission spread, and other New Zealand Chinese organisations expressed discontent. They protested the appointment of the New Zealand Chinese Association as sole representative of all poll-tax descendants, as numerous descendants were not members of the Association. The dissenting organisations sent a letter to the Prime Minister to express their view that the Association's submission was inappropriate.[110] Eventually, a compromise was reached: the Prime Minister would announce the government's apology for the poll-tax and other injustices dealt to the Chinese in the past generally, and the government would continue to hold dialogue with the poll-tax payers' descendants specifically, for the process of reconciliation.

On 12 February 2002 Clark, made a formal apology on behalf of the government to the Chinese

107 David Fung "The Tragi-comedy of the NZ Chinese Poll-Tax Issue: Background to the NZ Government's Apology" (2000) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/David-Fung-explains-the-background.html>.

108 David Fung "The Tragi-comedy of the NZ Chinese Poll-Tax Issue: Background to the NZ Government's Apology" (2000) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/David-Fung-explains-the-background.html>.

109 New Zealand Chinese Association "Submission to the New Zealand government regarding a formal apology to the Chinese community" (12 December 2001) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/12-December-2001-NZCA-Submission.html>.

110 David Fung "The Tragi-comedy of the NZ Chinese Poll-Tax Issue: Background to the NZ Government's Apology" (2000) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/David-Fung-explains-the-background.html>.

people who paid the poll-tax and suffered other discrimination imposed by statute.[111] The date for the apology was considered particularly auspicious, as it was the beginning of the Chinese New Year and thus signified new beginnings in the relationship between New Zealand and its Chinese residents. The apology acknowledged hardships imposed by the tax, and the consequences it had on Chinese families separated due to the high cost of bringing other family members to New Zealand. Clark expressed "sorrow and regret" for the imposition of the poll-tax, recognising such actions as unacceptable today.

This apology marked the formal beginning to a process of reconciliation. Clark spoke of meeting with representatives of the Chinese community to discuss next steps toward reconciliation with the Chinese community.[112] However, there was no mention of individual compensation. Prior to the apology being approved by the Cabinet Policy Committee, the Crown Law Office had advised that no legal liability would arise as a result of the apology under the principle of Parliamentary supremacy, likely prompting this omission.[113]

Despite their earlier objections, the apology was well-received among the leaders of the various other Chinese associations in New Zealand:[114]

> I applaud the Prime Minister's announcement tonight. This signals a start to righting the wrongs of the past. We will see the beginning of a greater understanding to ensure that such injustices do not occur again. It is significant, Prime Minister that you should choose to make such an important and historic announcement on this day.

In May 2002, the Office of Ethnic Affairs invited community groups to nominate persons to represent them in subsequent stages of discussion with the Department of the Prime Minister and Cabinet on reconciliation proposals. To be considered for a place in the advisory team, nominees had to fit several criteria. For example, they had to be a poll-tax payer or direct descendant of a poll-tax payer, with sufficient credibility and respect in their community. Ultimately, 42 nominations were made and 31 people were selected to form the Poll-tax Advisory Team.[115]

The next step was to invite public submissions on a form of reconciliation that was appropriate to and of benefit to the Chinese community. When submissions closed on 5 January 2003, 420 written submissions were received, in addition to suggestions made at community meetings in May 2002. Suggestions ranged from individual compensation to more general Chinese cultural initiatives.[116] There were also suggestions that the apology be repeated and affirmed in Parliament, and the rights

111 Helen Clark "Formal Apology to Chinese Community" (12 February 2002) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/Helen-Clark.html>.

112 Helen Clark "Formal Apology to Chinese Community" (12 February 2002) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/Helen-Clark.html>.

113 Cabinet Policy Committee "Early Chinese Settlers" (6 November 2001) POL (01) 323 at 1. See <https://web.archive.org/web/20040711042931/http://www.ethnicaffairs.govt.nz/oeawebsite.nsf/Files/proposal/$file/proposal.pdf>.

114 Allen Chang "Response to Formal Apology" (12 February 2002) Chinese in New Zealand <https://ndhadeliver.natlib.govt.nz/webarchive/20071026200000/http://www.stevenyoung.co.nz/The-Chinese-in-New-Zealand/Poll-Tax/Allen-Chang.html>.

115 Office of Ethnic Affairs "Advisory Team Appointments" <https://web.archive.org/web/20040828041835/http://www.ethnicaffairs.govt.nz/oeawebsite.nsf/wpg_URL/What-We-Do-Consultations-Advisory-team-appointments?OpenDocument>.

116 Office of Ethnic Affairs "List of most requested suggestions" <https://web.archive.org/web/20040829222902/http://www.ethnicaffairs.govt.nz/oeawebsite.NSF/wpg_URL/What-We-Do-Consultations-Analysis-Number-Occurrences?OpenDocument>.

of Chinese guaranteed constitutionally. Most suggestions were in fact made by descendants of poll-tax payers, but did not mention individual compensation as an appropriate remedy.[117]

After submissions were received, the Poll-tax Advisory Team, working together with the Office of Ethnic Affairs and the Department of Prime Minister and Cabinet, developed a reconciliation package based on those consultation results. They resolved that government funding of $5 million would be used to establish a community trust, and other initiatives designed to acknowledge the history and experience of the early-settler Chinese New Zealander community would also be implemented. For example, the Ministry of Education would provide historical resources on Chinese New Zealanders to schools, the Department of Conservation would preserve heritage sites relating to early Chinese settlement in New Zealand, and the New Zealand Immigration Service would facilitate access to immigration-related records held by Archives New Zealand for family history purposes.[118]

The community trust would be administered by the Department of Internal Affairs and would provide support for maintaining the language, culture and heritage of Chinese New Zealanders. The aims of the trust were to strengthen the unique identity of Chinese New Zealander communities and provide an independent focal point for community endeavours. Trustees would be appointed by the Minister for Ethnic Affairs, on the advice of the Department of the Prime Minister and Cabinet and the Office of Ethnic Affairs. Thereafter, the Minister would appoint trustees within a timeframe determined by the trust deed.[119]

On 24 August 2004, Chris Carter, Ethnic Affairs Minister, announced the appointment of eight trustees to the newly formed Chinese Poll-tax Heritage Trust.[120] They were selected from the Poll-tax Advisory team, and would apply trust funds from the $5 million government grant to projects involving the study and preservation of Chinese New Zealander history, culture and language. In a speech acknowledging the government's actions, the Poll-tax Advisory Team reiterated that the community trust and other government initiatives were not in repayment of the poll-tax collected, nor were they in settlement of a historic claim. Rather, the package was intended to acknowledge Chinese New Zealander history, in particular the "legislative discrimination" imposed by the poll-tax.[121]

Approximately £308,080 (present value ~$25−30 million) was paid by Chinese immigrants during the time the tax was enforced.[122] The trust settlement of $5 million and the estimated cost of $420,000 for the other government initiatives is barely a quarter of the current value of the tax collected. Furthermore, only $250,000 per year generated by trust property was available to be spent: the actual $5 million grant was unavailable. The reconciliation package was never intended to, nor did it actually, compensate for the poll-tax collected, inviting the question of whether it was inadequate redress, and failed to address personal costs to Chinese affected by the tax.

117 Office of Ethnic Affairs "Analysis Summary" <https://web.archive.org/web/20050423221110/http://www.ethnicaffairs.govt.nz/oeawebsite.NSF/wpg_URL/What-We-Do-Consultations-Analysis-Summary?OpenDocument>.

118 Office of Ethnic Affairs "Chinese Heritage Initiatives" (11 February 2004) <https://web.archive.org/web/20100307172110/http://www.beehive.govt.nz/Documents/Files/Chinese Heritage media kit.doc>.

119 Office of Ethnic Affairs "Chinese Heritage Initiatives" (11 February 2004) <https://web.archive.org/web/20100307172110/http://www.beehive.govt.nz/Documents/Files/Chinese Heritage media kit.doc> at 6.

120 Chris Carter "Chinese Poll-Tax Heritage Trustees announced" (25 August 2004) Beehive.govt.nz <https://www.beehive.govt.nz>.

121 Office of Ethnic Affairs "Chinese Heritage Initiatives" (11 February 2004) <https://web.archive.org/web/20100307172110/http://www.beehive.govt.nz/Documents/Files/Chinese Heritage media kit.doc> at 4.

122 Office of Ethnic Affairs "Chinese Heritage Initiatives" (11 February 2004) https://web.archive.org/web/20100307172110/http://www.beehive.govt.nz/Documents/Files/Chinese Heritage media kit.doc at 13.

The importance of individual compensation has been emphasised by Kenda Gee, President of the Head Tax and Exclusion Act Redress Committee in Canada, which seeks to obtain redress for the Chinese who were obliged to pay a $500 head tax on arrival in Canada. In his response to the formal apology made by New Zealand in 2002, he argued that redress should focus on the individuals who were harmed, and individual monetary compensation should take place as the government had been unjustly enriched through collection of the poll-tax. He questioned the idea of a formal apology without monetary settlement, asking how the New Zealand government planned to defend against future arbitrary claims, if it had acknowledged guilt.[123] This attitude towards insisting on individual compensation stands in contrast to New Zealand organisations, who seem largely satisfied without.

In 2000, the Chinese Canadian National Council announced that three Chinese Canadians, representing the families of those who had to pay a poll-tax, had filed a claim in the Ontario Court, seeking compensation from the Canadian government.[124] The plaintiffs alleged breaches of the Canadian Charter of Rights and Freedoms, international human rights law, and the doctrine of unjust enrichment. The case, *Mack v The Attorney General of Canada*[125] was heard in the Ontario Superior Court in 2001. Cumming J held that the Canadian Charter could not be retrospectively applied to cases of the head tax being levied. He then noted that human rights law did not prescribe a positive legal duty to provide redress for historical wrongs. Finally, he held that the government had not been unjustly enriched from the head tax levied on the Canadian Chinese, as the Chinese Immigration Acts which had provided for the tax constituted juristic reason for enrichment. The plaintiffs were unsuccessful in their claim for compensation. On appeal, the Ontario Court of Appeal upheld the decision of Cumming J for reasons identical to those provided in his judgment.[126] The plaintiffs then sought further leave to appeal this decision and were denied in the Supreme Court in 2003.[127]

In June 2006, word spread of an upcoming apology from the government of Prime Minister Stephen Harper, and on 22 June 2006, Harper delivered a formal apology to Chinese Canadians for the poll-tax. He acknowledged the existing hardships experienced by early Chinese Canadians, which were only exacerbated by the imposition of the poll-tax, and recognised that the Canadian government's failure to address this historical injustice earlier led many Chinese Canadians away from "seeing themselves as fully Canadian".[128] Alongside this apology, the government offered individual compensation payments of $20,000 to living poll-tax payers and living spouses of deceased payers, a $24 million fund for community projects related to immigration restrictions, and a $10 million national historical recognition program.[129]

In comparison with Helen Clark's apology, Harper's was worded far more strongly, perhaps

123 Kenda Gee "The Canadian case for compensation" (22 February 2002) Siyi Genealogy <https://web.archive.org/web/20210509185744/http://www.legacy1.net/ht_comp_yes.html>.

124 Chinese Canadian National Council "The Redress Campaign" Chinese Head Tax and Exclusion Act <https://web.archive.org/web/20160327005822/http://ccnc.ca/redress>.

125 *Mack v The Attorney General of Canada* (2001) 55 OR (3d) 113.

126 *Mack v The Attorney General of Canada* (2002) 60 OR (3d) 737.

127 *Mack v The Attorney General of Canada* [2003] 1 SCR xiii.

128 Stephen Harper "Address by the Prime Minister on Chinese Head Tax Redress" (22 June 2006) Road to Justice <http://www.roadtojustice.ca/wp-content/uploads/2011/02/Address-by-the-Prime-Minister-on-the-Chinese-Head-Tax-Redress.pdf>.

129 Government of Canada "Prime Minister Harper Offers Full Apology for the Chinese Head Tax" (22 June 2006) <https://www.canada.ca/en/news/archive/2006/06/prime-minister-harper-offers-full-apology-chinese-head-tax.html>.

equally reflected in the Canadian government's offering of far greater sums of general compensation in addition to individual payments. Despite initial setbacks in court, the Canadian Chinese movement's persistent action and insistence on individual compensation ultimately brought forth greater redress for their community than what Chinese New Zealanders have received from the New Zealand government.

VI. Conclusion

The New Zealand government only ever levied the poll-tax against the Chinese. It was plainly a discriminatory, anti-Chinese immigration measure, in line with societal and governmental attitudes that the Chinese should be excluded as much as possible. The tax was increased from £10 to £100 when it was perceived that there were still too many Chinese in New Zealand. Other obligations such as the reading test were added as further preventative measures.

This article aims to provide an initial contribution to the legal history of the poll-tax. This has been accomplished by means of an analysis of the Chinese Immigrants Act 1881 and subsequent legislation. An account of the formal apology and subsequent actions taken by the government to effect reconciliation with the Chinese community is also detailed.

The New Zealand government has decided to provide reconciliatory measures designed to benefit the Chinese community as a whole. One may argue that these measures align with traditional Chinese values and are satisfactory, but the question remains of whether individual compensation would have been suitable as an additional form of direct redress, as was offered to the Chinese Canadians. Nonetheless, the New Zealand government's actions have been consistent with Chinese New Zealander organisations' requests for collective redress and generally holistic approach towards reconciliation. In that respect, Chinese New Zealanders have achieved a satisfactory conclusion to the poll-tax saga.

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Poking the Bear: A Critical Analysis of the Legality of New Zealand's Sanctions in the Russia-Ukraine War

Te Wero i te Taniwha: He Tātaritanga Kaikini o te Tikanga ā-Ture o ngā Aukati Ōhanga o Aotearoa i te Pakanga o Rūhia-Ūkaraina

Laura Swears*

Russia's invasion of Ukraine in February 2022 created a threat to international peace and security on a scale not seen since the close of the Cold War. With states unwilling to physically intervene in the conflict, lest they prompt further Russian escalation, alternative approaches have been utilised in attempts to quell Russia's aggression. Most notable of these approaches has been the widespread suites of sanctions imposed against Russia, which are of an unprecedented scale and are designed to restrict Russia's ability to continue their invasion. However, while sanctions are one of the few tools available in combatting Russia, their legality under customary international and World Trade Organisation law is questionable. This article analyses the sanctions New Zealand has imposed on Russia to assess their compatibility with customary international law and the potential for them to be found to be in breach of arts I and XI of the General Agreement on Tariffs and Trade (GATT). As it is likely that breaches of GATT are present, this article also considers the potential justifications for New Zealand's sanctions under the essential security interest exception of art XXI(b)(iii) or the public morals exception of art XX(a) of GATT.

I. Introduction

When the Russian Federation (Russia) invaded Ukraine on 24 February 2022, several States were quick to impose a suite of sanctions to condemn Russia's actions.[1] These were initially implemented within days of the invasion; making Russia the most sanctioned State in the world.[2] States have subsequently extended and modified their sanctions, endeavouring to generate pressure on elements of the Russian economy that directly support Russia's war effort.[3] While most sanctioning States have explained that their sanctions are calculated to, firstly protect themselves, and secondly, demonstrate their support for Ukraine, the measures taken are potentially inconsistent

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1 "Russian forces launch full-scale invasion of Ukraine" *Al Jazeera* (online ed, Doha, 24 February 2022).

2 Note: many States extended existing sanctions which were first imposed in 2014; Nick Wadhams "Russia Is Now the World's Most-Sanctioned Nation" *Bloomberg* (online ed, New York, 8 March 2022); and Claire Mills *Sanctions Against Russia* (UK House of Commons, Briefing Paper, July 2023).

3 See for example: "Timeline – EU sanctions against Russia" (3 July 2026) Council of the European Union <www.consilium.europa.eu>; Council of the European Union "Russia's war of aggression against Ukraine: Council extends economic sanctions for another year" (press release, 25 June 2026); and Rt Hon Winston Peters "NZ announces sanctions on malicious Russian cyber actors, online platforms" (press release, 7 May 2026).

with World Trade Organisation (WTO) law.[4] This article broadly assesses whether the sanctions imposed against Russia are inconsistent with arts I and XI of the General Agreement on Tariffs and Trade (GATT) and, if so, whether that inconsistency is justified under the security exception of art XXI(b)(iii), and / or the public morals exception of art XX(a).[5] Particular focus is given to the legality and justification of New Zealand's sanctions, as its response to Russia's invasion was the first instance of New Zealand imposing unilateral sanctions,[6] which places the country in unfamiliar legal territory. While this article concludes that it is highly likely that New Zealand, and other States, will be able to justify its sanctions, it specifically considers some of the legal complexities that may arise.

II. Contextual Background

Russia's invasion of Ukraine in February 2022 was a dramatic escalation from decades of Russian aggression towards Ukraine. Since Ukraine declared its independence from Russia in 1991, Russia has pursued the return of Ukrainian territories to Russian control.[7] Notably, Russia's annexation of Crimea in 2014 created a potential threat to international peace and security, the likes of which had not been seen in Europe since the close of the Cold War.[8] The initial annexation of Crimea strengthened Russia's control of the Black Sea; therefore, a successful invasion of Ukraine would allow Russia to benefit from Ukraine's economic and trade position.[9] Since the Crimean annexation, Ukraine has strongly resisted Russian aggression but the sheer scale of Russian forces made it impossible for Ukraine to prevent the full-scale invasion in 2022,[10] which has developed into a war of attrition of a scale unseen in Europe for decades.[11]

Four years on from Russia's 2022 invasion, the combined Russian and Ukrainian casualties exceed 2 million, with hundreds-of-thousands of military personnel and tens-of-thousands of

4 See for example: *Joint Statement on Government Procurement Implications Resulting From The Aggression by The Russian Federation Against Ukraine, Communication From Albania; Australia; Canada; European Union; Iceland; Japan; Republic Of Korea; Republic Of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom And United States*, WT/GC/244 (15 March 2022).

5 General Agreement on Tariffs and Trade 1994 [GATT], arts XXI(b)(iii) and XX(a). Note: recent commentary suggests a further justification may be available under art XXI(b)(ii). This article does not address the application of art XXI(b)(ii), but acknowledges that multiple avenues of justification under GATT may be utilised to address States' imposition of sanctions.

6 New Zealand Government "NZ allows for significant expansion of sanctions on Russia" (press release, 7 March 2022).

7 Taras Kuzio "Why Russia Invaded Ukraine" (2022) 21 Journal of International Relations and Sustainable Development 40; and Vladimir Putin "On the Historical Unity of Russians and Ukrainians" (12 July 2021) The Kremlin <en.kremlin.ru>.

8 *Aggression against Ukraine* GA Res ES-11/1, A/Res/ES-11/1 (2022) at 2; Eugene Rumer *Russia and the Security of Europe* (Carnegie Endowment for International Peace, June 2016) at 3; and *Resolution on the Territorial Integrity of Ukraine* GA Res 68/262 (2014).

9 Jonathan Master "Ukraine: Conflict at the Crossroads of Europe and Russia" (14 February 2023) Council on Foreign Relations <www.cfr.org>; and Wojciech Konończuk "Russia's Real Aims in Crimea" (13 March 2014) Carnegie Endowment for International Peace <carnegieendowment.org>.

10 Bryan Frederick, Mark Cozad, and Alexandra Stark *Understanding the Risk of Escalation in the War in Ukraine* (RAND Corporation, Research Brief, July 2023) at 4 and 10.

11 Seth Jones and others "Ukrainian Innovation in a War of Attrition" (27 February 2023) Centre for Strategic and International Studies <www.csis.org>; and Seth Jones and Riley McCabe "Russia's Grinding War in Ukraine" (27 January 2026) Centre for Strategic and International Studies <www.csis.org>.

civilians having been killed or wounded.[12] Over 9.4 million Ukrainians have been displaced by the conflict,[13] creating a severe humanitarian crisis.[14] In addition to the human cost, Ukraine's rebuild from the war is expected to take many years and cost over US$588 billion.[15] The longer the war lasts, the higher the cost will be. Consequently, the international pressure exerted against Russia's war effort may be regarded as an important mechanism in attempting to reduce the potential for further destruction.

A. Global Response

Within days of their invasion of Ukraine, Russia became the most sanctioned State in the world,[16] with more than 45 States, representing over fifty percent of the global economy, imposing a variety of targeted sanctions in an "unprecedented act of global sanctions coordination".[17] Since 2022, sanctions against Russia have been renewed, extended and refined.[18] All sanctions have been calculated to inflict significant harm on the Russian government and military, while avoiding the creation of a serious humanitarian crisis for Russian civilians.[19] While specific sanctions differ between States, two broad classes of sanctions have been implemented: individual and trade.[20] This article only considers the sanctions affecting trade in goods.

1. Sanctions

Two elements of the sanctions imposed against Russia require particular attention: the revocation of Russia's Most-Favoured-Nation (MFN) status and the restriction on exports to and imports from Russia.

12 Bojan Pancevski "One Million Are Now Dead or Injured in the Russia-Ukraine War" *Wall Street Journal* (online ed, 17 September 2024); and OHCHR *Protection of Civilians in Armed Conflict − August 2024* (Office of the United Nations High Commissioner for Human Rights, report, September 2024); and Seth Jones and Riley McCabe "Russian Blood and Treasure: The Ballooning Costs of Putin's War" (1 July 2026) Centre for Strategic and International Studies <www.csis.org>.

13 UNHCR "Ukraine Emergency" (2024) <www.unrefugees.org>.

14 *Resolution on the Humanitarian consequences of the aggression against Ukraine* GA Res ES-11/2, A/Res/ES-11/2 (2022); and see OHCHR *Ukraine: Protection of Civilians in Armed Conflict – May 2026 Update* (Office of the United Nations High Commissioner for Human Rights, report, June 2026); and "Civilian Harm and rights Violations Intensify in Ukraine Four Years After Invasion, UN Human Rights Monitor Says" (press release, 16 February 2026).

15 World Bank "Updated Ukraine Recovery and Reconstruction Needs Assessment Released" (press release, 23 February 2026); and see Philip Luck "How Sanctions Have Reshaped Russia's Future" (24 February 2025) Centre for Strategic and International Studies <www.csis.org>.

16 Max Bergmann, Ilke Toygür, and Otto Svendsen "A Continent Forged in Crisis: Assessing Europe One Year into the War" (16 February 2023) Centre for Strategic and International Studies <www.csis.org>.

17 Claire Mills *Sanctions Against Russia* (UK House of Commons, Briefing Paper, July 2023) at 30; and The White House "Background Press Call by a Senior Administration Official on Imposing Additional Severe Costs on Russia" (press release, 27 February 2022).

18 See "Timeline – EU sanctions against Russia" (3 July 2026) Council of the European Union <www.consilium.europa.eu>; Council of the European Union "Russia's war of aggression against Ukraine: Council extends economic sanctions for another year" (press release, 25 June 2026); and Rt Hon Winston Peters "NZ announces sanctions on malicious Russian cyber actors, online platforms" (press release, 7 May 2026).

19 See for example: *Humanitarian Assistance and Food Security Fact Sheet: Understanding UK and U.S. Sanctions and their Interconnection with Russia* (HM Treasury and US Department of the Treasury, Fact Sheet, 28 June 2023); and European Council "EU sanctions against Russia explained" (12 October 2023) <www.consilium.europa.eu>; and "Report of the Statutory Review of the Russia Sanctions Act 2022" (Ministry of Foreign Affairs and Trade, June 2025) at 7.

20 European Commission "Sanctions against individuals, companies and organisations" (2022) <commission.europa.eu>.

(a) Most-Favoured-Nation revocation and tariffs

On 2 March 2022, Canada became the first State to announce its revocation of Russia's MFN-status and the subsequent imposition of a 35 per cent tariff on all imports from Russia and Belarus.[21] By 15 March, sanctioning States had announced or enacted their revocation of Russia's MFN-status, which would "revoke important benefits that Russia enjoys as a WTO member."[22] Most States subsequently imposed tariffs of 35 per cent on Russian imports, with the United States imposing tariffs of up to 70 per cent.[23] As the WTO generally requires tariffs to be minimal or non-existent,[24] a 35 per cent tariff can be interpreted as an extremely coercive measure,[25] intended to inflict significant pressure on the affected exporters.

Art I of GATT

In a WTO law context, the revocation of Russia's MFN-status is very significant. The MFN principle sits hand-in-hand with a core purpose of the WTO,[26] which is "the elimination of discriminatory treatment in international commerce".[27] Arising from the global aversion to the repetition of the events of the World Wars,[28] the WTO is significantly guided by this principle which,[29] when summarised, requires that "like products should be treated equally, irrespective of their origin …".[30] The principle is clearly manifested in art I of GATT, which states that:[31]

> … any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

Appearing at the beginning of GATT, art I is evidently of paramount importance in WTO law and,[32] while there are specific exceptions to the obligations of art I,[33] these should not be construed as

21 Department of Finance Canada "Canada cuts Russia and Belarus from Most-Favoured-Nation Tariff treatment" (press release, 3 March 2022).

22 David Collins "Exception and Revocation of Russia's Most Favoured Nation Status following the Invasion of Ukraine" (15 March 2022) City Law Forum <blogs.city.ac.uk/citylawforum/>; G7 "Statement by President von der Leyen on the fourth package of restrictive measures against Russia" (statement, 11 March 2022); and New Zealand Government "New Zealand to apply trade sanctions in response to Russian atrocities" (press release, 6 April 2022).

23 See Claire Mills *Sanctions Against Russia* (UK House of Commons, Briefing Paper, July 2023)Mills, above n 2, at 11–22 and 30–56; US Department of State "The United States Imposes Additional Sweeping Costs on Russia" (press release, 24 February 2023). Note: Russia was exempted from the 2025 "Liberation Day" tariffs imposed by the United States, given these existing tariffs and the lack of trade with Russia. See Barath Harithas and others "'Liberation Day' Tariffs Explained" (3 April 2025). Centre for Strategic and International Studies <www.csis.org>. At the time of writing, suggestions that a further, more severe tranche of sanctions would be imposed against Russia and its allies were not yet confirmed; see Erik Wasson and Jeff Mason "Senators Say They Have Deal With Trump on Russia Sanctions Bill" *Financial Post* (online ed, 10 July 2026).

24 *Doha Declarations* WT/MIN(01)/DEC/1, 14 November 2001 (Ministerial Declaration) at 7–8; and General Agreement on Tariffs and Trade 1994, art XXVIII *bis*: 2(a).

25 Tom Farer "Political and Economic Coercion in Contemporary International Law" (1985) 79 AJIL 405 at 406–407.

26 Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 307–310.

27 General Agreement on Tariffs and Trade 1994, Preamble.

28 Simon Lester, Bryan Mercurio, and Arwel Davies *World Trade Law: Text, Materials and Commentary* (2nd ed, Hart, Oxford, 2012) at 310.

29 World Trade Organization "What we stand for" <www.wto.org>.

30 *EC − Bananas III* WT/DS27/AB/R, 9 September 1997 (Report of the Appellate Body) at 190–191.

31 General Agreement on Tariffs and Trade 1994, art I:1.

32 Tons Noterman "Are EU Trade Sanctions on Russia WTO Compatible?" (paper presented to Conference on Current Issues of Theory and Practice in Law, Education, Social and Behavioral Sciences, Chernihiv, June 2022) at 3.

33 See for example the General Agreement on Trade in Services 1994, Annex on art II Exemptions.

an indication that the WTO considers that members should be permitted to deviate from the MFN principle. Since the MFN obligation was designed to ensure consistency in the implementation of tariffs and concessions, which ensures the fair and free flow of international trade,[34] it follows that exceptions to the obligation should only be invoked in exceptional circumstances.

Legal ramifications of revocation

The coordinated removal of Russia's MFN-status by the sanctioning States is the first occasion where such a large-scale revocation has been declared.[35] Russia has been entitled to MFN-treatment since its accession to the WTO in 2012, and remains entitled to it unless the revocation of the MFN-status can be justified.[36] The States applying the revocations are cognisant of this issue and have indicated their intention to justify the revocations under the security exception provided in art XXI(b)(iii) of GATT, declaring in a joint statement to the WTO General Council that:[37]

> We will take any actions, as WTO Members, that we each consider necessary to protect our essential security interests. These may include actions in support of Ukraine, or actions to suspend concessions or other obligations with respect to the Russian Federation, such as the suspension of most-favoured-nation treatment to products and services of the Russian Federation.

As it is uncommon for States to revoke their obligation to recognise another member State's MFN-status en masse, it is uncertain whether each of the States will be able to justify their revocation, given the lack of specific precedent available.[38] Russia has indicated its intention to pursue litigation against the States involved in the revocation;[39] therefore, sanctioning States will be required to explain why they deemed that Russia's actions were significant enough to justify the suspension of a fundamental GATT obligation.

(b) Restriction on imports and exports

In addition to the revocation of Russia's MFN-status, sanctioning States have imposed restrictions on the import from and export to Russia of various goods. A commonly imposed series of restrictions are bans on the export to Russia of any defence and aerospace-related goods or dual-purpose goods,[40] along with luxury goods, some types of machinery, and materials used in oil refinery or manufacturing.[41] The export restrictions are relatively minor and are targeted at stemming the flow

34 Simon Lester, Bryan Mercurio, and Arwel Davies *World Trade Law: Text, Materials and Commentary* (2nd ed, Hart, Oxford, 2012) at 261–267.

35 Global Future Council on Trade and Investment *Conflict, Sanctions and the Future of World Trade* (World Economic Forum, White Paper, May 2022) at 3.

36 Julinda Beqiraj and Munhee Jung "Economic Sanctions Against Russia and their Compatibility with WTO Law" (6 April 2022) British Institute of International and Comparative Law <www.biicl.org>.

37 *Joint Statement on Government Procurement Implications Resulting From The Aggression by The Russian Federation Against Ukraine, Communication From Albania; Australia; Canada; European Union; Iceland; Japan; Republic Of Korea; Republic Of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom And United States*, WT/GC/244 (15 March 2022).

38 While litigation under art I is common, each case is fact specific and, given that the coordinated revocation is unprecedented, it is difficult to predict how a Panel will approach the present situation.

39 *Communication from the Russian Federation,* WT/GC/245, 16 March 2022; and UK Law Societies' Joint Brussels Office "Russia threatens to challenge trade sanctions at the WTO and is preparing retaliatory restrictions of its own" (7 April 2022).

40 For an in-depth discussion of sanctions on dual-purpose goods, see Alexandr Svetlicinii and Xueji Su "The Unsettled Governance of the Dual-Use Items under art XXI(b)(ii) GATT: A New Battleground for WTO Security Exceptions" (2025) 24 World Trade Review 75.

41 Claire Mills *Sanctions Against Russia* (UK House of Commons, Briefing Paper, July 2023) at 30–56.

of war-related supplies, and goods that would be primarily sought by high-ranking individuals who are integral to supporting Russia's war effort. More recently, States have also imposed sanctions specifically targeting Russia's "shadow fleet" and cybercrime.[42] No export restrictions have been placed on food or essential goods, as it would be counterproductive to bring an end to the Ukrainian humanitarian crisis by creating a commensurate crisis in Russia.

In addition to the non-MFN tariffs imposed on Russia, sanctioning States have imposed import restrictions, the nature of which largely depends on the existing trade relationships of individual States with Russia. For example, while New Zealand and Australia have banned the import of Russian oil, gas, and limited other goods, this is possible due to their reliance on other States for supply.[43] Conversely, due to their reliance on Russian energy, the United Kingdom and European Union (EU) took a cautious approach to banning imports of Russian energy products; employing price caps and phase-out approaches, which cannot be as effective as an outright ban.[44] The recent events in the Middle East required multiple States to reduce their restrictions on Russian oil imports to avoid an outright fuel shortage.[45] Thus, restrictions on imports from Russia differ in nature and efficacy between States.

Art XI of GATT

Regardless of efficacy, the import and export restrictions imposed on Russia are likely to be deemed to be inconsistent with art XI of GATT, which provides that:[46]

> No prohibitions or restrictions other than duties, taxes or other charges … shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The wording of this article is very broad and can be interpreted as encompassing any limitations or restrictions imposed on imports from or exports to other member States, including those restrictions currently imposed on Russia.[47] Sanctioning States have indicated that they are aware their actions are inconsistent with art XI (and art I), but have noted their intention to justify their measures under

42 Rt Hon Winston Peters "New Russia sanctions target enables of war, including Russia's 'shadow fleet'" (press release, 19 June 2025); and see *Humanitarian Assistance and Food Security Fact Sheet: Understanding UK and U.S. Sanctions and their Interconnection with Russia* (HM Treasury and US Department of the Treasury, Fact Sheet, 28 June 2023); and European Council "EU sanctions against Russia explained" (12 October 2023) <www.consilium.europa.eu>; and "Report of the Statutory Review of the Russia Sanctions Act 2022" (Ministry of Foreign Affairs and Trade, June 2025).

43 Australian Department of Foreign Affairs and Trade "Russia sanctions regime" (2022) <www.dfat.gov.au>; and New Zealand Foreign Affairs and Trade "Russia Sanctions" (2026) <www.mfat.govt.nz>.

44 Chris Cook and David Sheppard "Russia dodges G7 price cap sanctions on most of its oil exports" *Financial Times* (online ed, London, 25 September 2023); and Claire Mills *Sanctions Against Russia* (UK House of Commons, Briefing Paper, July 2023) at 25.

45 See for example: Faisal Islam and others "UK waters down new Russian oil sanctions as fuel prices rise" *BBC News* (online ed, 21 May 2026).

46 General Agreement on Tariffs and Trade 1994, art XI.

47 *India − Measures Affecting the Automotive Sector* WT/DS146,175/R, 21 December 2001 (Report of the Panel) at 7.245–7.253; Simon Lester, Bryan Mercurio, and Arwel Davies *World Trade Law: Text, Materials and Commentary* (2nd ed, Hart, Oxford, 2012) at 245–246; and Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 482–488.

GATT.[48] With Russia's repeated assertions of an intention to litigate and the sanctioning States' maintenance of an argument of justification, it is likely that intense international litigation will take place in the near future.[49]

B. Summary of Contextual Background

The situation in Ukraine remains volatile, with varying levels of optimism as to how long it will be before there is a peaceful resolution. As intervention by the sanctioning States to physically protect Ukraine would likely exacerbate and expand the present situation, the sanctioning States must turn their attention to how they intend to justify their extensive sanctions, lest the WTO requires them to withdraw their sanctions.[50] As Cold War blocs re-form, global politics rapidly destabilises,[51] and international peace and security deteriorates, the precedents arising from litigation regarding the sanctions against Russia have the potential to be very influential in the coming years.

III. Customary International Law

While the primary focus of this article is on the legality of New Zealand's sanctions under WTO law, it is important to note that, like all law, WTO law does not exist in a vacuum and cannot "be read in clinical isolation from public international law".[52] Therefore, where possible, the WTO's Dispute Settlement Body interprets GATT provisions within the context of broader rules of international law, to avoid impinging on a State's other international obligations.[53] Some of these rules are provided in the articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

A. Articles on Responsibility of States for Internationally Wrongful Acts

The International Law Commission's (ILC's) ARSIWA forms part of customary international law and sets out non-WTO provisions relating to the imposition of countermeasures.[54] Under art 22, States may take actions that would otherwise not be "in conformity with an international obligation

48 See sanctioning states' notifications, pursuant to the 2012 Decision On Notification Procedures For Quantitative Restrictions in Quantitative Restrictions Database "Notifications" <qr.wto.org>; and *Joint Statement on Government Procurement Implications Resulting From The Aggression by The Russian Federation Against Ukraine, Communication From Albania; Australia; Canada; European Union; Iceland; Japan; Republic Of Korea; Republic Of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom And United States*, WT/GC/244 (15 March 2022).

49 As at July 2026, litigation has not yet been pursued by Russia.

50 Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 285–291.

51 Peter van Bergeijk "Sanctions Against the Russian War on Ukraine: Lessons from History and Current Prospects" (2022) 56 J World Trade 571 at 586.

52 *United States − Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 20 May 1996 (Report of the Appellate Body), at 17; and note: although the preceding discussion broadly considered the responses of all sanctioning States to Russia's invasion of Ukraine, the following analyses centre on New Zealand's legal position under customary international law and WTO law.

53 Gabrielle Marceau "Conflicts of norms and conflicts of jurisdictions: Relationship between the WTO Agreement and MEAs and Other Treaties" (2001) 35 Journal of World Trade 1081 at 1129.

54 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* UN Doc A/56/10 (10 August 2001) [ARSIWA]; and Danae Azaria "Trade Countermeasures for Breaches of International Law Outside the WTO" (2022) 71 ICLQ 389 at 391.

towards another State", if there is compliance with the requirements of pt 3 of ARSIWA. These requirements include, for example, that countermeasures can only be taken by an injured State "in order to induce [a] State to comply with its obligations", where the State is "responsible for an internationally wrongful act".[55] Since Ukraine is the direct victim of Russia's "internationally wrongful act" of compromising Ukraine's territorial integrity,[56] they are entitled, under ARSIWA, to impose countermeasures against Russia. However, it is also likely that ARSIWA's provisions will extend to allow third parties, such as New Zealand, to justify their countermeasures under customary international law.

Unlike WTO law, art 54 of ARSIWA provides for measures to be taken by States, other than the injured State in question, provided certain requirements are met. Art 54 has repeatedly been applied in tandem with art 48 of ARSIWA to allow States, other than the injured State, to respond to breaches of international obligations.[57] Art 48(1)(a) provides that States, other than the injured State, may invoke the responsibility of another if "the obligation breached is owed to the international community as a whole". Art 54 allows:

> … any State, entitled under article 48 … to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Taken in combination, arts 48 and 54 have specifically been applied to justify the imposition of third-party countermeasures.[58] However, the legality of this application remains a source of contention as the ILC did not "purport to regulate the taking of countermeasures by States other than the injured State".[59] While the lack of regulation makes the theoretical interpretation of the provisions challenging, the ILC's approach allowed the provision to evolve *with* customary international law.[60] States took advantage of this approach and, through developing a consistent practice in applying third-party countermeasures, ensured that third-party countermeasures became "an important tool in a limited international law enforcement toolbox".[61] As Martin Dawidowicz noted, regardless of the controversy around their theoretical legality, "third-party countermeasures are today part of the reality of international law".[62]

While some States were initially concerned about the way in which the law around third-party

55 ARSIWA, art 49(1).

56 *Aggression against Ukraine* GA Res ES-11/1, A/Res/ES-11/1 (2022) at 3; and *Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine* GA Res ES-11/7, A/Res/ES-11/7 (2023) at 2.

57 James Crawford *State Responsibility: The General Part* (Cambridge University Press, Cambridge, 2013) at 48; and Kathryn Allinson "Can Russia be held responsible for their invasion of Ukraine?" (4 April 2022) University of Bristol <www.bristol.ac.uk>.

58 See examples in Martin Dawidowicz "Third-party countermeasures: A progressive development of international law?" (2016) 29 QILJ 3.

59 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] vol 2, pt 2 YILC at 129.

60 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] vol 2, pt 2 YILC at 139, [6]; and Martin Dawidowicz "Third-party countermeasures: Observations on a controversial concept" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) at 351.

61 Martin Dawidowicz "Third-party countermeasures: Observations on a controversial concept" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) at 361.

62 Martin Dawidowicz "Third-party countermeasures: Observations on a controversial concept" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) at 351.

countermeasures developed, as the lack of formal regulation could lead to abuse, the approach to third-party countermeasures has predominantly been notably restrained. This restraint owes largely to the widely accepted proposal by the Institut de Droit International that third-party countermeasures can *only* be taken to counter a breach of international obligations "if there is widespread acknowledgment within the international community of the existence of a breach".[63] The proposal has led to the practice of States deferring to the resolutions of international bodies, such as the United Nations (UN), which condemn another State's breach of international obligations, *before* imposing countermeasures.[64] Thus, States have developed a reasoned approach to imposing third-party countermeasures, despite the lack of regulation.

Applying the normalised practices to the present circumstances, it appears that, under ARSIWA, there is strong justification for New Zealand's sanctions.[65] Firstly, Russia has breached its international obligations "owed to the international community as a whole" through its breach of art 2(4) of the UN Charter,[66] thereby allowing New Zealand to rely on art 48. Secondly, New Zealand has consistently signalled that its countermeasures are designed to respond to this breach and to urge Russia to withdraw from Ukraine, which indicates that New Zealand's countermeasures are designed to "ensure cessation of the breach."[67] Therefore, New Zealand can also rely on art 54. Finally, since New Zealand took no action until there was "widespread acknowledgement" of Russia's breach of its international obligations,[68] it has fulfilled the final, practiced requirement to successfully rely on ARSIWA in justifying its measures under customary international law.

B. ARSIWA and GATT

While sanctions may be justifiable under ARSIWA, the relationship between customary international law and international trade law means they are not necessarily justifiable under GATT. For example, art 55 of ARSIWA states that:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Much discussion has centred on whether GATT can occupy the position of *lex specialis* in relation to trade countermeasures; thereby displacing the authority of ARSIWA.[69] While the answer to this

63 Giogio Gaja *First Report on Obligations and Rights* Erga Omnes *in International Law* (Annuaire de l'institut de droit international, August 2005) at 148; and see also, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] vol 2, pt 2 YILC at 113.

64 Martin Dawidowicz "Third-party countermeasures: A progressive development of international law?" (2016) 29 QILJ 3.

65 Note: States are reluctant to explicitly rely on ARSIWA but will usually seek to comply with the practiced approaches; and Martin Dawidowicz "Third-party countermeasures: Observations on a controversial concept" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) at 350–352.

66 Stephan Hobe "Is Article 2(4) of the United Nations Charter Still Alive?" in Philipp Donath and others (eds) *Der Schutz des Individuums durch das Recht* (Springer, Berlin, 2023) at 31.

67 (9 March 2022) 757 NZPD 8002.

68 *Aggression against Ukraine* GA Res ES-11/1, A/Res/ES-11/1 (2022) at 2; Eugene Rumer *Russia and the Security of Europe* (Carnegie Endowment for International Peace, June 2016) at 3; and *Resolution on the Territorial Integrity of Ukraine* GA Res 68/262 (2014); the UNGA condemned Russia' invasion one week before New Zealand imposed sanctions.

69 Danae Azaria "Trade Countermeasures for Breaches of International Law Outside the WTO" (2022) 71 ICLQ 389 at 391 at 396–397.

remains inconclusive, GATT generally takes priority in relation to issues that fall directly within the WTO's jurisdiction.[70] Since WTO members submit to the jurisdiction of the WTO and agree to the WTO's Dispute Settlement Understanding, it would be unusual for customary international law to prevail over the set procedures of an internationally recognised body.[71] Where there is a specific breach of WTO law, by a WTO member, it follows that the procedures in place in the WTO will prevail.[72] Therefore, ARSIWA is predominantly useful where an incident involves non-WTO members or breaches of non-WTO obligations.[73] While ARSIWA and customary international law will be very relevant in many legal issues arising from the Russia-Ukraine war, these are not the focus of this article. Rather, the focus is on how GATT can be used to justify New Zealand's measures against Russia.

IV. Justifications under the Essential Security Interest Exception

While not expressly stated, it appears likely that New Zealand will specifically seek to invoke art XXI(b)(iii) of GATT to justify its sanctions.[74] The provision states that:

> Nothing in this Agreement shall be construed:
>
> …
>
> (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interest: …
>
> (iii) taken in time of war or other emergency in international relations …

The exception had seldom been invoked prior to *Russia—Transit* in 2019 but has since been analysed by WTO Panels on four instances.[75] The Panel in *Saudi Arabia—IP* assessed the analysis by the Panel in *Russia—Transit* to identify the four requirements for a successful invocation of

70 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] vol 2, pt 2 YILC at 140.

71 Marrakesh Agreement Establishing the World Trade Organisation 1867 UNTS 154 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes).

72 Jan Yves Remy "The Application of the Articles on Responsibility of States for Internationally Wrongful Acts in the WTO Regime" (7 August 2021) EJIL: Talk <www.ejiltalk.org>.

73 Danae Azaria "Trade Countermeasures for Breaches of International Law Outside the WTO" (2022) 71 ICLQ 389 at 412.

74 See *Joint Statement on Government Procurement Implications Resulting From The Aggression by The Russian Federation Against Ukraine, Communication From Albania; Australia; Canada; European Union; Iceland; Japan; Republic Of Korea; Republic Of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom And United States*, WT/GC/244 (15 March 2022).

75 "Panel" refers to the independent body established under the DSB to examine and issue recommendations on trade dispute. See Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 212–217; *Russia − Measures Concerning Traffic in Transit* WT/DS512/R, 26 April 2019 (Report of the Panel) [*Russia – Transit*]; *Saudi Arabia − Measures Concerning the Protection of Intellectual Property Rights* WT/DS567/R, 16 June 2020 (Report of the Panel) [*Saudi Arabia – IP*]; *United States − Certain Measures on Steel and Aluminium Products* WT/DS544/R, 9 December 2022 (Report of the Panel) [*US − Aluminium*; and *United States*] − *Origin Marking Requirements* WT/DS597/R, 21 December 2022 (Report of the Panel) [*US – Origin*].

art XXI(b)(iii).[76] The following sections of this article apply each of those requirements to assess the potential for New Zealand to successfully invoke the exception.

A. Existence of a "War or Other Emergency in International Relations"

For an invocation to stand under art XXI(b)(iii), the measures taken must have been necessary in "time of war or other emergency in international relations".[77] This element of the exception is objectively assessed by the Panel, which leaves little room for a State to manoeuvre a creative argument. However, States may choose between specifically arguing that their essential security interests were threatened by a war or suggesting that the threat to their essential security interests arose from some "other emergency in international relations". Wars, which can be international or internal, can be simply defined as an "armed conflict".[78] While this definition encapsulates the situation between Ukraine and Russia, it is unlikely that many sanctioning States, such as New Zealand, will choose to argue that their essential security interests require protection from the war itself. For example, as New Zealand is so geographically isolated from Ukraine, there are no physical threats, and minimal other threats, emanating from the war specifically. This makes it difficult for New Zealand to articulate that the *war* in Ukraine gives rise "to defence and military interests, or maintenance of law and public order interests" in New Zealand.[79] While there are avenues to circumvent this issue, these are unnecessarily complex and are largely built on untested arguments. Thus, to avoid the risk of an invocation failing at the first hurdle, New Zealand should explore the alternatives available.

Despite being so geographically isolated from Russia, New Zealand may seek to invoke the exception on the basis that Russia's invasion of Ukraine, and the subsequent war, have created an "other emergency in international relations". Indeed, as noted in the recent report by the Panel in *US—Origin,* art XXI(b)(iii) was specifically designed to allow third-party States, such as New Zealand, to justify measures that are otherwise inconsistent with GATT when a conflict indirectly affected their essential security interests.[80] When GATT was originally composed in 1947, United States representatives stated in drafting that:[81]

> As to the second provision, "or other emergency in international relations", we had in mind particularly the situation which existed before the last war, before our own participation in the last war … we were required, for our own protection, to take many measures which would have been prohibited under the Charter. Our exports and imports were under rigid control … because of the war then going on.

This statement indicates that the intention of the exception was to allow States that were not party to, but were affected by, wars or other conflicts (i.e., third parties) to take measures to protect themselves that would otherwise be prohibited. While this core intention remains, the meaning of

76 *Saudi Arabia − IP* at [7.242]; and note: the Panel assessed TRIPS, art 73(b)(iii), which is the equivalent of General Agreement on Tariffs and Trade 1994, art XXI(b)(iii); since *Saudi Arabia − IP* did not become binding, and both United States cases have been appealed, *Russia − Transit* is the focus of this article's analysis.

77 *US − Aluminium* at [7.145]–[7.146]; *Saudi Arabia − IP* at [7.244]; *Russia − Transit* at [7.71]; and *US − Origin* at [7.292].

78 *Russia − Transit* at [7.72].

79 *Russia − Transit* at [7.72].

80 *US − Origin* at 424.

81 *Verbatim Report of the Preparatory Committee of the United Nations Conference on Trade and Employment* UN Doc E/PC/T/A/PV/33 (24 July 1947) at 20–21.

an "emergency in international relations" has stretched far beyond States being affected by other States' wars and now encompasses a broader range of situations.

Since 2019, an "emergency in international relations" has been defined relatively consistently across multiple reports by WTO Panels. In addition to the given example of war, the Panel in *Russia—Transit* defined an emergency as "a situation … of heightened tension or crisis, or of general instability engulfing or surrounding a State".[82] For the emergency to be in "international relations", it must affect "global political interaction, primarily among sovereign States".[83] Importantly, however, the Panel restricted the otherwise broad definition of an "emergency in international relations" by noting that "political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations … unless they give rise to defence and military interests, or maintenance of law and public order interests".[84] Thus, following the *Russia—Transit* definition, New Zealand will need to demonstrate that its measures against Russia were put in place in response to an emergency in international relations, rather than in pursuit of a political agenda. While this may be a point of contention if Russia proceeds against New Zealand in WTO litigation, the scale of Russia's contraventions of international law may be sufficient to indicate that New Zealand's sanctions have been imposed for essential security interest, rather than political, reasons. This will be discussed in more detail below.

The *Russia—Transit* definition was put more succinctly in *US—Origin,* in which the Panel adopted the French and Spanish definitions of an "emergency" in international relations as "a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations".[85] If a breakdown in international relations is of a "truly grave nature", then an emergency in international relations exists.

In the present circumstances, it appears that such a grave breakdown in international relations has occurred. Few factors illustrate this more directly than Russia's breach of the UN Charter. In breaching Ukraine's territorial integrity and political independence, Russia has directly violated art 2(4) of the UN Charter, which states that: "All Members shall refrain *in their international relations* from the threat or use of force against the territorial integrity or political independence of any state …". Many sanctioning States have specifically condemned the "egregious violation" of the Charter and identified this violation of fundamental international law as a central reason for imposing sanctions against Russia.[86] As Russia has dismissed multiple calls from the UN General Assembly (UNGA) and the International Court of Justice to cease aggression and withdraw from Ukraine,[87] Russia has demonstrated an apparent contempt for international law and the fundamental tenets of international relations. Since the usual channels of international relations are now ineffective, it

82 *Russia − Transit* at [7.76].

83 *Russia − Transit* at [7.73].

84 *Russia − Transit* at [7.75]; and Tania Voon "Russia − Measures concerning traffic in transit" (2020) 114 AJIL 96 at 99.

85 *US − Origin* at [7.290].

86 *Joint Statement on Government Procurement Implications Resulting From The Aggression by The Russian Federation Against Ukraine, Communication From Albania; Australia; Canada; European Union; Iceland; Japan; Republic Of Korea; Republic Of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom And United States*, WT/GC/244 (15 March 2022).

87 *Aggression against Ukraine* GA Res ES-11/1, A/Res/ES-11/1 (2022) at 2; Eugene Rumer *Russia and the Security of Europe* (Carnegie Endowment for International Peace, June 2016) at 3; and *Resolution on the Territorial Integrity of Ukraine* GA Res 68/262 (2014); *Allegations of Genocide under the Convention on the Prevention and Punishment of Crime and Genocide (Ukraine v Russian Federation) (Provisional Measures)* [2022] ICJ Rep 211 at 231; and *Support for lasting peace in Ukraine* GA Res A/ES-11/L.17 (2026).

appears that there has been a grave breakdown of international relations. New Zealand is a member of the international community, with strong ties in the UN; therefore, it should not be difficult for the State to demonstrate that an "emergency in international relations" exists. Thus, provided that the following three elements of art XXI(b)(iii) are met, New Zealand should be able to justify its sanctions under the exception.

B. Taken in Time of "War or Other Emergency in International Relations"

The second objective requirement for New Zealand to meet to successfully invoke the exception requires that States must have imposed measures contemporaneously to the war or other emergency in question.[88] It appears that New Zealand has complied with this requirement, as no sanctions were imposed against Russia until March 2022. Thus, provided New Zealand withdraws sanctions if, and when, Russia withdraws from Ukraine, the second requirement to invoke art XXI(b)(iii) is satisfied. Obviously, if Russia challenges the previous element, they will also challenge the contemporaneous issue, but this is unlikely to succeed for the reasons set out above.

C. Essential Security Interest

To successfully invoke the exception, it is not enough that a war or other emergency in international relations exists, nor that measures are contemporaneous. Rather, the measures taken by a State during such a situation must be "necessary for the protection of its essential security interests".[89] Essential security interests were defined by the Panel in *Russia—Transit* as "those interests relating to the quintessential functions of the State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".[90] Subsequent Panels have taken little issue with this definition and have applied it with only minor modifications in terminology.[91] While the Panel in *Russia—Transit* noted that States are entitled to define their own security interests,[92] this cannot be taken to mean that States can define *any* concern as an essential security interest.[93] Rather, States are required to adhere to the international law principle of good faith in assessing their essential security interests to ensure that art XXI is not being abused as a loophole in GATT.[94] This requires States to "articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity".[95] Thus, while States have the freedom to determine what constitutes an essential security interest, that freedom is not without constraint.

88 *Russia − Transit* at [7.70].

89 General Agreement on Tariffs and Trade 1994, art XXI(b).

90 *Russia − Transit* at [7.130].

91 See Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 212–217; *Russia − Measures Concerning Traffic in Transit* WT/DS512/R, 26 April 2019 (Report of the Panel) [*Russia – Transit*]; *Saudi Arabia − Measures Concerning the Protection of Intellectual Property Rights* WT/DS567/R, 16 June 2020 (Report of the Panel) [*Saudi Arabia – IP*]; *United States − Certain Measures on Steel and Aluminium Products* WT/DS544/R, 9 December 2022 (Report of the Panel) [*US − Aluminium*; and *United States*] − *Origin Marking Requirements* WT/DS597/R, 21 December 2022 (Report of the Panel) [*US – Origin*].

92 *Russia − Transit* at [7.131].

93 *Russia − Transit* at [7.131].

94 *Russia − Transit* at [7.133]; Vienna Convention on the Law of Treaties 1969, art 31(1); and Erich Vranes *WTO Security Exceptions in Practice and Scholarship: Curtailing "Trump Cards" through Proportionality* (Springer, Vienna, 2023) at 26.

95 *Russia − Transit* at [7.133].

The Panel will assess the articulations of essential security interests made by each State invoking the exception to ascertain whether the measures taken were designed, in good faith, to protect an essential security interest.[96] Under the current interpretation of the requirements of articulating essential security interests, as given in *Russia–Transit,* it is possible that most sanctioning States will be able to sufficiently articulate their essential security interest under the definition, as Panels tend to provide the invoking State with broad discretion in determining their essential security interests. However, it appears that some States, including New Zealand, may be seeking to apply their discretion too widely. For example, in prohibiting the import of petroleum from Russia, Canada stated that "Canada's essential security interests are threatened by the Russian Federation's violation of international law and its wilful disregard of the rules-based international order."[97] Similarly, New Zealand and Australia both stated that:[98]

> Russia's actions are a gross violation of international law, including the Charter of the United Nations. They violate Ukraine's sovereignty and territorial integrity and undermine the rules-based international order. [The state] is committed to upholding these principles, which are essential to international, regional and domestic stability and security.

While these preliminary articulations demonstrate that sanctioning States consider that Russia's violation of international order threatens essential security interests, some appear to contain a step in logic as to *how* Russia's actions pose a threat to the sanctioning States. This step will need to be addressed as, firstly, Russia has previously targeted vague articulations of essential security interests in litigation and,[99] secondly, "Article XXI cannot be pressed into action by one WTO member country to take action against another member country because the latter has breached its international law obligations."[100] Rather, States must articulate how Russia's actions have affected them specifically – instead of simply stating that international law and order has been breached. Although New Zealand has identified that Russia's invasion of Ukraine constitutes a breach of the UN Charter, they are yet to explicitly articulate *how* that affects New Zealand's essential security interests directly. This is unlikely to remain problematic, as New Zealand may be able to rely on its inaugural National Security Strategy, which clearly establishes that threats to the rules-based international system are a threat to New Zealand's core security interests.[101] As such, the UNGA's condemnation of Russia's actions as a breach of international order may be sufficient for New Zealand to demonstrate a threat to essential security interests.[102] While this argument may succeed, as the Panel has little authority to question a State's articulation of their essential security

96 *Russia − Transit* at [7.133].

97 *Notification Pursuant to The Decision on Notification Procedures for Quantitative Restrictions* G/MA/QR/N/CAN/4/Add.3, 1 April 2022.

98 *Notification Pursuant to The Decision on Notification Procedures for Quantitative Restrictions* G/MA/QR/N/AUS/5/Add.4, 6 July 2022; and *Notification Pursuant to The Decision on Notification Procedures for Quantitative Restrictions* G/MA/QR/N/NZL/6, 28 March 2023.

99 John Burke "Economic Sanctions Against the Russian Federation Are Illegal under Public International Law" (2015) 3 Russian Law Journal 126 at 135.

100 Prabhash Ranjan "Russia-Ukraine War and WTO's National Security Exception" (2022) 58 Foreign Trade Review 246 at 253.

101 New Zealand Government "Secure Together: New Zealand's National Security Strategy 2023−2028" (Department of the Prime Minister and Cabinet, 2023) at 19.

102 See *Aggression against Ukraine* GA Res ES-11/1, A/Res/ES-11/1 (2022) at 2; Eugene Rumer *Russia and the Security of Europe* (Carnegie Endowment for International Peace, June 2016) at 3; and *Resolution on the Territorial Integrity of Ukraine* GA Res 68/262 (2014).

interests, a risk remains that Russia may challenge the veracity of New Zealand's articulation and push for a revisit of the definitions of essential security interests. This will be discussed shortly.

D. Relationship between Measures and Essential Security Interest

The final element for a State to demonstrate in justifying their sanctions is the existence of a level of plausibility between the measures taken and the interests being protected.[103] The Panel in *Russia—Transit* established that the measures put in place cannot be "implausible as measures protective of [essential security] interests".[104] Plausibility is a low bar and is one of the very few restrictions on a State determining the necessity of its measures.[105] Considering that most States have provided reasons for imposing their sanctions on Russia, with each targeting a specific element of the Russian economy, it is likely that a plausible connection will be found. For example, while New Zealand's import and export bans on luxury goods appear unrelated to an endeavour to condemn Russia and bring an end to the war in Ukraine, they have been calculated to negatively impact those individuals and entities with the most influence and power in Russian society.[106] Thus, while banning the export of luxury goods may superficially appear irrelevant to the intended outcome, such measures are intrinsically connected to the goal of ending conflict in Ukraine and, thereby, restoring international peace and security. Consequently, provided New Zealand can articulate this and the other elements of art XXI(b)(iii), it is possible that the measures taken, which are inconsistent with GATT, will be accepted as being justified.

V. Counterargument to Art XXI(b)(iii) Justifications

In assessing the viability of New Zealand's arguments justifying its sanctions under art XXI(b)(iii), it should be kept in mind that this is the first instance in which the subclause is to be invoked by a third-party in this manner, which places sanctioning States, and the WTO, in uncharted territory. While WTO precedents and academic analyses allow for a plausible prediction that New Zealand *will* be able to justify its measures,[107] it may equally be the case that Russia will be able to counter New Zealand's invocation. This section of the article assesses a possible argument that Russia could employ, which could undermine New Zealand's justifications; namely, the absence of good faith in the invocation of art XXI(b)(iii).

103 *Russia − Transit* at [7.138]; and Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022) at 267.

104 *Russia − Transit* at [7.132]−[7.138].

105 Alberto Alvarez-Jimenez "The international law gaze: the security exception in international trade law" [2020] NZLJ 75 at 77; and Daria Boklan and Amrita Bahri "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box" (2020) 19 World Trade Review 123 at 134.

106 (9 March 2022) 757 NZPD at 8015 and 8028; and see generally: Patrick Wintour "Sanctions regime put to legal test in UK as oligarch seeks release of assets" The Guardian (online ed, London, 19 July 2023) <www.theguardian.com>; and Peter van Bergeijk "Sanctions Against the Russian War on Ukraine: Lessons from History and Current Prospects" (2022) 56 J World Trade 571 at 577.

107 See Mona Pinchis-Paulsen and others "The National Security Exception at the WTO: Should It Just Be a Matter of *When* Members can Avail of It? What about *How*?" (2024) 23 World Trade Review 271.

A. Good faith in International and WTO Law

The doctrine of good faith is fundamental to international law and has been for millennia.[108] As the Appellate Body noted, good faith is:[109]

> … a general principle of law and a general principle of international law, [which] controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a State's rights.

Similarly, Wolfgang Weiß explained that "[i]n WTO law, a good faith interpretation ensures that the rights and interests of exporting members in liberalized trade are balanced against the rights of regulating members to raise trade barriers in exercise of their rights flowing from exception provisions."[110] Importantly, the principle of good faith can be assessed objectively, which provides a stay on the otherwise predominantly unfettered, subjective interpretation of art XXI.[111] This objectivity allows the Panel to assess whether States have articulated their essential security interests, and the necessity of measures to protect those essential security interests, in good faith, or whether it has been done in a way that seeks to exploit the exception and abuse the functions of the WTO.[112] Thus, the application of good faith under GATT is designed to prevent abuse of the international trading system.

While some scholars are satisfied that the inclusion of the Panel's ability to review a State's good faith is sufficient to prevent abuse of the WTO system,[113] others are more sceptical. For example, Weiß considered that "[t]he obligation of good faith as an interpretive principle … does not imply any concrete guidance for the … standard of review".[114] While this lack of guidance provides Panels with the flexibility necessary to assess the nuances of specific disputes, it has been argued that too much flexibility has been afforded to the review of adherence to good faith, to the point that Panels merely refer to good faith as a formality and stop short of requiring a State to articulate its essential security interests sufficiently.[115] This was illustrated in *Russia—Transit* and in *Saudi Arabia—IP,* in which the Panels noted that the States invoking the exception were required to articulate their essential security interests in good faith, yet proceeded to a decision without a

108 Talya Uçaryılmaz "The Principle of Good Faith in Public International Law" (2020) 68 Estudios De Deusto 43 at 45.

109 *United States − Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/RW, 22 October 2001 (Report of the Appellate Body) at [158].

110 Wolfgang Weiß "Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries" (2020) 54 J World Trade 829 at 846.

111 Daria Boklan and Amrita Bahri "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box" (2020) 19 World Trade Review 123 at 129–130; and Tatian Prazeres "Trade and National Security: Rising Risks for the WTO" (2020) 19 World Trade Review 137 at 141.

112 *Russia − Transit* at 7.138; and Wolfgang Weiß "Interpreting Essential Security Exceptions in WTO Law in View of Economic Security Interests" in Wolfgang Weiß and Cornelia Farculita (eds) *Global Politics and EU Trade Policy: Facing the Challenges to a Multilateral Approach (European Yearbook of International Economic Law)* (Springer Nature, Switzerland, 2020) 255 at 278.

113 See, for example: Daria Boklan and Amrita Bahri "The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box" (2020) 19 World Trade Review 123 at 129; and Chao Wang "Invocation of National Security Exceptions under GATT art XXI: Jurisdiction to Review and Standard of Review" (2019) 18 Chin J Int Law 695 at 711.

114 Wolfgang Weiß "Adjudicating Security Exceptions in WTO Law: Methodical and Procedural Preliminaries" (2020) 54 J World Trade 829 at 846.

115 Jacob Gladysz "The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction" (2021) 52 Geo J Int'l L 835 at 850–851; and John Burke "Economic Sanctions Against the Russian Federation Are Illegal under Public International Law" (2015) 3 Russian Law Journal 126 at 129.

substantive explanation of the interest in question.[116] Therefore, while the requirement of good faith is designed to prevent the abuse of security exceptions, the principle has not always been applied with sufficient strictness to achieve its purpose.

Some scholars have criticised the leniency with which Panels have assessed adherence to the principle of good faith as they have arguably allowed States to abuse the security exceptions to GATT.[117] Criticism largely centres on the Panel in *Russia–Transit,* which accepted Russia's assertion that their invocation of art XXI(b)(iii) was made in good faith, "without the necessary information to consider the plausibility of essential security interests".[118] Such leniency is positive for the States currently sanctioning Russia, as one of the few restraints on their discretion to invoke the security exception has generally been interpreted very lightly. However, given academic criticism, it is possible that assessments of good faith will become increasingly "demanding".[119] Russia may build upon the criticism of the Panel's current approaches and argue that the threshold for demonstrating good faith be raised; thereby making it more challenging for sanctioning States to demonstrate that their invocation of the security exception was made in good faith.

B. A "Bad Faith" Argument

If Russia decides not to pursue a new line of argument in suggesting that the good faith requirement be strengthened, they may challenge some States' invocations of art XXI(b)(iii) based on the existing prohibition of *bad* faith. While the presence of bad faith is more challenging to argue than the absence of good faith,[120] it is possible that Russia will argue that States, such as New Zealand, acted in bad faith by using GATT to justify measures that are purely political and unrelated to essential security interests, as Russia has posed no threat to those States.[121] Since an essential security interest must be more than political and must involve interests relating to the protection of a State's territory and population from external threats,[122] it is possible that Russia's argument will stand in some cases.[123] For instance, while Russia's breach of the UN Charter is widely deemed to be a threat to international peace and security, Russia's actions have been almost exclusively confined to Ukraine and, until September 2022, no threat had been made against the sanctioning

116 Jacob Gladysz "The National Security Exception in WTO Law: Emerging Jurisprudence and Future Direction" (2021) 52 Geo J Int'l L 835 at 848–849.

117 See, for example: Olga Gurgula "Invoking Article 73 TRIPS in good faith: no recourse to 'security exceptions' for Russia's violation of TRIPS" (2023) 18 JIPLP 418; and Pramila Crivelli and Mona Pinchis-Paulsen "Separating the Political from the Economic: The *Russia-Traffic in Transit* Panel Report" (2021) 20 World Trade Review 582.

118 Pramila Crivelli and Mona Pinchis-Paulsen "Separating the Political from the Economic: The *Russia-Traffic in Transit* Panel Report" (2021) 20 World Trade Review 582 at 593; and see also discussion in *Russia − Transit* at [7.133] and [7.135]–[7.137].

119 Peter van den Bossche and Sarah Akpofure "The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994" (World Trade Institute, Working Paper 03/2020, September 2020) at 21.

120 Michael Hahn "Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception" (1991) 12 Mich J Int'l Law 558 at 583.

121 *Communication from the Russian Federation,* WT/GC/245, 16 March 2022.

122 *Russia − Transit* at [7.130].

123 Note: there are also arguments that unilateral sanctions are illegitimate. Such arguments go beyond the scope of this article but see: Mariya Keshner "Issues of the Legitimacy of Restriction by Countermeasures of Extraterritorial Jurisdiction of the State" (2021) 25 Journal of Russian Law 152; Alena Douhan "Unilateral coercive measures: notion and qualification" (2021) 2 Journal of the Belarusian State University 26 at 43–44; and Anatoly Kapustin and Bulat Khabriev "Unilateral Sanctions – A Vestige of a Unipolar World: The Conceptualisation of the Legal Positions of the BRICS countries (2019) 6 BRICS Law Journal 67.

States.[124] Although the sanctioning States may regard the argument as tenuous, it is possible that Russia will argue that States against which no threat was made cannot articulate their endangered essential security interests in good faith, as no essential security interests were threatened until *after* sanctions had been imposed.

1. New Zealand's vulnerability

If a bad faith argument is pursued by Russia, New Zealand may be particularly vulnerable. Given that Russia maintains it posed no threat to the sanctioning States until *after* sanctions were imposed, it may be difficult for New Zealand to demonstrate that the Russian invasion of Ukraine posed any risk to the protection of New Zealand's "territory and its population from external threats, and the maintenance of law and public order internally". For example, Russia may argue that, firstly, they posed no physical threat to New Zealand until six-months after sanctions were initially imposed – thereby precluding New Zealand from claiming that its sanctions are designed to protect New Zealand from external threats. Secondly, Russia may suggest that its actions in Ukraine have not caused any threat to the maintenance of law and public order internal to New Zealand as, for example, while grain and oil prices have increased globally in light of the situation in Ukraine, the effect on New Zealand has been minimal, since New Zealand is not heavily reliant on trade with Russia or Ukraine for supplies.[125] Therefore, under the existing definition of an essential security interest, Russia may argue that New Zealand is unable to articulate a threat to an essential security interest, as no essential security interest had been threatened.

Despite Russia posing no direct threat to New Zealand, the flexibility provided to States to articulate their essential security interests may allow New Zealand to argue a reasonable justification for its sanctions. New Zealand has stated, and maintains, that its sanctions are designed to uphold principles of rules-based order "which are essential to international, regional and domestic stability and security".[126] Since New Zealand has based part of its core national security strategy on the protection of rules-based order, it may be possible for New Zealand to argue that Russia's actions directly threaten New Zealand's essential security interests. However, despite New Zealand's national security policy making it difficult for a Panel to deny that a threat to essential security interests exists in a broad sense, Russia may still counter that New Zealand's intentions in applying sanctions were purely political and, therefore, in bad faith. For instance, New Zealand's Foreign Minister stated that the sanctions were designed to ensure that "New Zealand remains aligned and in-step with international partners".[127] This statement, and others like it, suggest that New Zealand imposed sanctions to retain political favour with its international partners, rather than to protect New Zealand's essential security interests. Thus, it could be argued that New Zealand has used GATT to shore up international, political relations, rather than to protect its essential security

124 V Voynikov "EU Anti-Russian Sanctions (Restrictive Measures): Compliance with International Law" (2022) 92 Herald of Russian Academy of Sciences 636 at 639; and Guy Faulconbridge "Putin escalates Ukraine war, issues nuclear threat to West" *Reuters* (online ed, Moscow, 21 September 2022).

125 *Potential impacts of the Russian Invasion of Ukraine on the New Zealand economy* (Ministry of Foreign Affairs and Trade, Trade Market Report, 28 February 2022); and *Russia Sanctions Act 2022 and Russia Sanctions Regulations 2022* (Ministry of Foreign Affairs and Trade, Post implementation Review, 16 November 2022) at 21.

126 *Notification Pursuant to The Decision on Notification Procedures for Quantitative Restrictions* G/MA/QR/N/NZL/6, 28 March 2023 at 2; and see Ministry of Foreign Affairs and Trade "New Zealand Statement Delivered by Permanent Representative, H.E. Ms Carolyn Schwalger on 24 February 2026" (press release, 24 February 2026); and Rt Hon Winston Peters "Providers of military assistance to Russia targeted in new sanctions" (press release, 11 July 2024).

127 (9 March 2022) 757 NZPD at 7993.

interests. If such an argument is upheld, New Zealand's invocation of art XXI(b)(iii) may fail, and alternative arguments should be considered.

VI. Alternative Arguments

While the preceding analysis may appear harsh and such arguments by Russia may be unsuccessful, it is important to remember that the jurisprudence surrounding the invocation of the essential security interest exception is still developing and uncertain. Therefore, while Panels have recently maintained a very low threshold for invocation, there is no guarantee that this will continue.[128] If, for whatever reason, New Zealand's invocation of art XXI(b)(iii) is unsuccessful, it will need to pursue an alternative argument to justify its sanctions under WTO law.

A. Art XX(a)

While this article considers that New Zealand's sanctions may not be justifiable under art XXI(b)(iii), it considers that the sanctions may be legally justified under WTO law. The General Exceptions contained in art XX may be utilised to argue a justification. For example, it has been suggested that art XX(a), which allows for GATT-inconsistent measures to be taken in order to protect public morals, could be invoked to justify sanctions imposed against States that commit human rights violations.[129] Similarly to art XXI(b)(iii), art XX(a) was not frequently utilised or interpreted until recently.[130] However, despite the limited amount of jurisprudence on the subparagraph, the conclusions as to the functioning of art XX(a) have been fairly consistent.[131] Assessments of invocations of the article take place in two stages: first, the Panel assesses whether the measures meet the requirements of the subparagraph, and then they consider whether the measures comply with the terms of the Chapeau.[132] Each of these stages is discussed below.

The integral element of art XX(a) is the protection of public morals. The term "public morals" has been broadly and consistently defined by Panels and the Appellate Body as "standards of right and wrong conduct maintained by or on behalf of a community or nation."[133] As with the articulation of an essential security interest, States have broad discretion when determining what

128 Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022) at 266.

129 James Harrison and Jane McAdam *The Human Rights Impact of the World Trade Organisation* (Hart, London, 2007) at 211–216; and Rachel Harris and Gillian Moon "GATT Article XX and Human Rights: What Do We Know from the First 20 Years?" (2015) 16 Melb J Int Law 1.

130 There has been a marked increase in invocations of art XX(a) since *EC − Measures Prohibiting the Importation and Marketing of Seal Product* WT/DS400/R, WT/DS401/R, 18 June 2014 (Report of the Panel) [*EC – Seal*].

131 Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 578–589; and Simon Lester, Bryan Mercurio, and Arwel Davies *World Trade Law: Text, Materials and Commentary* (2nd ed, Hart, Oxford, 2012) at 374–380.

132 *Brazil − Certain Measures Concerning Taxation and Charges* WT/DS472/R, WT/DS497/R, 11 January 2019 (Report of the Panel) hereinafter, *Brazil − Taxation,* at [7.513]; Peter van den Bossche *The law and policy of the World Trade Organization: text, cases, and materials* (4th ed, Cambridge University Press, Cambridge, 2017) at 554–556 and 592–605; and Simon Lester, Bryan Mercurio, and Arwel Davies *World Trade Law: Text, Materials and Commentary* (2nd ed, Hart, Oxford, 2012) at 367–368.

133 *US − Tariff Measures on Certain Goods from China* WT/DS543/R, 15 September 2020 (Report of the Panel) hereinafter [*US – Tariff*] at [7.115].

constitutes a "public moral". However, it is not unfettered. In *Colombia – Textiles,* the Appellate Body set out a simple summary of the process to assess invocations of art XX(a):[134]

> In order to establish whether a measure is justified under Article XX(a), the analysis proceeds in two steps. First, the measure must be "designed" to protect public morals. Second, the measure must be "necessary" to protect such public morals.

To establish that a measure is "designed to protect public morals", States must demonstrate the nexus between the public morals being protected and the measure taken.[135] Articulating this nexus, and the necessity of a measure, has historically been challenging.[136] While the demonstration that a measure was designed to protect public morals requires only that the measures are "not incapable of protecting public morals",[137] the demonstration of necessity can be very challenging for States. The articulation of necessity has a comparatively high threshold for States to meet, as it requires that there be no clear, non-trade-restrictive alternative action available.[138] As this is difficult for any State to demonstrate, the Panel take a pragmatic approach and assess "whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'".[139] Thus, provided the public morals cannot reasonably be protected *without* recourse to the GATT-inconsistent measure, and the terms of the Chapeau are satisfied, the Panel may find the inconsistency to be justified under the exception.

1. Human rights and public morals

The preceding, simplistic summary of the invocation of art XX(a) provides the context for a new argument to come before the WTO. As mentioned, there is an increasing appetite for the application of art XX(a) to justify GATT-inconsistent measures that respond to breaches of human rights. While no case law has yet arisen on the application of an exception for the protection of public morals in a human rights context, some scholars suggest that interpreting the exception *without* allowing a human rights element would be to misinterpret the exception and the basic meaning of public morals. As Robert Howse noted:[140]

> In the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.

134 *Colombia − Measures Relating to the Importation of Textiles, Apparel and Footwear* WT/DS461/AB/R, WT/DS461/AB/R/Add/1, 22 June 2016 (Report of the Appellate Body) at [5.67].

135 See for example: *US − Tariff* at 7.109; and Nicolas Diebold "The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole" (2008) 11 JIEL 43 at 50–51.

136 Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022) at 254–257.

137 *Brazil − Taxation* at [7.519].

138 James Harrison and Jane McAdam *The Human Rights Impact of the World Trade Organisation* (Hart, London, 2007) at 218–220.

139 *Brazil − Taxation* at [7.531].

140 Robert Howse "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labor and environmental exceptions in the European Union's generalized system of preferences" (2003) 18 AUILR 1333 at 1368.

Therefore, human rights sit comfortably within the definition of public morality.[141] It follows that measures inconsistent with GATT, but taken to protect human rights, are justifiable under art XX(a). While States cannot impose measures to protect their perception of public morality in other States, they may be able to impose such measures to prevent their own State from inadvertently supporting human rights violations. Consequently, there may be scope for States to invoke the exception in the present circumstances.

2. Applying Art XX(a)

Based on the few cases that have come before the WTO under the public morals exception, the Panel is expected to look at how the measures are designed to protect public morals *within* the State invoking the exception.[142] Therefore, to invoke the exception, New Zealand must demonstrate that the measures taken are necessary to protect public morals *in* New Zealand. While challenging, this should not be an insurmountable issue. New Zealand has a well-established stance of supporting and defending human rights and routinely decries breaches of human rights internationally. If an argument is taken under art XX(a), this stance, along with New Zealand's involvement in most international human rights instruments, will be integral to New Zealand's justification.[143] As World Trade Institute researcher, Iryna Bogdanova, argued, "[a] WTO Member can rely upon its obligations under human rights treaties, as well as domestic human rights standards to demonstrate that human rights considerations constitute 'public morals'."[144] Thus, as New Zealand considers human rights to be integral to international and domestic law, it may readily be argued that actions taken to combat human rights violations in Russia are designed to protect the public morals of New Zealand's society.

New Zealand is well aware of the human rights violations which are reportedly rife in the Russia-Ukraine war. The Office of the United Nations High Commissioner for Human Rights has identified several egregious human rights violations by Russian forces in Ukraine, including, but not limited to, the killing or arbitrary detention of civilians, the ill-treatment of children, and multiple cases of sexual violence.[145] As such violations "are a direct result of Russia's full-scale invasion of Ukraine and its ongoing war of aggression",[146] it follows that measures taken to coerce Russia to withdraw from Ukraine would also be effective in coercing Russia to cease human rights violations against the Ukrainian people.[147] However, applying sanctions with this end in mind is not enough – New Zealand will have to demonstrate that its measures against Russia were *necessary* to protect public morals.

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141 *Human Rights and World Trade Agreements Using General Exception Clauses To Protect Human Rights* (Office of the United Nations High Commissioner for Human Rights, HR/PUB/05/5, November 2005) at 5.

142 Rachel Harris and Gillian Moon "GATT Article XX and Human Rights: What Do We Know from the First 20 Years?" (2015) 16 Melb J Int Law 1 at 23.

143 See discussion in Gabrielle Marceau "WTO Dispute Settlement and Human Rights" (2002) 13 EJIL 753 at 791.

144 Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022) at 251.

145 "Human rights in Ukraine still 'dire' amid wide-ranging violations: OHCHR" (24 March 2023) United Nations <news.un.org/en/>; and Office of the United Nations High Commissioner for Human Rights *Situation of human rights in Ukraine: 1 December 2024 to 31 May 2025* UN Doc A/HRC/59/CRP.3 (30 June 2025).

146 Lucy Duncan, New Zealand Permanent Representative to UNHRC "Statement at Interactive Dialogue with Ukraine Commission of Inquiry" (54th Session of the UNHRC, 25 September 2023).

147 Note: while human rights violations have been identified, Russia has disputed this, defending litigation at the ICJ; and see *Allegations of Genocide under the Convention on the Prevention and Punishment of Crime and Genocide (Ukraine v Russian Federation) (Provisional Measures)* [2022] ICJ Rep 211 at 231; and *Support for lasting peace in Ukraine* GA Res A/ES-11/L.17 (2026).

The requirement of necessity, although a relatively high bar, is arguably simple to demonstrate. As Bogdanova noted: "Unilateral economic sanctions imposed to remedy grave human rights violations have an important objective. Since it is undeniable that the protection of human rights would be acknowledged as a valid objective, human rights sanctions meet the first requirement of the necessity analysis."[148] If New Zealand demonstrates that its sanctions are designed to protect human rights, the measures may readily be recognised as being necessary. Where the invocation becomes difficult for New Zealand is the nexus between the measures and the protection of public morals.

If the invocation is to be successful, there must be a nexus between New Zealand's revocation of Russia's MFN status and the imposition of quantitative restrictions, and the objective of protecting human rights. Regarding the import restrictions imposed, it may be arguable that preventing, or restricting, the import of Russian goods prevents New Zealanders from inadvertently buying "morally tainted" goods, as buying Russian goods directly supports the Russian economy, which in turn supports Russia's invasion of Ukraine, which, as discussed, has caused serious human rights violations.[149] Although tenuous, it is possible that this argument would stand to justify the revocation of Russia's MFN status.

Similar logic applies to the export restrictions imposed by New Zealand. Limiting, or prohibiting, the export of military and luxury goods prevents New Zealand exporters from supporting or enabling continuing Russian aggression, or the funding thereof. This prevents New Zealand from directly supporting the continuation of human rights violations in Ukraine. Thus, there may well be justification under art XX(a) for the imposition of quantitative measures against Russia from a human rights perspective.

3. The Chapeau

Given the strong potential for New Zealand's sanctions to meet the requirements of art XX(a) specifically, its measures may be justified; provided they meet the requirements of the Chapeau. In assessing compatibility with the Chapeau, the Panel will consider whether the measures taken by a State constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[150] This analysis involves the Panel comparing the conditions placed on a State with, where relevant, the same conditions placed on another State.[151] If States with the same conditions are treated differently, the Panel may deem this to be discriminatory. If this is the case, the Panel will consider whether that discrimination is arbitrary or unjustifiable; an analysis that will centre on the purpose of the measures.[152] In the present case, it appears that New Zealand will be able to meet the requirements of the Chapeau as, while the measures may be discriminatory against Russia, they have been carefully targeted and only been implemented in light of Russia's fundamental breaches of human rights and international law. Therefore, the sanctions are not arbitrary, nor unjustifiable. As a result, it is likely that New Zealand's sanctions will be justified under art XX(a).

The major challenge for New Zealand, and States like it, is the total lack of precedent for the

148 Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022) at 255.

149 New Zealand Foreign Affairs and Trade, above n 43; and James Harrison and Jane McAdam *The Human Rights Impact of the World Trade Organisation* (Hart, London, 2007) at 66.

150 General Agreement on Tariffs and Trade 1994, art XX.

151 *EC − Seal* at [5.300].

152 *EC − Seal* at [5.306].

present situation.[153] While there is academic support for a human rights argument in the current circumstances,[154] there is no way to predict how the WTO will respond, as human rights issues are seldom brought before the WTO. However, this should not be a reason to refrain from pursuing a human rights argument. Regardless of which exception States use to justify their sanctions against Russia, the WTO is entering uncharted territory.

VII. Conclusion

While sanctioning States may need to pursue untested or developing lines of argument to justify their measures against Russia, it is likely that the sanctions imposed in response to Russia's invasion of Ukraine can be justified under customary international law and, more significantly, under GATT. On a broad, customary international law level, the general interpretation of ARSIWA suggests that, given their purpose, the sanctions imposed against Russia are justified as third-party countermeasures. Regarding GATT, whether sanctions are justified under art XXI(b)(iii) largely turns on the relationship between the sanctioning State and Russia, thus each State will need to assess their liability independently. Under current jurisprudence, New Zealand should be able to demonstrate that its sanctions are necessary to protect essential security interests, in light of its National Security Strategy. However, given the dearth of art XXI(b)(iii) precedents, Russia may be able to suggest that the current approach to good faith is too lenient and, therefore present an argument disputing New Zealand's invocation on the basis that New Zealand is only using the exception for political purposes and, therefore, in bad faith. Should this argument arise, it may be difficult to counter. Therefore, New Zealand should be prepared to pursue the untested, yet academically sound, alternative argument that its sanctions are justified under art XX(a), as they are necessary for the protection of public morals, in light of Russia's human rights violations. While some lines of argument may be more tenuous than others, it is likely that New Zealand, and most other sanctioning States, will be able to justify their sanctions against Russia.

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153 Rachel Harris and Gillian Moon "GATT Article XX and Human Rights: What Do We Know from the First 20 Years?" (2015) 16 Melb J Int Law 1 at 3.

154 Rachel Harris and Gillian Moon "GATT Article XX and Human Rights: What Do We Know from the First 20 Years?" (2015) 16 Melb J Int Law 1 at 4 and 211.

Unlocking the Land: A Critical Review of the Landlocked Land Provisions in the Te Ture Whenua Māori Act 1993

Te Whakatuwhera i te Whenua Karapoti: He Arotake Kaikini o ngā Wāhanga Ture mō te Whenua Karapoti i Te Ture Whenua Māori Act 1993

Lucy Vellenoweth

I. Introduction

Today, Māori-owned land comprises 5.6 per cent of New Zealand's total land area,[1] and approximately 20 per cent of that land is landlocked.[2] Landlocked Māori land is not a new phenomenon; Māori landowners have faced its consequences for generations. The Te Ture Whenua Māori Act 1993 (TTWMA) marked a radical step towards adequate governance of Māori land. This research paper investigates whether the TTWMA and its subsequent amendments have been adequate in unlocking landlocked Māori land.

This paper is divided into five parts. First, it examines the historical causes of landlocked Māori land. Second, it outlines the current legal framework under the TTWMA. Third, it analyses the 2002 and 2020 amendments made to the TTWMA and considers their effectiveness. Fourth, it considers the impacts felt by tangata whenua, particularly in the Rangitīkei ki Rangipō inquiry district. Finally, it evaluates the proposed solutions and suggests recommendations for rectifying landlocked land inequities.

II. The Origin of Landlocked Māori Land

The prevalence of landlocked Māori land is inextricably linked to the widespread alienation and confiscation suffered by Māori throughout the 19th and 20th centuries. These processes were facilitated by numerous legislative provisions enacted by the Crown to regulate, administer and acquire Māori land.[3] Consequently, Māori have inherited land which is inaccessible, of limited use and low economic value. The confiscation, alienation and fragmentation of Māori land occurred

1 Stats NZ "Change in use of Māori land for primary production" (19 April 2018) <www.stats.govt.nz>.

2 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 68.

3 The Crown passed 560 statutes through the period of 1840 to 1920 in relation to the acquisition of Māori land. See John AB O'Keefe *Maori land ownership: introductory readings* (Auckland Law Society, Auckland, 1980) at pt XV.

during four key historical eras, providing a fundamental understanding of the origin of landlocked Māori land.

A. The Doctrine of Pre-emption

Article II of the English text of the Treaty of Waitangi granted the Crown the exclusive right to purchase Māori land, known as the doctrine of pre-emption.[4] This right derived from the Marquis of Normanby's instructions, which influenced William Hobson to proclaim that no private title to land would be recognised unless derived from Her Majesty.[5] In effect, the Crown could exclusively purchase land at a discounted price and sell it at a premium to finance British colonisation,[6] while retaining control of the land. Consequently, the Crown confiscated almost the entirety of the South Island, and cumulatively, two-thirds of New Zealand within the first 20 years.[7] The Crown's pre-emptive powers created a monopoly over land acquisition. Arguably, the era of pre-emption is the root cause of landlocked Māori land, resulting in the largest mass confiscation of Māori land. However, the most egregious conduct towards Māori land occurred through confiscation during the New Zealand Wars under the New Zealand Settlement Act 1863.

B. Kīngitanga Movement and New Zealand Wars

The Crown's period of pre-emption sparked an initiative to unite tribes in pursuit of a distinct political power for Māori.[8] The Kīngitanga Movement emerged in the 1850s to control land transactions and affairs.[9] Intertribal rivalries were set aside so chiefs could form a common interest in land retention.[10] These intertribal meetings supported placing tapu on land sales.[11] In the late 1850s, the Māori King was elected to unify the tribes against the alienation and sale of Māori land,[12] halting the ability of British settlers to acquire land. The settlers resented the Kīngitanga Movement, realising it was a land league preventing land from reaching the market. Governor George Grey declared "I shall not fight against [the king] with the sword, but I shall dig round him till he falls of his own accord."[13] Ultimately this resistance led to the outbreak of the New Zealand Wars.

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4 Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 5.

5 Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 20.

6 Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, Auckland, 1977) at 197–201.

7 Alan Ward *National Overview: Waitangi Tribunal Rangahaua Whanui Series: Volumes I–III* (Waitangi Tribunal, Wellington, 1997) vol 2, at X.

8 Mark Derby "Māori–Pākehā relations– Military conflicts" Te Ara – the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

9 Michael R Litchfield "Confiscation of Māori Land" (1985) 24 VUWLR 335 at 339.

10 Toon Meijl "The Maori King Movement: Unity and Diversity in Past and Present" (1993) 149(4) Journal of the Humanities and Social Sciences of Southeast Asia 673 at 678.

11 Toon Meijl "The Maori King Movement: Unity and Diversity in Past and Present" (1993) 149(4) Journal of the Humanities and Social Sciences of Southeast Asia 673 at 678.

12 Rahui Papa and Paul Meredith "Kīngitanga – the Māori King movement" Te Ara–the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

13 John Eldon Gorst *The Maori king: or, The story of our quarrel with the natives of New Zealand* (Oxford University Press, Auckland, 1959) at 208.

C. New Zealand Settlement Act 1863 and Suppression of Rebellion Act 1863

The outbreak of the New Zealand Wars was just the beginning of the outrageous treatment of Māori and their rights to land. In the heat of the Wars, the New Zealand Settlement Act 1863 and Suppression of Rebellion Act 1863 were passed, enabling the Crown to confiscate land from those considered "engaged in a rebellion against Her Majesty's authority."[14] Any rebellion against the Crown forfeited the right of possession under Te Tiriti o Waitangi, and was not subject to compensation.[15] Māori referred to these confiscations as Raupatu.[16] The intention behind confiscations was questionable, as not only did those considered rebels have land taken, but also those who were neutral or supported the Crown.[17] These Acts were purely for acquisition purposes, ensuring the Crown could obtain better quality land.[18] The confiscations covered the vast majority of Te Ika-a-Māui, resulting in a loss of 3.25 million acres from Māori.[19] The majority of the land was not returned, and land that was returned had lost its customary title, was of the lowest quality, and was generally not returned to the true owners.[20]

D. Native Lands Acts and Native Land Court 1862–1873

In 1862, the Crown introduced the Native Lands Acts of 1862 and 1865 and the Native Land Court. The Court was initially established to deal with customary title, with jurisdiction to give certificates of title to Māori for their land.[21] The Native Lands Acts revolutionised Māori land tenure by privatising land purchases and abandoning Crown pre-emption, creating an "open market" for Māori land. There are mixed perspectives on the true intentions of the Native Lands Acts. Hugh Kawharu described the Court as "an engine of destruction for any tribe's tenure of land,"[22] and Judith Binney suggested the Acts were "acts of war".[23] However, other academics suggested the legislation represented a policy shift from Crown pre-emption to a free-trade regime.[24] In this perspective, the Acts abolished the Crown's pre-emption and allowed Māori to sell their land to anyone.[25] Richard Boast expressed that the free-trade regime would allow Māori to get a "better ride" to have the highest title of land: the *freehold*.[26] However, this radical change was arguably

14 Michael R Litchfield "Confiscation of Māori Land" (1985) 24 VUWLR 335 at 343.
15 NZ History "Land Confiscation Law Passed 3 December 1863" (13 December 2021) <www.nzhistory.govt.nz>.
16 Rahui Papa and Paul Meredith "Kīngitanga – the Māori King movement" Te Ara–the Encyclopedia of New Zealand <www.TeAra.govt.nz>.
17 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556 at 557.
18 Antoine Coffin *Barriers to the Development of Māori Freehold Land* (Waikato Regional Council, 2016).
19 Mason Durie *Te Mana, te kāwanatanga: The politics of Māori self-determination* (Oxford University Press, Auckland, 1998) at 115.
20 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556.
21 Richard P Boast "The Native Land Court and the Writing of New Zealand History" (2017) 4 Law&history 145 at 148.
22 Ian Hugh Kawharu *Maori land Tenure: Studies of a changing institution* (Clarendon Press, Oxford, 1997) at 18.
23 Judith Binney, Judith Bassett and Eric Olssen (eds) *The people and the Land: Te Tangata me Te Whenua: An illustrated History of New Zealand 1820–1920* (Allen & Unwin, Wellington, 1990) at 143.
24 Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 65.
25 Native Lands Act 1862, Preamble.
26 Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) at 65.

naïve, highlighting the incompatibility of the two systems and the failure to recognise that Māori land ownership could not be compartmentalised into the Torrens system.

1. Concept of ownership

For context, it is important to differentiate how land ownership differs between Pākehā and Māori. Prior to British colonisation, Māori land was collectively owned based on traditional custom. Ownership was derived from possession rights at iwi, hapū and whānau level.[27] Whenua was distributed in accordance with function, giving tangata whenua rights of usage.[28] The te ao Māori world view regards land as a place of belonging rather than ownership, emerging from the belief that people came from Papatuānauku and Ranginui, and that tangata whenua is everlasting, while human life is transient.[29] Land ownership was established through discovery, settlement and occupation by maintaining take ahi kaa,[30] which then transformed into take tipuna.[31] The kinship group held the land and allocated rights of access to individuals.[32] As ownership was based on occupation by different iwi, there were never distinctive boundaries;[33] land was categorised by genealogical alliances, and governed by relationships.[34] This contrasts with the British perspective, where ownership is geographically allocated with distinctive individual property rights through deeds.[35] For Pākehā, land is a commodity valued by an external market, whereas the te ao Māori view encompasses cultural, spiritual and intergenerational value, considering land a taonga.[36] Kaumatua Derek Te Ariki Morehu stated that without the land, "the strength of our people has been diminished and the process of dislocation devastating in its impact on our language and Tikanga Māori".[37] This contrast in philosophy has created a dichotomy of anger, trauma and confusion. As noted by the Muriwhenua Tribunal, tikanga relating to the land are still remembered and upheld and are a vital concern for Māori today.[38]

27 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556 at 557.

28 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556 at 557.

29 Tanira Kingi "Reconciling Customary Ownership and Development: Maori landownership and land management in New Zealand" in *Making Land Work* (Vol 2) (Australian Agency for International Development, Canberra, June 2008) at 134.

30 Tanira Kingi "Reconciling Customary Ownership and Development: Maori landownership and land management in New Zealand" in *Making Land Work* (Vol 2) (Australian Agency for International Development, Canberra, June 2008) at 134.

31 Ian Hugh Kawharu *Maori land Tenure: Studies of a changing institution* (Clarendon Press, Oxford, 1997).

32 Tanira Kingi "Reconciling Customary Ownership and Development: Maori landownership and land management in New Zealand" in *Making Land Work* (Vol 2) (Australian Agency for International Development, Canberra, June 2008) at 135.

33 Tanira Kingi "Reconciling Customary Ownership and Development: Maori landownership and land management in New Zealand" in *Making Land Work* (Vol 2) (Australian Agency for International Development, Canberra, June 2008) at 135.

34 Tanira Kingi "Reconciling Customary Ownership and Development: Maori landownership and land management in New Zealand" in *Making Land Work* (Vol 2) (Australian Agency for International Development, Canberra, June 2008) at 135.

35 Jim McAloon "Land ownership" (24 November 2008) Te Ara–the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

36 Rowan Thom and Arthur Grimes "Land loss and the intergenerational transmission of wellbeing: The experience of iwi in Aotearoa New Zealand" (2022) 296 Social Science & Medicine 114804 at [2.1].

37 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at [2.1.2].

38 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 13.

Although the Native Lands Acts limited the Crown's pre-emptive powers, they did so by imposing a European paradigm of land ownership in disregard of the Māori customary concept of land tenure. Furthermore, despite the Native Lands Acts purporting to allow Māori to free-trade, several barriers made trading difficult. For example, to free-trade, Māori had to obtain a certificate of title from the court and a Crown grant from the governor.[39] Accessing a certificate became a significant barrier for many Māori due to the ten-owner rule.[40] This rule dispossessed any Māori individual or iwi member from their land if they were not recognised as part of the 10 owners of the land.[41] The effect of land disposition for Māori was compounded, and alienated many whānau and hapū from their iwi.

The *ten-owner rule* was later abolished under the Native Lands Act 1873, which sought to recognise Māori landowners as equal owners.[42] This allowed an unrestricted number of named individuals to be recorded on land titles, resulting in some titles having up to 100 owners. Although intended to address the implications of the ten-owner rule, this change created further issues. By allowing descendants to inherit the land and be recognised on the legal title, the Native Land Court individualised Māori freehold land and prevented its reversion to customary Māori land.[43] As a result, Māori land has become increasingly fragmented with each successive generation.

E. Effect of Alienation, Confiscation and Partition of Māori Land

Landlocked Māori land was largely attributable to the Native Land Court's failure to preserve legal and practical access. Initially, the Court's powers did not anticipate the consequences of landlocked land. Unfortunately, it was not until the enactment of the Native Land Court Act 1886 that access provisions were introduced.[44] Section 91 provided that the Court could, in its discretion, order a private road for access, but only if applied for within five years of partition. Despite this provision, the proportion of landlocked land today suggests there were limited applications.[45] Although Māori landowners could have been more proactive, the Native Land Court should have been more aware of access issues. This was noted in *He Kura Whenua ka Rokohanga*, observing that the more land was partitioned, the higher the risk of it becoming landlocked.[46] In retrospect, the concept of individual land ownership remained unfamiliar to many Māori landowners. So as long as the land could be accessed informally, and legal title was held, there was little incentive for Māori to seek formal legal access. Moreover, formalising access could have exposed owners to heavier rates or unwanted liability for works construction costs.[47] Given the expense of participating in the Native

39 Native Lands Act 1862, ss 17 and 47.

40 Native Lands Act 1862, s 23.

41 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556 at 557.

42 Rowan Thom "Land loss, confiscation, arability and colonisation: the experience of iwi in Aotearoa New Zealand" (2022) 18 AlterNative 556 at 557.

43 Tanira Kingi "Ahuwhenua – Māori land and agriculture: Land ownership and Māori agriculture" (24 November 2008) Te Ara –the Encyclopedia of New Zealand <www.TeAra.govt.nz>.

44 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 11; Also See Native Land Court Act 1886, s 91.

45 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 92.

46 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 40.

47 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 93.

Land Court, it was unsurprising that applications for access were scarce.[48] Although responsibility for inaccessible land was shared, legislation ought to have ensured legal access was provided.

III. Te Ture Whenua Māori Act 1993

The primary legislation governing Māori land is the TTWMA. At the time of its enactment, the TTWMA was considered a "watershed" moment in history, being the first legislative form truly incorporating Māori perspective.[49] The preamble of the TTWMA states that the TTWMA seeks to recognise land as a taonga to Māori people and to promote the retention, protection, occupation development, and utilisation of that land for the benefit of its owners, their whānau and hapū.

A. The Definition of "Landlocked"

Landlocked Māori land is governed by ss 326A to 326D of the TTWMA. Under s 326A, "landlocked land" is defined as:[50]

> a piece of land that has no reasonable access to it and is either—
>
> (a) Māori freehold land; or
>
> (b) General land owned by Māori that ceased to be Māori land under Part 1 of the Māori Affairs Amendment Act 1967.

Additionally, "reasonable access" is defined as the physical access to land for persons or services that is of a nature and quality that is reasonably necessary for those owners to use and enjoy the land.[51]

B. Key Considerations

An owner may apply to the Māori Land Court (MLC) under s 326B of the TTWMA for a reasonable access order if their land is landlocked. In considering such application, the MLC must have regard to:[52]

> (a) if the applicant purchased the land, the nature and quality of the access (if any) to the land at the time of purchase;
>
> (b) how the land became landlocked;
>
> (c) the conduct of the applicant and the other parties, including any attempts to negotiate reasonable access;
>
> (d) the hardship to the applicant if no order is made, compared to the hardship to any other person if the order is made;
>
> (da) the applicant's relationship with the and with any water, culturally or traditionally significant site or other taonga associated with the land;

48 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 97.

49 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 1.

50 Te Ture Whenua Māori Act 1993, s 326A "landlocked land".

51 Te Ture Whenua Māori Act 1993, s 326A "reasonable access".

52 Te Ture Whenua Māori Act 1993, s 326B(4).

(db) the applicant's culture and traditions in relation to the land;

(e) the requirements of Part 3B of the Conservation Act 1987, if the application affects a conservation area;

(f) any public safety issues raised by a rail operator, if the application affects a railway line; and

(g) any other matters the court considers relevant.

C. Property Law Act 2007

The provisions under the TTWMA were directly taken from s 129B of the Property Law Act 1952 (PLA 1952) which was inserted by s 12(2) of the Property Law Amendment Act 1975. The landlocked land sections under the TTWMA and the Property Law Act 2007 (PLA 2007) are mostly identical with a few exceptions. The definitions in relation to "reasonable access" and what is considered to be "landlocked" are principally very similar, with a few minor differences.[53] The court's considerations for making a reasonable access order differ slightly under the PLA 2007 and the TTWMA. Under the PLA 2007 the considerations include:[54]

(a) the nature and quality of the landlocked land at the time of purchase or acquisition;

(b) the circumstances relating to how the land became landlocked;

(c) the conduct of the parties to negotiate reasonable access;

(d) hardship which would be caused to the applicant if the order was refused; and

(e) any other relevant matters.

Comparatively, the MLC has the ability to make cultural considerations under s 326B(4)(d) as implemented by the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 (Amendment Act 2020). Overall, the two statutes are, as expected, very similar.

IV. The Development of Landlocked Legislative Provisions

Throughout history, the issue of landlocked land has often been overlooked. It was 1975 when New Zealand first saw the introduction of s 129B of the PLA 1952, giving the High Court the jurisdiction to order reasonable access to land.[55] Before the Te Ture Whenua Māori Amendment Act 2002 (Amendment Act 2002), there were only two options for Māori landowners to obtain access to their land: through the limited jurisdiction of the MLC or under the PLA 1952 in the High Court. The MLC had the ability to order roadway access,[56] however, to grant road access, the MLC had to have the consent of all owners who would be affected.[57] Additionally, if the road was across neighbouring Māori land, the MLC had to be satisfied there was sufficient notice, discussion, consideration and evidence of support by all landowners.[58] Under the PLA 1952, both Māori land

53 Property Law Act 2007, s 326 "reasonable access" and "landlocked".
54 Property Law Act 2007, s 329.
55 Property Law Amendment Act 1975, s 12.
56 Te Ture Whenua Māori Act 1993, ss 315–326.
57 Te Ture Whenua Māori Act 1993, s 317(3).
58 Te Ture Whenua Māori Act 1993, s 317(1).

and general land could be granted access by the High Court under s 129B. If consent was not given, the cost of arguing reasonable access in the High Court was completely out of reach for most Māori landowners.[59]

A. Amendment Act 2002

The implementation of the Amendment Act 2002 sought to recognise the implications for Māori by simplifying the process to obtain access to their lands. In its first reading bill form, Hon Doug Kidd argued that the nature of landlocked land presented a twofold problem. The inaccessibility of the land meant it had not been utilised or developed. Thus, the land had no means to produce monetary value. As a consequence, Māori landowners were unable to afford a claim for access.[60] Nonetheless, the Amendment Act 2002 granted the Māori Land Court wider jurisdiction to deal with landlocked claims under ss 326A−326D of the TTWMA. This amendment sought first to avoid the costs of the High Court, and second, to allow Māori to appear in a familiar court, to negate the alienating feel of the justice system.[61] The new sections mimicked the landlocked sections under the PLA 2007. In effect, this allowed the common law principles already developed under the PLA 2007 to be directly applied in the MLC.

1. Intention of the Act

At the time, the Amendment Act 2002 was anticipated to improve Māori landowners' ability to use, develop and control their land. Parekura Horomia, the Minister of Māori Affairs noted "it is right and proper that the Māori Land Court have full powers to deal with the problems of land-locked Māori land."[62] The Amendment Act 2002 was well received.

2. Anticipated success

Following the Amendment Act 2002, Jacinta Ruru and Anna Crosbie published the article *The key to unlocking landlocked Māori land* anticipating the future effect of the changes to the TTWMA.[63] The article sought to interpret how the MLC would approach the new provisions. In considering whether the land was landlocked, it was anticipated that the MLC would apply a lower threshold, accepting that much of Māori land is poorer quality. Caution was advised, as "over-emphasising" the economic potential of the land could undermine the special significance of the land.[64] The article outlined that a wider approach in determining reasonable use may be taken. For example, it was considered that sea access may not meet the threshold of reasonable access given the MLC's obligation to encourage utilisation of the land.[65]

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59 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at I.

60 (22 March 2001) 591 NZPD 8480.

61 See Chief Judge Joseph Williams *The Māori Land Court – A Separate Legal System?* (New Zealand Centre for Public Law, Occasional Paper No 4, July 2001).

62 Parekura Horomia "Te Ture Whenua Maori Amendment Bill passed" (31 May 2002) Te Kāwanatanga o Aotearoa <www.beehive.govt.nz>.

63 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13.

64 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at IV.

65 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at IV.

3. The courts' interpretation

The anticipated interpretation of the Court's approach was mostly accurate. Since the Amendment Act 2002, the MLC has taken a relatively consistent approach. *Roberts – Te Touwai B19A1* held the approach under the s 326 provision is as follows:[66]

(a) First, to determine the threshold question of whether the land is landlocked;

(b) Second, to assess whether relief should be granted; and

(c) Third, to consider what conditions should be imposed, including, where appropriate, payment of compensation.

(a) Section 326A: reasonable access

The approach to reasonable access has been debated, specifically whether the principles under the PLA 2007 are to be adopted under the TTWMA.[67] In *Huata v Robin*, the MLC determined that principles should be applied as they appear in the TTWMA,[68] noting common law principles under the PLA 2007 may be adopted only where "necessary to fill gaps".[69] *Huata* confirmed that reasonable access should be interpreted consistently with the kaupapa of the TTWMA, supporting the development and facilitation of Māori land.[70] *Huata* upheld *Māori Trustee v Forde,* where the MLC emphasised reasonable access to land as a "taonga tuku iho", requiring the Court to "encourage the retention, use, and development and management of Māori land."[71] However, these considerations have not necessarily lowered the threshold for establishing reasonable access. This is demonstrated by *Houpapa v Woods,* where the MLC rejected the claim for access over the neighbouring block after finding reasonable foreshore access existed.[72] *Houpapa* concerned a 108-hectare block of Māori land forming part of the North Kawhia Harbour peninsula with no legal road access, locked since its partition in 1914, with steep contour completely overgrown in scrub and bush.[73] The applicant sought access over the neighbouring farm property for farming purposes. In assessing the application, and bearing in mind the Preamble, ss 2 and 17 of the TTWMA, the MLC considered:[74]

(a) the nature of the land and its likelihood of economic potential;

(b) the costs of establishing the land access;

(c) the negotiations and conduct between the shared owners of the block;

(d) the existing access that was used by the applicant;

(e) the hardship that would be faced by the applicant;

66 *Roberts – Te Touwai B19A1* (2015) 114 Taitokerau MB 131 (114 TTK 131).
67 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7).
68 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [67].
69 *Māori Trustee v Forde – Section 186 Block V Longwood Survey District* (2013) 17 Te Waipounamu MB 152 (17 TWP 152) at [47].
70 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [67].
71 *Māori Trustee v Forde – Section 186 Block V Longwood Survey District* (2013) 17 Te Waipounamu MB 152 (17 TWP 152) at [38].
72 *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167) at [64].
73 *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167) at [10].
74 *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167) at [46] to [78].

(f) whether the applicant had any financial plans or security to properly fulfil his plans for the farming venture; and

(g) the difficulty for the applicant's mother, as an elderly person, to access the land block.

The MLC concluded that although access over the neighbouring land was considered reasonable, the poor condition of the track and the high cost of restoring it meant the Court was not persuaded that sea access presented any more difficulty or prevented use of the recreational land.[75] As anticipated in 2002, the MLC applies the reasonable access definition as it appears in the TTWMA, adopting common law principles under the PLA 2007 only where necessary. The preamble and ss 2 and 17 remain relevant considerations but do not necessarily lower the threshold of reasonable access compared to general landlocked land under the PLA 2007.

(b) Section 326B(4): considerations

In stepping through the MLC's mandatory considerations, Jacinta Ruru and Anna Crosbie make insightful observations.[76] Limb (a) considers the nature of access prior to acquisition. Despite the courts being unsympathetic to those who acquire land in a landlocked state under calculated risk,[77] Māori landowners who succeeded the land would likely be unaffected by such consideration.[78] Under limb (b), Ruru and Crosbie consider that the landlocked state of much Māori land is attributable to historic alienation, confiscation and acquisition within the 19th and 20th centuries. Bryan Gilling noted there was no doubt these practices led Māori land to become neglected and inaccessible.[79] Under limb (c), general principles under the PLA 1952 would likely apply, requiring no perfect standard of conduct, although failure to consider reasonable proposals could be detrimental.[80] Limb (d) focuses on hardship if a remedy is or is not granted. It was expected that most claims would concern the utilisation of Māori land;[81] however, it was questioned whether the underlying intentions of the TTWMA would override hardship experienced by affected non-Māori landowners. Ruru and Crosbie also noted cultural and historical perspectives may be recognised under limb (g).[82]

The MLC takes all considerations under s 326B(4) into account when determining whether relief should be granted. This exercise is fact dependent, and sometimes certain limbs may be given more weight. As anticipated, relief is generally determined under limbs (d) and (g) of s 326B(4). Hardship under limb (d) has been determinative in many cases. In *Huata v Robin*, the applicants successfully established that their hardship outweighed any suffered by the respondents.[83] *Huata* involved Rotopounamu 1B1A and its neighbouring block. The trustees wished to utilise the

75 *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167) at [77].

76 See mandatory considerations: Te Ture Whenua Māori Amendment Act 2002, s 326B(4).

77 *Cooke v Ramsay* [1984] 2 NZLR 689 at 695.

78 See *Brankin v MacLean* [2003] 2 NZLR 687 at 702. The Court acknowledged that historical limitations would be irreparable if knowledge would prevent relief.

79 Bryan Gilling "Engine of Destruction? An Introduction to the History of the Māori Land Court" (1994) 24 VUWLR 115.

80 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at V, commentary on s 326B(4)(c).

81 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at V, commentary on s 326B(4)(d).

82 Jacinta Ruru and Anna Crosbie "The key to unlocking landlocked Maori land: the extension of the Maori Land Court's jurisdiction" [2004] 10 Canterbury L Rev 13 at V, commentary on ss 326B(4)(e), 326B(4)(f) and 362B(4)(g).

83 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7).

land for papakāinga housing and needed access to Robins Road right of way.[84] The claimants argued refusal would ruin the potential for papakāinga housing and that secured funding would be withdrawn. The respondents contended they would be unable to partition their shares and that traffic would impact the Marae.[85] Balancing these considerations, the MLC noted the claimants were willing to mitigate impacts such as noise, road maintenance and by offering car parks for the Marae.[86] Furthermore, there was no certainty that the respondent's partition application would be granted.[87] Therefore, allowing access would not cause undue hardship and aligned with principles of retention and facilitation of Māori land.[88] *Huata* demonstrates how the MLC balances competing interests when considering whether reasonable access should be granted.

Turning to limb (g), from the handful of judgments within the last 20 years, there has been limited use of "any other relevant considerations".[89] Some judgments have considered whether there has been support for reasonable access.[90] Other judgments have considered the principal purpose of pt 14 of the TTWMA: to facilitate use and occupation of landowners by providing access or improved access.[91] However, for the most part, the MLC has relied upon hardship considerations and upholding the foundational principles under the TTWMA when granting access.

(c) Section 326C: conditions and other matters

If the MLC is satisfied that an order for reasonable access should be made, it may make an order under s 326B(5) vesting landlocked landowners with a legal estate in fee simple in any specific piece of land they see fit. However, in making such an order, the MLC is likely to impose conditions on the applicant. These conditions are outlined under s 326C of the TTWMA and include:[92]

(a) the payment of compensation by the applicant;

(b) the exchange of land by the applicant and any other person;

(c) the fencing, fence upkeep and maintenance;

(d) the upkeep and maintenance of land subject to an easement;

(e) the court's powers under Part 16 as to Māori land;

(f) any survey that may be required by the Registrar-General of Land before the issue of a record of title that is not qualified;

(g) the timeframe for completing work necessary to give effect to the order;

(h) the execution, stamping, and delivery of any instrument; and

(i) any other matters the court considers relevant.

Note: Sections 326C(2) – (4) provide further ancillary matters in making such an order.

84 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [2].
85 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [121].
86 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [128].
87 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [129].
88 *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7) at [137].
89 Te Ture Whenua Māori Amendment Act 2002, s 326B(4)(g).
90 See *Huata v Robin – Rotopounamu 1B1A* (2017) 60 Takitimu MB 7 (60 TKT 7); *Roberts – Te Touwai B19A1* (2015) 114 Taitokerau MB 131 (114 TTK 131).
91 *Tuson – Mangamuka West 3B2A Block* (2019) 206 Taitokerau MB 130 (206 TTK 130) at [99].
92 Te Ture Whenua Māori Act, s 326C(1).

The costs of these conditions generally fall on the plaintiff, unless they are apportioned equally to both parties.[93] Costs vary case by case, but are generally significant. The leading threshold test on compensation is provided by *Jacobsen v Drexel*, an authority upheld in the MLC.[94] The test outlines:[95]

> What has to be discovered is the value of the interest to the defendant owner with all its existing advantages, possibilities and potentialities. This must mean the market value; the price at which a willing seller would sell and a willing buyer would buy … There is however no reason at all to exclude from that market a purchaser who has special needs and who would therefore be willing to pay more than others …What it comes down to in the end is that 'compensation' and purchase money or price are the same thing under different names.

In applying *Jacobsen*, Judge Milroy in *Trustees of Oparau* did not consider that the principles contained in the preamble or ss 2 and 17 of the TTWMA should temper how compensation was to be calculated.[96] The MLC held that the applicant was to cover the costs of maintaining and repairing the access way and the fence line. As another illustration, the MLC in *Nukutere Lands Trust*[97] held that all costs associated with upgrading and maintaining the track was to be met by the plaintiff, including compensation of $7,000 and $15,500 to the defendants within 3 months.[98] It is apparent that these costs alone are likely to discourage Māori landowners from making a claim. This concern was identified during the bill's first reading by Richard Prebble who noted "the reason why people do not apply for access to landlocked land is that the cost of the road often exceeds the value of the land".[99] The costs of compensation, maintenance and/or development costs on top of court, surveying and legal costs, make access unattainable for the majority of Māori landowners.

The law has inherent limitations. In cases involving landlocked Māori land, neither the applicant nor the defendant is at fault. Nevertheless, one party may be required to surrender parts of their indefeasible title and exclusive land use and enjoyment, while the other party is burdened with high costs to repurpose undeveloped and uneconomic land. Legislation alone is not sufficient on its own to address this problem.

4. Key implications

The implementation of the Amendment Act 2002 has brought few applications and judgments under s 326B of the TTWMA. In 2018, the Ministry of Justice disclosed that within the 16 years of the Amendment Act 2002, there had been 28 applications made under s 326B of the TTWMA.[100] Of those 28 applications, 10 were declined or dismissed, nine were completed, and nine were active at the time. Subsequently, there have been five more requests for access under these provisions.[101]

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93 For example, the costs to install a gate for security measures to the benefit of both parties may be apportioned equally. See *Trustees of Oparau – Oparau No 1 and Pirongia West 1 2B3D* (2004) 109 Waikato Maniapoto MB 300 (109 W 300).

94 *Trustees of Oparau – Oparau No 1 and Pirongia West 1 2B3D* (2004) 109 Waikato Maniapoto MB 300 (109 W 300).

95 *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (CA) at 333–334.

96 *Trustees of Oparau – Oparau No 1 and Pirongia West 1 2B3D* (2004) 109 Waikato Maniapoto MB 300 (109 W 300) at 23.

97 *Nukutere Lands Trust v Trustees of Whitikau A1 – Opape 28* (2013) 70 Waiariki MB 272 (70 WAR 272) at [105].

98 *Nukutere Lands Trust v Trustees of Whitikau A1 – Opape 28* (2013) 70 Waiariki MB 272 (70 WAR 272) at "order".

99 (28 May 2002) 601 NZPD 16635.

100 Updated Summary of Evidence of Michelle Hippolite and Rahera Aroha Ohia on behalf of Te Puni Kōkiri (Wai 2180, #M28(c)) at [12].

101 Te Kooti Whenua Māori "Ngā raraunga whenua Māori: Māori land data" <www.maorilandcourt.govt.nz>. See Māori Land Update 2018 to 2024.

Furthermore, there have been no claims appealed to the Māori Appellate Court or the High Court. It has been noted that appeal costs and the likelihood that the principles of indefeasibility will prevail have discouraged Māori landowners from applying.[102] The applications made to date suggest the Amendment Act 2002 has not been as successful as originally anticipated.

The shortfall of the Amendment Act 2002 was not the provisions themselves, but the cost of accessing the land. Without access to financial support, the landlocked provisions will struggle to rectify landlocked disparities. Costs are simply too high: application fees, lawyer fees and surveying fees (topographic surveying can be upwards of $3,000), with no guarantee of success.[103] Success in the MLC brings further costs including, compensation to neighbouring landowners, fencing, and developing access.

(a) Whenua Māori Fund

In 2015, the Whenua Māori Fund (the Fund) was created to support Māori landowners and trustees to utilise and develop their land, including pre-commercial activities such as education, research and development.[104] In 2017, the Fund was broadened so Māori landowners could seek assistance with landlocked land access constraints.[105] However the financial support could not go towards accessway developments, compensation to neighbouring landowners, or lawyer's fees.[106] No applications were made in relation to land access. It is likely that funds which could have supported landlocked land were used for higher-priority land issues.

(b) Provincial Growth Fund

In 2018, the Ministry of Business, Innovation and Employment released a Provincial Growth Fund over three years.[107] This fund was broad in its purpose, with $100 million allocated towards Māori business.[108] It required any land to be investment ready, already having legal access granted by the courts. This fund has been subsequently replaced by the Regional Strategic Partnership Fund, which sought to support "undeveloped and unutilised" Māori land.[109] It is still unclear whether legal access requirements must be met before the fund can be accessed. These funds were another missed opportunity to support landlocked lands.

Despite these two available funds, landlocked lands were not supported due to restrictions on legal access, or expenses to gain access. The inability to access funds has trapped Māori landowners into a vicious cycle. In *Houpapa v Woods*, Mr Houpapa stated that his inaccessible farm had to be abandoned due to insufficient funds and an inability to secure a loan against Māori land. He noted, "the lack of access was the final straw."[110] Even after access is achieved, problems persist: access

102 Ministerial Advisory Group on the Te Ture Whenua Reform *Te Ture Whenua Māori Reform Consultation Document* (Te Puni Kōkiri, 13 May 2015) at 26.

103 For example, see costs of Topographical surveying "Site Survey Costs & Timing (incl. Marking Boundaries)" Surveying Services <www.surveyingservices.co.nz>.

104 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 117.

105 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 117.

106 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 118.

107 Ministry of Business, Innovation and Employment "The Provincial Growth Fund" <www.growregions.govt.nz>.

108 Ministry of Business, Innovation and Employment "Māori Economic Development" <www.growregions.govt.nz>.

109 See "Accelerating Māori economic aspirations" in Ministry of Business, Innovation and Employment "Funding Allocation" <www.growregions.govt.nz>.

110 *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167) at [19].

to drainage, electricity and water were outstanding issues when landlocked lands were eventually unlocked.[111] The Amendment Act 2002 brought legislative mechanisms for Māori to access their land, but policy considerations failed to ensure these mechanisms could be reached.

B. Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020

1. Key changes

The Amendment Act 2020 made a few key changes to the landlocked land provisions. First, per s 326A the definition of reasonable access was replaced. The new provision now states:[112]

> reasonable access means physical access to land for persons or services that is of a nature and quality that are reasonably necessary to enable the owner or occupier to use and enjoy the land.

In effect, reasonable access broadened the scope for some cases to include vehicle access. Therefore, decisions such as *Houpapa* where foreshore access was considered "reasonable" may have been decided differently under this new provision.[113] Second, the consideration under s 326B(4)(a) was clarified. Third, under s 326B(4)(d), the MLC can have regard to two additional considerations when determining whether an order for reasonable access should be made. The additional limbs under s 326B(4)(d) include:

> (da) the relationship that the applicant has with the landlocked land and with any water, site, place of cultural or traditional significance, or other taonga associated with the land; and
>
> (db) the culture and traditions of the applicant with respect to the landlocked land.

The additional limbs under s 326B(4)(d) will enable greater weight to be placed on the cultural relationship between Māori and their land. Fourth, judgments from the MLC can now be appealed to the Māori Appellate Court, as opposed to the High Court.

2. Adequacy of the changes

The new reasonable access provision allows the MLC to consider whether the access will allow owners to act upon commercial and cultural obligations or opportunities that they may have with the land. This will be favourable for Māori landowners and trustees looking to pursue business ventures with underutilised land. The new s 326B(4)(d) considerations will assist the recognition of landlocked urupā as a compelling reason to order reasonable access. This provision should, in turn, recognise access to wāhi tapu as a significant site that whānau connect, visit and exercise kaitiakitanga.[114] The appeal rights to the Māori Appellate Court will avoid the costs associated with the High Court and will ensure Māori landlocked claims are heard by a court with expertise in Māori land and tikanga principles.

These changes are a positive step, however, they do not adequately address the cost barrier for landlocked Māori landowners. Even with the success of the "reasonable access" definition, and the considerations under s 326B(4)(d), the applicant is still burdened by costs under s 326C.

111 (28 May 2002) 601 NZPD 16632.

112 Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, s 69.

113 See *Houpapa v Woods – Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167).

114 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 123.

Comparatively, a right of appeal to the Māori Appellate Court will not favour those unable to get to the MLC. The appeal amendment, however, will bring a positive change for Māori owners who are able to bring an application forward and are subsequently unsuccessful. The removal of the High Court cost will encourage those to pursue a more affordable appeal alternative.

The Amendment Act 2020 reemphasises the inability to recognise the fundamental issues with landlocked Māori land. Both amendments to the TTWMA have not adequately considered the implications of landlocked land. In the second reading of the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill, Hon Nicky Wagner noted that the bill was limited in its scope and "deeply disappointing" that major concerns such as landlocked lands were "not tackled comprehensively".[115] The changes made in 2020 will only be impactful once Māori landowners have support to take on the responsibility of compensation, maintenance and development fees under s 326C.

V. Effect on Tangata Whenua

This part of the paper focuses on the prejudices felt by the district of Taihape, as one of the most disproportionately affected districts in relation to landlocked Māori land.

A. The Legislative Impacts Felt by Taihape

The Taihape district inquiry illustrates how the TTWMA provisions have failed to adequately allow Māori landowners to unlock their land. Taihape has deeply felt the injustices of the landlocked land provisions since the 19th century. In Taihape, landlocked land is an acute problem, with disproportionate amounts of Māori land left in a landlocked state. Of the 72,158 hectares of Māori land in the district, between 52,000 and 59,000 hectares are landlocked.[116] These statistics equate to approximately 73 per cent of Māori land being in a landlocked state. From 2016 to 2020, the Waitangi Tribunal received 46 claims from those within the Taihape district area concerning landlocked land. This led the Waitangi Tribunal to conduct a report. The pre-publication report, *He Whenua Karapotia, He Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape Inquiry District*, was released on 18 January 2024.

To understand the prejudice felt by those within the Taihape region, it is important to understand the nature and significance of the land. The Taihape: Rangitīkei ki Rangipō district stretches along the west of the Ruahine and Kāweka Ranges and to the south of the Kaimanawa Mountains. The district is home to Aorangi Maunga, enriched with cultural historical, spiritual and historical values highly valued by tangata whenua, and the Rangitīkei River. The nature of the landlocked land within the district is described as high altitude "mountainous" lands.[117]

Since the Amendment Act 2002, the Taihape district has had three claims made under s 326 of the TTWA,[118] of which none succeeded. The number and outcome of claims illustrate the shortfall of the TTWMA for Māori landowners in the district. Claimants have had to live with the burden of

115 (24 June 2020) 747 NZPD 19140.

116 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 6.

117 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 12.

118 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 47.

these landlocked lands, impacted by the loss of economic development, the loss of access to wāhi tapu and further alienation.

1. Limited economic development

From the 1870s, whānau and hapū in the Taihape region were heavily involved with sheep farming.[119] This saw a steep decline in the 1890s as a result of significant financial costs, and the alienation and partition of lands into the 20th century.[120] Following partition, the majority of Māori land left within the region was mountainous and impractical for agriculture. Without economic opportunities, Māori had to rely on wage labour. Moving into the late 20th century, Māori tribes looked to utilise these lands through different means, such as the Ōwhāoko block's honey production, deer farming, trophy hunting, and timber. Some ventures enjoyed economic success; however, for others, poor access created severe cost limitations.[121] Arrangements to collect honey crops involved a convoy of helicopters costing up to $100,000.[122] Helicopter services have been described as "sobering", costing around $2,500 per hour.[123] These extortionate costs have thwarted any economic potential.

2. Loss of access to Wāhi tapu

Some of the landlocked lands hold wāhi tapu sites that tangata whenua have had significant difficulty accessing. This has impeded their ability to connect, visit and exercise kaitiakitanga over these sites. Landlocked wāhi tapu also includes the urupā near Opaea Marae, with access being permitted by whānau relatives. This issue was also acknowledged by the Tribunal in *He Kura Whenua ka Rokohanga*, where the lack of access to wāhi tapu and urupā has displaced vital cultural connections and alienated those seeking to fulfil their obligations as kaitiaki.[124]

3. Further alienation of Māori land

Inaccessible lands are more prone to alienation. Some landlocked lands have been sold or leased to neighbouring landowners who could create access through their own block. Within the Taihape district, this occurred to both the landlocked block Awarua 2C8 and Rangipō–Waiū B1 block.[125] The Crown accepted in submissions that 17 blocks in the district were sold between 1912 and 1975 due to inaccessibility.[126] This is unsurprising given that until the early 2000s, landlocked Māori landowners were still obliged to pay rates on their land. The subsequent alienation was not only felt in Taihape. In the *Wairarapa ki Tararua* Report, the Tribunal noted that difficulties faced by Māori

119 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 121.

120 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 121.

121 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 122.

122 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 122.

123 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 122.

124 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 124.

125 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 128.

126 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 129.

landowners would lead them to selling the land.[127] The *Te Rohe Pōtae* Tribunal highlighted that often the only alternative for owners of landlocked Māori land was to sell to adjoining owners.[128] Further alienation due to landlocked status has been suffered in Taihape and across New Zealand.

The TTWMA has been ineffective in assisting Māori landowners to unlock their lands. Taihape is just one example of the many districts in New Zealand that have suffered. The Taihape district inquiry reveals that landlocked Māori land represents far more than a mere access issue. It is a profound injustice that has inflicted lasting hardship on countless hapū and whānau.

VI. Proposed Solutions

The Tribunal in *He Whenua Karapotia, he Whenua Ngaro* concluded that practically, the "TTWMA alone is not and could never be an adequate remedy."[129] Although the Tribunal's recommendations are specific to the district of Taihape, aspects of its recommendations will be useful in a wider application. In its report, the Tribunal recommended that the Crown establish a "contestable fund", governed by a komiti or board and supported by a commission.[130] Some aspects of how this fund was proposed to be implemented are outlined below:

(a) The komiti should comprise experienced, skilled Māori members, not associated with the hapū of the land in question.[131]

(b) The fund must be supported by the tangata whenua of the Taihape district.[132]

(c) Bodies with shared crown responsibility for the fund should be the Ministry of Business, Innovation and Employment, Te Arawhiti, and Te Puni Kōkiri.[133]

(d) The fund shall assist Māori landowners to seek an access order through the MLC. This funding shall be feasible. In some cases this may require a feasibility study on whether an order for access will be funded.[134]

(e) The fund should enable applicants to object to funding decisions by a way of an appeal.[135] This would encompass a panel review, chaired by a MLC judge. These appeals shall be conducted in accordance with the usual claim process, including witnesses, evidence under affirmation, and written decisions. Any appeals may subsequently be made to the Māori Appellate Court.

127 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 129.

128 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 129.

129 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 168.

130 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 174.

131 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 179 (see point 1).

132 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180 (see point 2).

133 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180 (see point 3).

134 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180 (see point 6).

135 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180 (see point 7(a) and (b)).

Other considerations noted by the Tribunal included: the ability of the MLC to review komiti decisions;[136] funding being available for lasting initial access, with ongoing work supported by Te Puni Kōkiri;[137] and reasonable access determined on a case-by-case basis.[138] However, not all land will be practical to unlock; "sliver like" blocks may have disproportionate costs associated with access.[139] The details of this contestable fund are district-specific, and will not capture all landlocked Māori lands across New Zealand. However, the intention and basic features of the framework may be useful in reaching a nationwide solution.

Contestable funds are by no means a new solution. The High Country Tenure Review resulted in the Crown spending approximately $117 million over 25 years to purchase back pastoral leasehold rights from 330,000 hectares.[140] Similarly, under the Māori Reserved Land Amendment Act 1997, $142.5 million was paid to fairly reflect market value.[141] However, the costs of addressing landlocked lands are likely to be extremely high. In *He Whenua Karapotia, he Whenua Ngaro*, a technical witness noted that constructing a road to provide access could cost "[m]any, many, many" millions of dollars.[142] Furthermore, there is limited research beyond the Taihape district inquiry. As stated by the Tribunal in *He Kura Whenua ka Rokohanga*, access to information surrounding the extent of the issue is "obviously essential" before any real solution can be found.[143] Accordingly, the first step must be to identify the extent of the problem through thorough investigation before establishing a fund.

A key limitation of a contestable fund is the lack of certainty. First, there is no clarity around how the fund will be apportioned between claims of significantly different costs. Second, the Tribunal has not discussed how claims will be prioritised. Although Taihape cannot "be unlocked at once",[144] applications may be deprioritised or delayed, and the komiti would need to act cautiously to ensure prioritisation does not perpetuate existing inequities. Third, a contestable fund does not guarantee Māori landowners access to their lands, and such contestability and appeal rights may create further delay. Despite these limitations, the contestable fund is the most pragmatic solution in resolving these issues.

Taking a district-centric approach is likely to be successful on a nationwide scale, implementing bodies within the community of tangata whenua who are affected. Smaller scale funds accessible to those within the community are likely to be more successful than a nationwide fund, as evidenced by the inadequacy of past funds. Alongside the Whenua Māori Fund and the Provincial

136 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180.

137 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 180.

138 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 181.

139 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 182.

140 Ann Brower "A Case of Using Property Rights to Manage Natural Resources" (2017) 1(1) Case Studies in the Environment 1 at 2.

141 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 173.

142 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 172.

143 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 244.

144 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 173.

Growth Fund, the Te Ture Whenua Māori Network was introduced in May 2015 to help Māori landowners improve the productivity of their land, with $12.8 million aimed at targeted regions such as Northland, the East Coast, Bay of Plenty, Manawatu and Whanganui.[145] Although this fund assisted other aspects of Māori land, landlocked lands were overlooked. Collectively, these funds demonstrate broad funding approaches are ineffective in addressing the distinct challenges of landlocked land.

Alternative measures have been considered by Te Puni Kōkiri and the Māori Affairs Committee. Te Puni Kōkiri advised that they would seek an agreement between the Department of Conservation and the New Zealand Defence Force to provide access to landlocked lands bordering government-owned land.[146] This does not address the majority of landlocked lands bordering private land but may still help some Māori landowners. In 2020, Hon Nanaia Mahuta MP suggested removing the charge imposed on land for survey costs to strengthen retention of inaccessible Māori land.[147] Until sufficient research has been conducted, smaller initiatives such as removing surveying costs and assistance with legal costs are likely to be more feasible than a large contestable fund.

VII. Recommendations

A fund initiative is essential to ensure landlocked Māori land is adequately supported. However, before access can be readdressed, there must be sufficient research undertaken. This research needs to investigate where the remainder of landlocked Māori land is in New Zealand and the extent of the problem. This will provide clarity to the Ministry of Business, Innovation and Employment, Te Arawhiti, and Te Puni Kōkiri and enable an extensive funding plan to be put in place targeting the identified communities. If the Waitangi Tribunal's proposed framework of a contestable fund in Taihape is implemented by the Crown, this will act as an excellent pilot project and can serve as a model for a New Zealand-wide implementation.

Overall, the landlocked provisions within the TTWMA are fit for purpose. This paper has highlighted the unfavourable costs which arise under s 326C; however, it would be impractical to remove these conditions as they are fundamental to balance the interests between access and the respondent's exclusive property rights. The new provisions under the Amendment Act 2020 should make the application processes more favourable for Māori landowners. The requirement for vehicle access under s 326A should alleviate the threshold of "reasonable access" and the limbs under s 326B(4)(d) should broaden the MLC's scope, particularly for those in Taihape who have incurred loss of access to wāhi tapū. Based on these considerations, the legislation in its current form is adequate; however, until Māori landowners have the financial means to access these provisions, the benefits remain dormant.

The Waitangi Tribunal's recommendation of a contestable fund is likely to be the most realistic solution for landlocked Māori land going forward. However, other areas of funding which are potentially unexplored could include smaller scale funds aimed to support Māori landowners into a position where they can make an application to the MLC. For example, a fund targeting initial surveying costs and legal costs.

145 Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 242.

146 Waitangi Tribunal *He Whenua Karapotia, he Whenua Ngaro: Priority Report on Landlocked Māori Land in the Taihape District* (Wai 2180, 2024) at 169.

147 (24 June 2020) 747 NZPD 19140.

VIII. Conclusion

In conclusion, the failure of the Crown in the 19th century to ensure lands were accessible when sold and partitioned has resulted in Māori landowners enduring unjustifiable prejudices. It was not until the Property Law Amendment Act 1975 that landlocked landowners could apply for access, and barriers such as High Court costs and consent obligations made it difficult for Māori landowners to do so. The most radical legislative change was the Te Ture Whenua Māori Amendment Act 2002; however, this has been insignificant in assisting access as a direct consequence of limited financial support. The Amendment Act 2020 will support applications for reasonable access, but for these legislative changes to have a positive effect, financial assistance is vital. The legal provisions governing landlocked land under the TTWMA are adequate, but insufficient for Māori landowners in the absence of financial support.

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Quasi-Punishment Without Treatment: Mental Health and the Structural Limits of New Zealand's Returning Offenders Regime

Te Āhua-Whiu me te Kore Maimoatanga: Te Hauora Hinengaro me te Herenga Hanganga o te Tikanga Whakahaere i ngā Tāngata Hara e Hoki Mai ana

Jasmine McTavish

This article examines the structural failure of Aotearoa New Zealand's legal framework governing the reintegration of deported offenders with mental illness. Returning Offenders (Management and Information) Act 2015 (ROMIA)[1] is formally classified as a civil regime. It imposes coercive, surveillance-based conditions analogous to criminal punishment, without the therapeutic safeguards typically associated with penal systems. This disjunction is particularly acute for individuals deported to New Zealand following decisions made under s 501 of the Migration Act 1958 (Cth),[2] many of whom present with complex and untreated psychiatric conditions.

Drawing on statutory analysis, case law, and empirical literature, this article advances a central claim: ROMIA operates as a quasi-penal regime that is incompatible with its civil classification due to its failure to incorporate mandatory mental health assessment, treatment pathways, or transnational care continuity. This structural omission undermines both individual rights and public safety by displacing, rather than managing, psychiatric risk.

Comparative analysis demonstrates that integrated, health-informed models are both feasible and effective. The article concludes that meaningful reform requires reconceptualising reintegration as a clinically informed legal process. Without such reform, the current regime risks perpetuating cycles of exclusion, reoffending, and systemic harm.

I. Introduction

A man is deported to Aotearoa New Zealand under s 501 of the Migration Act 1958 (Cth) after spending most of his life in Australia. Having left New Zealand as a young child, he returns to a country in which he has no meaningful social ties, limited cultural familiarity, and no established access to mental health services. His psychiatric history remains unassessed and uncommunicated. Within months, he reoffends.

This scenario is not exceptional. Between 2015 and 2025, 3,587 individuals were deported from Australia to Aotearoa New Zealand. Of these, 2,242 individuals (approximately 62.5 per cent) were subsequently linked to offending behaviour, generating a total of 27,697 alleged offences following

1 Returning Offenders (Management and Information) Act 2015.

2 Migration Act 1958 (Cth), ss 201 and 501.

their return.[3] These figures raise a fundamental question: does New Zealand's reintegration framework reduce risk, or does it reproduce it?

Taken together, these patterns indicate that post-return offending is not an aberration, but a systemic outcome of the current reintegration model. In the absence of coordinated mental health assessment and support, instability is not mitigated but reproduced, manifesting in persistent, low-level offending and regulatory non-compliance.

For the purposes of this analysis, individuals "linked as an offender" refers to those recorded in official justice datasets as having allegedly committed offences following their return to Aotearoa New Zealand. This classification does not necessarily indicate conviction but provides a consistent measure of post-return system contact.

This article argues that Returning Offenders (Management and Information) Act 2015 (ROMIA) is structurally incapable of achieving its stated objectives. Although framed as a civil regulatory regime, it imposes coercive, surveillance-based conditions analogous to punishment while omitting the therapeutic safeguards that typically accompany such restrictions. This produces a fundamental incoherence: a quasi-penal system operating without clinical infrastructure.

The argument proceeds in five parts. Part II establishes the relationship between mental illness, reintegration failure, and recidivism, incorporating empirical data on post-return offending. Parts III–VI analyse the Migration Act 1958 (Cth), ROMIA, and the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCATA),[4] demonstrating how their interaction produces systemic gaps. Part VII evaluates comparative models before proposing reform.

II. Mental Health, Reintegration, and Recidivism

A critical foundation for evaluating deportation policy is the established relationship between mental illness, reintegration failure, and recidivism. Empirical literature consistently demonstrates that untreated psychiatric conditions significantly increase the likelihood of reoffending, particularly in the absence of stable housing, social support, and clinical care. In New Zealand, approximately 62 per cent of prisoners are estimated to experience mental health or substance use disorders,[5] reflecting a substantial overlap between psychiatric vulnerability and criminal justice involvement.

Desistance theory further emphasises that cessation of offending is not a singular event, but a process requiring psychological stability, social integration, and identity transformation.[6] Untreated mental illness disrupts each of these stages, reinforcing criminogenic risk factors and limiting the capacity for sustained reintegration.[7] Where support structures are absent, individuals are more likely to revert to learned behaviours, particularly those developed within custodial environments.

These theoretical insights are reflected in empirical data relating to deportees. As mentioned above, between 2015 and 2025, 3,587 individuals were deported from Australia to Aotearoa New Zealand. Of these, 2,242 individuals, approximately 62.5 per cent, were subsequently linked

3 New Zealand Police "Request for data relating to returning offenders and reoffending rates" (received under the Official Information Act 1982, 24 June 2025).

4 Mental Health (Compulsory Assessment and Treatment) Act 1992.

5 Devon Indig, Craig Gear and Kay Wilhelm *Comorbid Substance Use Disorders and Mental Health Disorders Among New Zealand Prisoners* (Department of Corrections, June 2016) at v.

6 Beth Weaver "Understanding Desistance: A Critical Review of Theories of Desistance" (2019) 25 Psychol Crime & Law Journal 641 at 650.

7 Marianne Bevan "Desistance from crime: A review of the literature" (2015) 3 New Zealand Corrections Journal 5 at 6.

to offending behaviour following their return, generating a total of 27,697 alleged offences.[8] This high rate of post-return offending provides a critical empirical foundation for assessing the effectiveness of New Zealand's reintegration framework.

The demographic composition of deportees further highlights structural inequities. Māori comprise the largest group (1,474 individuals), followed by Europeans (1,409) and Pasifika peoples (789). This distribution mirrors broader patterns of overrepresentation within the criminal justice system, indicating that transnational deportation practices extend, rather than disrupt, existing disparities. The reintegration framework therefore operates within, and contributes to, a context of entrenched inequality.[9]

Psychological treatment, particularly cognitive behavioural interventions, can reduce reconviction rates by 10–40 per cent among high-risk individuals, particularly when targeted at those most likely to reoffend.[10] These offenders, responsible for a disproportionate share of violent and repeat crime, should be central to rehabilitative policy. Yet those deported under s 501 and managed under ROMIA typically arrive in New Zealand without screening, treatment continuity, or integrated reintegration planning. The result is a legislative vacuum where mental health needs are both foreseeable and unaddressed.

The offence profile challenges assumptions that returning offenders primarily pose serious violent threats. While high-harm offending is present, including homicide (30 individuals) and sexual offending (126 individuals), the data is dominated by high-volume, lower-level offending categories. Theft alone accounts for 5,378 alleged offences, followed by offences against justice procedures and orders (4,222), traffic and vehicle offences (3,384), and assault (3,302).[11]

This pattern is significant. The prevalence of lower-level and repeat offending suggests instability, rather than exclusively entrenched violent criminality. In particular, the large number of offences against justice procedures indicates that a substantial proportion of post-return offending arises from non-compliance with supervisory conditions. This is consistent with regulatory breach behaviour, rather than independent criminal intent.

These trends align with established research on populations with untreated mental illness, where instability, impulsivity, and lack of support contribute to cycles of persistent, low-level offending.[12] The data therefore support a broader structural conclusion: post-return offending is not simply an individual failure, but a predictable outcome of a system that prioritises surveillance over support.

Within this context, the absence of mandatory mental health assessment, treatment pathways, and continuity of care is not a neutral omission. It represents a structural gap that undermines both rehabilitation and public safety. Rather than managing psychiatric risk, the current framework displaces it into the community, where it re-emerges in the form of reoffending.

8 New Zealand Police "Request for data relating to returning offenders and reoffending rates" (received under the Official Information Act 1982, 24 June 2025).

9 New Zealand Police "Request for data relating to returning offenders and reoffending rates" (received under the Official Information Act 1982, 24 June 2025).

10 Harry Love *Best Use of Psychological Service Treatment Resources* (Department of Corrections) <www.corrections.govt.nz>.

11 New Zealand Police "Request for data relating to returning offenders and reoffending rates" (received under the Official Information Act 1982, 24 June 2025).

12 Adrian TA West and others "Continuity of Mental Health Care and Recidivism in Justice-Involved Populations: A Systematic Review" (2022) BMC Psychiatry.

III. Migration Act 1958 (Cth)

Section 501 of the Migration Act 1958 (Cth) grants the Minister for Home Affairs wide discretion to cancel or refuse visas if a person fails the so-called "character test." While originally intended to exclude individuals posing genuine threats to the community,[13] the provision has evolved into a sweeping removal mechanism that disproportionately affects long-term residents of New Zealand citizenship. Between 2014 and 2024, it was estimated that over 3,000 individuals were deported from Australia to New Zealand under s 501,[14] the majority for character-related reasons. A significant number had lived in Australia since childhood: over 36 per cent had left Aotearoa before age 20, including 6 per cent who departed before age nine.[15]

Critically, the character test does not require decision-makers to consider psychiatric vulnerability or the likelihood of reoffending upon return. There is no mandatory requirement to meaningfully weigh psychiatric vulnerability, or to ensure that the receiving state can manage serious psychiatric conditions. Deportation can proceed even where an individual poses minimal current risk but has a historic conviction or association that fails the character threshold. This disregard for mental health has profound consequences for both human rights and public safety.[16]

The scheme has been widely criticised for its procedural deficiencies. Deportees are often removed without full merits review, particularly when the Minister personally exercises discretion under s 501(3),[17] precluding oversight by the Administrative Appeals Tribunal. Judicial review remains technically available but is narrow in scope and structurally unsuited to addressing complex psychiatric or reintegration concerns. As a result, many individuals are deported without any effective legal pathway to challenge their removal on mental health, family, or rehabilitation grounds.

This omission is concerning given the known prevalence of mental illness in offender populations, up to five times higher than in the general community. In Australia alone, 8 per cent of male and 14 per cent of female prisoners have been diagnosed with psychotic disorders.[18] The trauma of forced removal, compounded by untreated psychiatric conditions, creates a high-risk reintegration profile. Clinical psychiatrists have condemned the conflation of mental illness with character defects under s 501, as both discriminatory and morally wrong.[19]

Deportation is typically executed without adequate transition planning. Clinical care is neither coordinated nor guaranteed between jurisdictions, and there is no consistent or mandatory mechanism under the Migration Act 1958 (Cth) which requires the Australian Government to share medical records with New Zealand authorities. As a result, returnees may arrive without prescriptions, mental health assessments, or safety planning. For individuals with undiagnosed

13 Migration Act 1958 (Cth), s 501.

14 "Rate of 501 deportations to New Zealand dropping – police figures" (30 October 2023) Radio New Zealand <www.rnz.co.nz>.

15 Julie Artus and others "Australia's unethical deportation practice discriminates against New Zealanders with mental illness: 'Everybody needs good neighbours!'" (2023) 11 Aust NZ J Psychiatry at table [1].

16 Australian Human Rights Commission *Background Paper: Immigration Detention and Visa Cancellation under s 501 of the Migration Act 1958 (Cth)* (March 2010) <www.humanrights.gov.au>.

17 Migration Act 1958 (Cth), s 501(3).

18 James RP Ogloff and others "The identification of mental disorders in the criminal justice system" (2007) 334 AIC at 2.

19 Julie Artus and others "Australia's unethical deportation practice discriminates against New Zealanders with mental illness: 'Everybody needs good neighbours!'" (2023) 57 Aust NZ J Psychiatry 1410.

schizophrenia, Post-Traumatic Stress Disorder (PTSD), or complex trauma, this absence of care is not merely negligent; it is legally and clinically destabilising.

The proposed Migration Amendment (Strengthening the Character Test) Bill 2019[20] would have further expanded the circumstances in which visas could be cancelled on character grounds. Although the Bill was ultimately defeated in the Senate, it reflected a broader policy trajectory towards increasingly stringent character-based deportation powers. Yet the law still remains silent on how psychiatric risk is to be identified, mitigated, or communicated across borders. There is no statutory obligation to coordinate with receiving states or to ensure mental health continuity upon arrival.

While clinical literature consistently highlights the urgent need for early intervention, structured mental health responses, and reintegration planning in criminal justice contexts,[21] the Migration Act 1958 (Cth) stands entirely outside this evidence base. The Migration Act 1958 (Cth) does not merely facilitate removal; it externalises unmanaged psychiatric and social risk to the receiving state without corresponding safeguards. By failing to require mental health assessment, treatment continuity, or meaningful information sharing, the regime displaces responsibility rather than resolving it. In doing so, it transforms what is fundamentally a clinical and social issue into a downstream criminal justice problem for Aotearoa New Zealand.

IV. The Returning Offenders (Management and Information) Act 2015 (ROMIA)

ROMIA was enacted to monitor individuals deported to Aotearoa New Zealand following overseas imprisonment, primarily under Australia's s 501 regime. Upon return, individuals are subject to mandatory and discretionary conditions mirroring the Parole Act,[22] including electronic monitoring,[23] substance restrictions, curfews, and mandatory reporting within 72 hours.[24] However, despite these parallels, ROMIA's civil framework lacks the procedural safeguards and rehabilitative services integral to parole supervision.[25]

The structure of ROMIA reveals a fundamental inversion of rehabilitative logic. While the regime imposes conditions designed to manage risk, it omits the clinical mechanisms necessary to reduce that risk at its source. Surveillance substitutes for treatment, and compliance replaces recovery as the primary metric of success. As a result, the system monitors instability without addressing its underlying causes, increasing the likelihood that risk will re-emerge in the form of reoffending.

While the Parole Act explicitly integrates risk assessment and rehabilitation, including structured mental health assessments and access to treatment, ROMIA does not require or facilitate the

20 Migration Amendment (Strengthening the Character Test) Bill 2019 (Cth).

21 Harry Love *Best Use of Psychological Service Treatment Resources* (Department of Corrections) <www.corrections.govt.nz> at 1.

22 Parole Act 2002.

23 Department of Corrections "FAQs for Returning Offenders" (Jan 2019) <www.corrections.govt.nz>.

24 Returning Offenders (Management and Information) Act 2015, s 25(b).

25 How does ROMIA 2015's framework for managing returning offenders compare with parole supervision under the Parole Act 2002, especially regarding procedural safeguards and rehabilitative services (Obtained under the Official Information Act 1982 Request to the Ministry of Justice).

collection, transfer, or consideration of psychiatric information.[26] Although a 2015 Memorandum of Understanding (MoU)[27] between NZ and Australian agencies enables Trans-Tasman information exchange, its scope is limited. The MoU primarily covers biometric data, conviction history, and corrections information, but excludes mental health records and clinical risk assessments unless explicitly referenced in sentencing or parole documentation.

New Zealand officials may request mental health information from the Australian Border Force (ABF) on arrival, but the ABF is not mandated to collect or share such data. According to an OIA response from Health NZ, the ABF Health Team may initiate a mental health assessment upon deportee arrival, with any discharge summary triaged by a Health NZ Coordinator and the Acute Mental Health Team at Health NZ Counties Manukau. If required, a clinical assessment may be arranged.[28] However, there is no statutory requirement for a formal psychiatric evaluation, nor are there any mandatory assessment processes in place for returning offenders who may have an undiagnosed or undisclosed disorder. The lack of systematic screening means access to mental health care relies on discretionary action or the visible instability of the returnee, with New Zealand Police sometimes contacting the Acute Mental Health Team if a returnee appears acutely unwell. Even then, triage is conducted via telephone using the Health NZ Mental Health Telephone Triage Scale. Health New Zealand | Te Whatu Ora confirmed it is unable to determine how many returning offenders received a mental health assessment without substantial manual collation.[29] This ad hoc and reactive model results in significant gaps in care, where serious psychiatric needs may go unidentified and untreated.

This omission structurally disables ROMIA's rehabilitative capacity. With no statutory obligation to obtain or act on psychiatric data, authorities must rely on voluntary disclosure, an unreliable method that displaces state responsibility onto individuals already in crisis. The absence of clinical continuity not only increases distress but also raises recidivism risk. According to the Department of Corrections' 2019 report, individuals with mental health problems are more likely to reoffend due to a lack of support systems and effective treatment during reintegration.[30] The Department of Corrections has also acknowledged that offenders with untreated mental illness are significantly more likely to reoffend, particularly where surveillance is substituted for support.[31]

OIA responses from the Ministry of Justice, Corrections, and Police reveal an absence of centralised data on breaches, enforcement actions, mental health referrals, and electronic monitoring compliance under ROMIA. These data deficiencies hinder evaluation of ROMIA's impact on recidivism and mental health outcomes, complicating legislative reform or systemic improvement.

The high prevalence of offences against justice procedures and orders suggests that a substantial proportion of post-return offending arises from non-compliance with supervisory conditions. This

26 Mental Health Assessments of Returning Offenders – Any mandatory assessment processes in place for this population (Obtained under Official Information Act 1982 Request to Health New Zealand | Te Whatu Ora).

27 Beehive "Joint Statement by Prime Ministers Hon Tony Abbott and Rt Hon John Key" (press release, 1 March 2015).

28 Mental Health Assessments of Returning Offenders – How assessments were initiated (Obtained under Official Information Act 1982 Request to Health New Zealand | Te Whatu Ora).

29 Access to Mental Health Treatment – Data on the number of returning offenders diagnosed with mental health conditions, and: The proportion who received mental health treatment; (Obtained under Official Information Act 1982 Request to Health New Zealand | Te Whatu Ora).

30 Department of Corrections "New Zealand's Six Pillar Model of reintegration and international reintegrative models: A review of the literature" (July 2019) <www.corrections.govt.nz>.

31 Brendan Antiss *The Effectiveness of Correctional Treatment* (Department of Corrections, April 2007).

indicates that the regime itself contributes to criminalisation, as individuals are cycled through enforcement processes for breach behaviour that may be symptomatic of underlying instability rather than deliberate criminal intent.

This structural silence has tangible consequences. In *Chief Executive of the Department of Corrections v Harris*,[32] a returning offender subject to ROMIA conditions reoffended after release, in part due to unaddressed psychiatric issues. The court imposed a 10-year Extended Supervision Order with 24-hour monitoring, underscoring ROMIA's overreliance on control measures rather than clinical support. While not centred on mental health, the case of *Commissioner of Police v G*[33] illustrates that ROMIA's retrospective application imposed a penalty in breach of legal protections, though the Court of Appeal later upheld the law's civil character. In *Chief Executive of the Department of Corrections v Chisnall*,[34] the Court of Appeal considered whether the imposition of conditions without fresh offending violated basic justice norms, particularly in cases involving mental health impairment.

The New Zealand Law Society has expressed concern about the psychological toll of ROMIA, noting that constant surveillance and stigma exacerbate pre-existing mental health conditions.[35] By treating returning offenders as risks to be managed rather than individuals in need of care, ROMIA entrenches social exclusion and undermines desistance.

In summary, ROMIA creates a civil regime of control without therapeutic substance. The absence of statutory mental health safeguards, despite a formalised MoU intended to improve intergovernmental information flow, reveals a system that displaces rather than manages risk. Reintegration is thereby reduced to compliance, not recovery, with consequences borne by both returnees and the communities to which they return.

V. Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCATA)

MHCATA provides the legal framework for compulsory psychiatric assessment and treatment in Aotearoa New Zealand. It is designed to balance individual rights with the need to address serious mental health concerns, ensuring that treatment is only imposed when strictly necessary and that procedural safeguards are followed. MHCATA also consolidates and reforms laws related to the assessment of individuals suffering from mental disorders.[36]

A. Application to Returning Offenders

While MHCATA applies to all individuals in Aotearoa, including deportees, it is not systematically triggered upon return under ROMIA. The gap between legislative intention and operational practice is significant. Although MHCATA provides avenues for compulsory assessment, its use in the context of returning offenders is highly discretionary, reliant on visible distress, police referrals, or third-party concerns rather than routine clinical screening. As confirmed by a Health NZ OIA

32 *Chief Executive of the Department of Corrections v Harris* [2021] NZHC 897.
33 *Commissioner of Police v G* [2023] NZCA 93, [2024] 3 NZLR 116.
34 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110.
35 New Zealand Law Society "Submission to the Justice Committee on the operation of the Returning Offenders (Management and Information) Act 2015" at [2].
36 Mental Health (Compulsory Assessment and Treatment) Act 1992 at title.

response, there is no standardised protocol requiring mental health triage or evaluation upon a person's arrival under ROMIA.

Instead, mental health intervention is ad hoc: ABF may alert New Zealand officials if they observe psychiatric risk, but are not mandated to assess mental health or share clinical histories.[37] Upon arrival, if an individual is immediately detained in a prison, treatment centre or a residence under a public protection order, then MHCATA can apply. A superintendent or authorised officer may request an assessment if there are reasonable grounds to believe the person is mentally disordered.[38] If the offender is transferred for an assessment, they remain in the institution's legal custody unless formally admitted for treatment. Compulsory treatment orders can be issued but do not interfere with ongoing criminal proceedings. Although this section highlights procedural safeguards for detained prisoners needing mental health treatment, it also underscores gaps in ROMIA, where similar mental health considerations upon arrival should apply to all prisoners under deportation notice, not just those in institutions deemed eligible for assessment by an officer or superintendent. This comparison shows the oversight in mental health support under current legislative frameworks for returning offenders, emphasising the need for such mechanisms in ROMIA to improve rehabilitation and reduce recidivism.

Moreover, ROMIA lacks any legislative mechanism to initiate compulsory psychiatric assessment unless another actor (e.g., Police or Corrections) activates the MHCATA process. This reactive approach risks missing high-need individuals who do not present with overt behavioural symptoms. As noted in the Department of Corrections' reports and echoed in the 2025 OIA responses, untreated psychiatric disorders among returning offenders correlate strongly with recidivism and social exclusion.

B. Jurisprudence and Legislative Gaps

The consequences of these omissions are visible in case law. *In Chief Executive of the Department of Corrections v Harris,*[39] the offender's untreated psychiatric condition contributed to serious reoffending, resulting in a ten-year Extended Supervision Order. The court acknowledged the inadequacy of existing support mechanisms. Likewise, in *Commissioner of Police v G*,[40] and *Chief Executive of the Department of Corrections v Chisnall*,[41] the courts were asked to reconcile ROMIA's civil nature with its punitive effects, particularly for individuals with psychiatric impairments. However, without statutory compulsion to assess or treat such impairments, courts have limited capacity to intervene before harm occurs.

Advocacy groups, alongside mental health professionals, have long supported the development of a Therapeutic Jurisprudence framework, including the introduction of mental health courts to divert individuals away from criminal sanctions and into clinical treatment.[42] Such courts operate in Australia and the United States, and pilot models have shown reductions in recidivism and improved mental health outcomes. The New Zealand Law Commission has also recommended

37 Mental Health Assessments of Returning Offenders – Any mandatory assessment processes in place for this population (Obtained under Official Information Act 1982 Request to Health New Zealand | Te Whatu Ora).

38 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 45(2).

39 *Chief Executive of the Department of Corrections v Harris* [2021] NZHC 897.

40 *Commissioner of Police v G* [2023] NZCA 93, [2024] 3 NZLR 116.

41 *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126, [2020] 2 NZLR 110.

42 Changing Minds "Mental health court and therapeutic jurisprudence" (October 2021) <www.changingminds.org.nz>.

embedding therapeutic principles into sentencing and post-release frameworks.[43] However, these recommendations remain unrealised in the context of the legislation pertaining to returning offenders.

The limitations of MHCATA do not arise from deficiencies within the Act itself, but from its lack of integration with the broader reintegration framework. In practice, access to compulsory assessment is triggered by visible crisis or third-party intervention, rather than systematic identification of need. This reactive model fails to capture individuals whose conditions manifest through instability rather than acute episodes, leaving a significant cohort without meaningful clinical oversight until risk escalates to a crisis point.

VI. Transnational Mental Health Data Sharing and Privacy Concerns

One of the most significant gaps in the reintegration process is the lack of coordinated transnational sharing of mental health data between Australia and New Zealand. While ROMIA facilitates the exchange of biometric, criminal, and corrections information under the 2015 MoU, mental health records and clinical risk assessments are excluded unless explicitly referenced in sentencing or parole documentation.

This lack of formal coordination creates a serious risk to continuity of care. Individuals often arrive in New Zealand without access to their prior diagnoses, prescribed medications, or treatment plans, which delays clinical responses and exacerbates the risk of harm to themselves and others. The trauma associated with deportation, including the use of restraints, public exposure, and the severing of familial and cultural ties, has been shown to heighten rates of depression, anxiety, and post-traumatic stress among deportees[44] and violate human rights.[45] In the absence of relevant health information, frontline services are ill-equipped to respond to these needs,[46] placing further strain on an already overburdened mental health system and increasing the likelihood of reoffending.

Despite these challenges, the development of a transnational mental health data-sharing framework raises complex ethical and legal issues. Both Australia and New Zealand are subject to their respective privacy laws: the Privacy Act 1988 (Cth),[47] and the Privacy Act 2020,[48] as well as international obligations under the International Covenant on Civil and Political Rights (ICCPR).[49] Any cross-border exchange of sensitive health information must therefore include robust safeguards. These should include informed consent protocols (where possible), limits on data use and retention, encrypted and secure storage systems, independent oversight through audits or tribunals, and appeal mechanisms for individuals adversely affected by disclosure.

OIA responses from the Ministry of Justice, Department of Corrections, and Health NZ collectively reveal a concerning lack of centralised policy or tracking regarding the request, receipt, and use of mental health information for returning offenders. This administrative and legislative

43 New Zealand Law Society "Submission to the Justice Committee on the operation of the Returning Offenders (Management and Information) Act 2015" (30 January, 2017).

44 Leanne Weber and Sharon Pickering *Exporting risk, deporting non-citizens* (1st ed, Routledge, United Kingdom, 2012) at 118.

45 Shahram Khosravi "Sweden: Detention and Deportation of Asylum Seekers" (2009) 50 Race & Class 38.

46 Shahram Khosravi "Sweden: Detention and Deportation of Asylum Seekers" (2009) 50 Race & Class 38 at 56.

47 Privacy Act 1988 (Cth).

48 Privacy Act 2020.

49 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 17.

vacuum highlights the urgent need for a consistent, transparent, and rights-compliant framework to support returnees with known or suspected psychiatric conditions.

VII. Comparative Approaches to Mental Health and Reintegration

Comparative jurisdictions demonstrate that the integration of mental health frameworks into offender management is both feasible and effective. These systems recognise that untreated mental illness is not merely correlated with offending, but often operates as a primary driver of criminal behaviour. As such, they adopt models that embed clinical intervention within supervisory frameworks, rather than treating mental health as external to risk management.

A. Australia (Domestically)

In Australia, a range of mental health diversion mechanisms operate across several states and territories, including New South Wales, Victoria, and Queensland. These mechanisms are grounded in the principles of therapeutic jurisprudence, which emphasise the law's capacity to produce either therapeutic or antitherapeutic outcomes depending on its design and implementation. Legislative frameworks such as the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)[50] enable courts to divert eligible defendants away from traditional criminal processes and into treatment-based pathways where appropriate. These mechanisms, however, are primarily embedded within the criminal adjudication stage and are directed toward sentencing and supervision within Australia's domestic justice system, rather than post-sentence removal or deportation contexts.

Empirical literature on mental health diversion programmes more broadly suggests associations between structured therapeutic interventions and reduced reoffending, as well as improved engagement with mental health services, particularly where participation is supported by coordinated case management and judicial oversight.[51] Judicial monitoring, combined with access to psychiatric care and social support services, creates a framework in which compliance is linked to treatment progression rather than purely punitive supervision. However, these therapeutic benefits are contingent upon continued jurisdictional control and active service engagement within Australia's correctional and health systems.

Importantly, these frameworks do not extend to individuals subject to immigration removal or deportation processes, including non-citizens transferred out of Australia following sentence completion. As a result, any therapeutic continuity developed during diversion or custodial management is not systematically carried through the deportation process, creating a structural discontinuity in mental health support for those removed to other jurisdictions, including Aotearoa New Zealand.

50 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW).

51 C I Jalaina, P A Lucas and G E Higgins "Assessing the Effectiveness of Mental Health Courts in Reducing Recidivism: A Systematic Review with Meta-analysis" (2024) 7 Justice Evaluation Journal 212.

B. Canada

Canada provides a further example of integrated reintegration practice, particularly through its emphasis on continuity of care at the point of release. Under the Corrections and Conditional Release Act 1992 c 20 (Can),[52] correctional authorities are required to engage in structured release planning, which increasingly incorporates mental health assessment and service coordination. The Canadian model is characterised by collaboration between correctional institutions and provincial health services, ensuring that individuals with identified mental health needs are connected to community-based treatment providers prior to release.[53] In practice, this includes discharge planning, medication continuity, and referral to forensic or community mental health teams. The importance of continuity is well established in the literature, with disruptions in treatment consistently associated with relapses, destabilisation, and increased risk of reoffending. By contrast, coordinated care models have been shown to improve both health outcomes and public safety by reducing the likelihood that individuals fall through institutional gaps during the transition from custody to community.[54]

This emphasis on continuity reflects a well-established body of empirical literature demonstrating that disruption to mental health care at the point of release is strongly associated with relapse, clinical deterioration, and increased risk of reoffending.[55] In contrast, coordinated and structured continuity-of-care models have been shown to improve both psychiatric outcomes and public safety indicators, particularly by reducing service disengagement during the critical post-release period.[56] These findings are consistent with broader forensic psychiatry research highlighting that stable treatment pathways across institutional boundaries are a key protective factor against reoffending among justice-involved individuals with mental illness.[57] Accordingly, the Canadian approach illustrates a preventative model of correctional health governance in which structured release planning functions not only as a rehabilitative mechanism but also as a risk-management tool within the wider criminal justice system.

C. United Kingdom

The United Kingdom provides a further example of systemic integration through the interface between offender management and national health services. Multi-Agency Public Protection Arrangements (MAPPA), established under the Criminal Justice Act 2003 (UK), operate as a statutory framework requiring cooperation between police, probation services, and other relevant agencies in the management of high-risk offenders.[58] Operational guidance and annual reporting demonstrate that this framework facilitates structured inter-agency coordination in risk assessment and management processes, including the involvement of health professionals where appropriate.[59]

52 Corrections and Conditional Release Act 1992 c 20 (Can), ss 86–89.

53 Correctional Service Canada *Commissioner's Directive 800: Health Services* (2023).

54 Correctional Service Canada *Guidelines for Mental Health Services in Federal Corrections* (2021).

55 Adrian TA West and others "Continuity of Mental Health Care and Recidivism in Justice-Involved Populations: A Systematic Review" (2022) BMC Psychiatry.

56 Steven K Hoge and others "Mental Health Care in Correctional Settings: Bridging the Gap Between Institutions and Community" (2019) 70 Psychiatric Services 1105.

57 Julian D Ford and others "Trauma, Mental Illness, and Recidivism: Implications for Correctional Health Continuity" (2016) 44 Journal of the American Academy of Psychiatry and the Law 450.

58 Criminal Justice Act 2003 (UK), ss 325–327.

59 Ministry of Justice (UK) and HM Prison and Probation Service *Multi-Agency Public Protection Arrangements (MAPPA) Guidance* (2021); Home Office (UK) *MAPPA Annual Report 2023/24* (2024).

Within this structure, psychiatric clinicians and other health professionals may contribute to risk assessment and management decisions, ensuring that clinical expertise informs determinations regarding supervision intensity, treatment needs, and reintegration planning.

In addition, liaison and diversion services operate at earlier stages of the criminal justice process. They identify individuals with mental health vulnerabilities at the point of arrest or detention and facilitate access to treatment pathways rather than allowing such individuals to proceed untreated through the criminal justice system.[60] These services reflect a preventative intervention model in which clinical assessment is embedded within criminal processing decisions to reduce unnecessary escalation into custodial settings.

These comparative models share several structural features. First, they recognise mental health as integral to risk assessment and offender management, rather than peripheral to it. Second, they institutionalise mechanisms for continuity of care, ensuring that individuals do not experience a breakdown in treatment at the point of transition between custody and community. Third, they adopt a hybrid governance model in which supervision is explicitly linked to clinical intervention, thereby aligning legal control with therapeutic objectives. These features reflect a broader international shift towards recognising that effective reintegration requires both legal supervision and sustained clinical engagement, consistent with empirical evidence linking continuity of care to reduced relapse and recidivism.[61]

By contrast, the current framework under ROMIA remains predominantly surveillance oriented and administratively fragmented. While it permits the imposition of significant restrictions on liberty, including electronic monitoring and reporting requirements, it does not establish equivalent mechanisms for mandatory mental health assessment or treatment continuity. Nor does it provide a structured framework for transnational clinical information sharing, resulting in a system that manages risk without systematically addressing its underlying psychiatric dimensions. Parliamentary and professional commentary has similarly identified this emphasis on surveillance over reintegration as a key structural limitation of the regime.[62] This absence of integration creates a structural gap between supervision and treatment that is not present in the comparative jurisdictions discussed above.

While it is acknowledged that each of these systems operates within distinct legal, cultural, and resource environments, and that none is without limitation, their existence nonetheless demonstrates that integrated approaches are both practically achievable and normatively justified. In particular, concerns relating to cost, administrative burden, and privacy can be managed through targeted safeguards rather than by excluding clinical considerations entirely from offender management frameworks. The comparative evidence therefore suggests that the absence of similar integration within New Zealand is not a necessary feature of system design, but rather a policy choice that warrants reconsideration in light of both rights-based and public safety considerations.

These comparative models demonstrate that the integration of mental health assessment, treatment continuity, and inter-agency coordination is both operationally feasible and empirically

60 NHS England *Liaison and Diversion Service Specification 2023/24* (2023); Bradley K *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health, 2009).

61 Jill Peay "Mental Health and Crime: A Critical Interface" (2010) 73(1) Modern Law Review; Steven K Hoge and others "Mental Health Care in Correctional Settings: Bridging Systems of Care" (2019) 70(12) *Psychiatric Services* 1105.

62 Justice Committee *Review of the Operation of the Returning Offenders (Management and Information) Act 2015* (2019).

effective. The absence of equivalent mechanisms within the New Zealand framework is therefore not an inevitable limitation, but a policy choice. The current model reflects a structural preference for surveillance over therapeutic engagement, despite clear evidence that integrated approaches produce better outcomes for both individuals and public safety.

VIII. Reforms

Addressing the structural deficiencies identified in this analysis requires both legislative and operational reform that embeds mental health considerations directly within the reintegration framework.

A. Legislative Reform: Integrating Compulsory Mental Health Assessment into ROMIA

One key recommendation is the statutory amendment of ROMIA to incorporate mental health assessments within its early supervision framework. Under the MHCATA, individuals may be assessed upon application by a concerned party who believes the person is mentally disordered. However, no equivalent proactive mechanism exists under ROMIA, even though deportees often present with complex trauma, psychiatric histories, and high-risk profiles. The introduction of a mandatory mental health screening within the first 72 hours of return, particularly for individuals with known custodial sentences, use of force during deportation, or indicators of distress, would mirror best practice in prison mental health triage. This reform could follow a tiered triage model akin to that used in forensic mental health settings, with culturally appropriate screening tools administered by trained clinicians. Given the compulsory nature of ROMIA, embedding MHCATA-aligned processes into the Act would both improve therapeutic outcomes and satisfy the state's obligation to prevent foreseeable harm to vulnerable returnees. Without such provisions, returnees are effectively subject to surveillance and control without access to equivalent care and rehabilitative support.

B. Operational Reform: Establishment of a Trans-Tasman Mental Health Protocol and Liaison Service

This involves developing a Trans-Tasman Mental Health Protocol between Aotearoa New Zealand and Australia to ensure continuity of care and ethical, secure sharing of relevant mental health information. Under the 2015 MoU between the NZ Department of Corrections and Australian Border Force, health records are excluded unless noted in sentencing documents, undermining reintegration and increasing risks. A protocol modelled on the Five Nations Health Data Sharing Framework[63] could set guidelines for consent-based transfer of clinical summaries, medications, and risk assessments. A joint liaison unit clinician from Health NZ, Forensic Mental Health Services, and an ABF Health representative should initiate referrals pre-departure and manage cases in transit, enabling prescription transfer and community support activation. Embedding a Māori and Pasifika cultural liaison would uphold Te Tiriti o Waitangi obligations and address the disproportionate impact on Indigenous and racialised populations.

Any expansion of transnational mental health data sharing must operate within existing privacy frameworks, including the Privacy Act, as well as international obligations relating to the protection

63 Stephanie Perrett and others "Five Nations Model for Prison Health Surveillance: Lessons from Practice Across the UK and Republic of Ireland" (November 2019) ResearchGate <www.researchgate.net>.

of personal information. However, these constraints do not preclude information exchange where it is necessary for the provision of care or the prevention of serious harm. A structured protocol incorporating informed consent (where practicable), strict purpose limitation, secure transmission mechanisms, and independent oversight would enable clinically relevant information to be shared in a manner that is both lawful and proportionate. Properly designed, such a framework would enhance, rather than undermine, the rights and wellbeing of returning individuals by facilitating continuity of care and reducing the risk of untreated mental illness upon return.

Without such reforms, the system will continue to manage risk procedurally rather than substantively, perpetuating cycles of instability, non-compliance, and reoffending.

IX. Conclusion

The absence of mandated mental health assessments and data transfer for individuals deported from Australia to Aotearoa New Zealand creates significant barriers to reintegration and heightens recidivism risk, particularly among those with pre-existing conditions and the disproportionate number of Māori and Pacific Peoples affected. Support from organisations such as Prisoners Aid and Rehabilitation Services (PARS) is valuable but insufficient to address systemic gaps.[64]

Empirical evidence reinforces this conclusion. With approximately 62.5 per cent of deportees linked to offending following their return, and a total of 27,697 alleged offences recorded between 2015 and 2025,[65] post-return criminalisation cannot be understood as isolated or incidental. Rather, the prevalence of repeat, lower-level, and compliance-based offending suggests a pattern of reintegration instability consistent with untreated mental health needs and the absence of coordinated support structures. In particular, the high incidence of offences against justice procedures indicates that a significant proportion of offending arises within, rather than outside, the regulatory framework itself.

ROMIA, in its current form, prioritises monitoring over rehabilitation, imposing conditions that manage risk procedurally while failing to address its underlying causes. Legal precedent highlights the quasi-punitive nature of the regime, yet its lack of therapeutic integration renders it ill-equipped to respond to the psychological realities of the population it governs. The Migration Act 1958 (Cth) compounds these challenges by facilitating deportation without meaningful consideration of mental health vulnerability or continuity of care, while the reactive application of MHCATA limits timely intervention.

The result is a fragmented system in which risk is displaced rather than resolved. Individuals are returned without clinical support, subjected to intensive surveillance, and left to navigate reintegration in the absence of meaningful treatment pathways. Under these conditions, reoffending becomes a predictable outcome rather than an exceptional one.

Legislative and operational reform is therefore essential. Mandating mental health assessment, enabling secure and ethical transnational data sharing, and integrating treatment pathways within the ROMIA framework would represent a shift toward a more coherent and effective model of reintegration. Such reforms would not only improve individual outcomes but also enhance public safety by addressing the underlying drivers of offending rather than merely regulating its expression.

64 "Deportee Support in New Zealand" pars.org <www.pars.org.nz>.

65 New Zealand Police "Request for data relating to returning offenders and reoffending rates" (received under the Official Information Act 1982, 24 June 2025).

Without such change, the current framework risks perpetuating cycles of exclusion, instability, and criminalisation. In this sense, the system does not fail despite its design, but because of it.

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Allocating Liability for Cyberattacks on Maritime Autonomous Surface Ships (MASS): Structural Gaps in Contemporary Maritime Law

Te Tohatoha Taunaha mō ngā Whakaeke Matihiko ki ngā Kaipuke Waipapa Mana Motuhake Taha Moana (MASS): Ngā Āpure Hanganga i te Ture Taha Moana Ōnaianei

Sebastiano Gianino*

I. Introduction

The growing interest in Maritime Autonomous Surface Ships (MASS) reflects a broader shift within the maritime industry toward automation and technological innovation. MASS are expected to transform maritime transport by enhancing operational efficiency, reducing costs, and potentially improving safety.[1]

The International Maritime Organization (IMO) has played a key role in promoting conceptual consistency in this field. In its regulatory scoping exercise, it defines a MASS as a vessel that can operate with varying levels of autonomy from human control.[2] The IMO distinguishes between four degrees of autonomy in MASS, progressing from crew-operated vessels supported by automated systems to remotely controlled ships with or without onboard personnel, and culminating in fully autonomous vessels capable of independent decision-making.[3]

Despite its advantages, the development of MASS introduces new vulnerabilities, particularly in relation to cybersecurity.[4] The maritime sector is increasingly dependent on digital systems for navigation, cargo operations, and communication. This growing reliance on interconnected technologies expands the potential exposure to cyber threats and malicious interference.[5]

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1 Sarah Marie Malmquist and Ziaul Haque Munim "Exploring the Barriers to Autonomous Shipping" (2025) 9 *Maritime Transport Research* at 1 <https://doi.org/10.1016/j.martra.2025.100135>.

2 International Maritime Organization "Maritime Autonomous Surface Ships: Proposal for a Regulatory Scoping Exercise" (MSC 98/20/2, 27 February 2017).

3 International Maritime Organization "Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS): Report of the Working Group" (MSC 99/WP.9, 23 May 2018) annex 1 at [4].

4 Nimra Tabish and Tsai Chaur-Luh "Maritime Autonomous Surface Ships: A Review of Cybersecurity Challenges, Countermeasures, and Future Perspectives" (2024) 12 IEEE Access at 17114–17115 <https://doi.org/10.1109/ACCESS.2024.3357082>.

5 Shlok Mhatre and Vedanti Shete "Cybersecurity in Maritime Law: Legal Liability for Cyber Attacks on Ships and Ports" (2025) 7(3) International Journal of Legal Science and Innovation 85 at 85–86 <https://ijlsi.com/article/view/cybersecurity-in-maritime-law-legal-liability-for-cyber-attacks-on-ships-and-ports>.

A 2026 white paper published by Cyber Trust & Resilience (CYTUR) underscores the growing cybersecurity risks linked to the rapid digitalisation of the maritime industry.[6] It notes that maritime cyber incidents increased by 103 per cent between 2024 and 2025, with distributed denial-of-service (DDoS) attacks, ransomware, and malware representing the most common and rapidly expanding forms of threat.[7]

MASS operations face increasing cyberattacks, creating complex challenges with far-reaching consequences. Such attacks, including unauthorised access, data breaches, and interference with critical navigation systems, threaten the operational integrity of autonomous vessels.[8] Beyond compromising confidentiality, integrity, and availability of data, these incidents may cause disruptions to vessel functionality, navigation errors, safety hazards, risks of collisions, cargo loss or damage and potential environmental harm. Common methods include denial-of-service (DoS) attacks, signal jamming, and spoofing, each creating specific risks for the security and reliability of MASS operations.[9]

A significant proportion of maritime industry stakeholders − 64 per cent − identify uncertainty regarding the allocation of liability in cases where unmanned vessels are involved in incidents resulting from cyberattacks.[10]

Therefore, this article examines how liability should be allocated in such cases and evaluates the extent to which existing legal frameworks can address these emerging risks.

This article is structured as follows: part II examines cyberattacks within the maritime law framework, analysing the limitations in addressing remote, non-physical threats, the adaptation of traditional seaworthiness obligations into the concept of "cyberworthiness", and the potential recognition of cyberattacks as force majeure. Part III explores maritime liability in the context of MASS, highlighting the shift from fault-based regimes toward strict liability for software and hardware developers, and assessing regulatory, contractual, and insurance measures, including the EU Product Liability Directive, as mechanisms for addressing cyber risks. Part IV concludes this article.

II. The Legal Characterisation of Cyberattacks within the Maritime Law Framework

The IMO defines maritime cyber risk as circumstances or events that may lead to operational disruption or create safety and security vulnerabilities in maritime operations, arising from the compromise, damage, or loss of technological systems, data, and assets.[11] The maritime sector,

6 CYTUR is a cybersecurity company that specialises in maritime and transport sectors, providing risk intelligence, threat analysis, and security solutions to protect ships, ports, and maritime infrastructure from cyber threats. For further information, consult this website: <https://cytur.net/en/index>.

7 "Maritime Cyber Incidents Jumped 103% in 2025" (24 February 2026) SAFETY4SEA <https://safety4sea.com/maritime-cyber-incidents-jumped-103-in-2025/>.

8 Steve Symes and others "The Survivability of Autonomous Vessels from Cyber-Attacks" (2025) 24 Journal of Marine Engineering & Technology 194 <https://doi.org/10.1080/20464177.2024.2428022>.

9 European Union Agency for Cybersecurity *Port Cybersecurity: Good Practices for Cybersecurity in the Maritime Sector* (26 November 2019) <https://www.enisa.europa.eu/publications/port-cybersecurity-good-practices-for-cybersecurity-in-the-maritime-sector>.

10 "Cyber Liability Issues Hindering Unmanned Ships, Says New Report" (21 November 2017) SAFETY4SEA <https://safety4sea.com/cyber-liability-issues-hindering-unmanned-ships-says-new-report/>.

11 International Maritime Organization "Guidelines on Maritime Cyber Risk Management" (MSC-FAL.1/Circ.3/Rev.4, 28 May 2026).

similarly to other industries, faces exposure to cyber risks resulting from cyberattacks.[12] In this context, a "maritime cyberattack" can be defined as a deliberate malicious act targeting maritime systems, intended to cause disruption or harm: for example, the deployment of malware to compromise port operations.[13]

Furthermore, according to the IMO's *Guidelines on Maritime Cyber Risk Management*, cyberattacks on ships can be classified as either targeted or untargeted. Such attacks may be carried out by individuals or organisations, and the actors involved can include accidental actors, activists, criminals, opportunistic hackers, states, state-sponsored entities, and terrorist groups.[14]

A. Cyberattacks under the United Nations Convention on the Law of the Sea (UNCLOS): Doctrinal Limits of Piracy and Jurisdiction Challenges for MASS

As noted previously, the European Union Agency for Cybersecurity (ENISA) report highlights that cyberattacks on the maritime sector may lead to operational interruptions, safety risks, data and cargo theft, financial and reputational losses, damage to IT systems, and environmental harm.[15]

Consequently, it could be argued that, given its malicious nature, a cyberattack might fall within the concept of maritime piracy.[16] However, under art 101(a) of UNCLOS, piracy is defined as illegal acts of violence, detention, or depredation committed on the high seas for private purposes by one ship against another, linking it primarily to physical attacks on vessels rather than cyberattacks targeting onboard computer systems.[17]

On this basis, a cyberattack would not qualify as piracy under art 101(a) since piracy requires acts of "violence" involving physical force and tangible interference between vessels as well as a direct physical nexus between attacker and target and the pursuit of private ends, whereas cyberattacks may be remote, non-physical, and often motivated by political or state-sponsored objectives. Nonetheless, art 101(c) of UNCLOS extends the definition of piracy to include acts that facilitate or incite piracy, suggesting the theoretical possibility that a cyberattack could be employed to support or encourage piratical activities.[18]

Within UNCLOS art 101(a), although the concept of detention is comparatively straightforward, generally encompassing the exercise of control through the confinement of persons or the restraint of property, the meaning of "depredation" is less readily ascertainable. The term is associated with a range of overlapping notions, including ravaging, pillaging, plundering and looting, which

12 Özgenur Kara Balci, Izel Varan Samut and Ademuni-Odeke "An Evaluation of Cyber-Worthiness and Related Factors in Maritime Safety and Maritime Security" (2024) 8 Journal of International Maritime Safety, Environmental Affairs, and Shipping at 6 <https://doi.org/10.1080/25725084.2024.2411180>.

13 Yongmin Jin and others "Navigating the Digital Seas: Legal Challenges and Global Governance of Maritime Cyber Operations" (2025) 12 Frontiers in Marine Science <https://doi.org/10.3389/fmars.2025.1616906>.

14 Özgenur Kara Balci, Izel Varan Samut and Ademuni-Odeke "An Evaluation of Cyber-Worthiness and Related Factors in Maritime Safety and Maritime Security" (2024) 8 Journal of International Maritime Safety, Environmental Affairs, and Shipping at 6 <https://doi.org/10.1080/25725084.2024.2411180>.

15 European Union Agency for Cybersecurity *Port Cybersecurity: Good Practices for Cybersecurity in the Maritime Sector* (26 November 2019) <https://www.enisa.europa.eu/publications/port-cybersecurity-good-practices-for-cybersecurity-in-the-maritime-sector>.

16 Jacques Hartmann "Piracy and Undersea Cables: An Overlooked Interpretation of UNCLOS?" (6 March 2025) EJIL: Talk! <https://www.ejiltalk.org/piracy-and-undersea-cables-an-overlooked-interpretation-of-unclos/>.

17 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 101(a).

18 Ademuni-Odeke "Challenges of Apprehending and Prosecuting Somali Pirate Leaders and Financial Backers: The Big Mouth Case" (2023) 29(3) Journal of International Maritime Law 165 at 165–184.

complicates attempts to delineate its precise legal scope. At its core, however, depredation may be understood as conduct of a predatory or destructive character, encompassing acts involving the plunder, destruction or devastation of property.[19]

The application of art 101(a) to cyberattacks against unmanned vessels reveals a fundamental difficulty. Even assuming that a cyber operation causing destruction of, or substantial damage to, a MASS is capable of constituting an "act of depredation", satisfaction of that element alone would not bring the conduct within the conventional definition of piracy. Article 101(a)(i) requires the relevant act to be committed for private ends "by the crew or the passengers of a private ship or a private aircraft" and to be directed, on the high seas, against "another ship or aircraft, or against persons or property on board such ship or aircraft". The provision therefore presupposes a particular relationship between the perpetrator and the maritime domain: the proscribed conduct emanates from a private ship or aircraft and is directed against another vessel.[20]

Yet, considering current technological capabilities, a cyberattack against a MASS need not originate from another ship or aircraft. An attacker operating from land may remotely access or interfere with the vessel's navigation, propulsion or other operational systems while the MASS is navigating on the high seas. Such a scenario would fall outside the conventional ship-to-ship framework contemplated by art 101(a)(i), since the perpetrators would not be acting as the crew or passengers of a private ship or aircraft against "another" vessel.[21]

A further complexity arises where cyberattacks against unmanned vessels are conducted by politically motivated non-State actors. Article 101(a) requires the relevant conduct to be committed for "private ends", the interpretation of which remains contested. While one interpretation distinguishes private ends from acts undertaken exclusively for public or political purposes, a broader approach encompasses acts committed by private actors irrespective of whether their motivations are financial or political. Accordingly, the classification as piracy of a cyberattack conducted by a non-State actor for predominantly political or ideological purposes remains uncertain. The combined effect of the requirement that the attack originate from the crew or passengers of a private ship or aircraft and the ambiguity surrounding the "private ends" requirement therefore substantially limits the application of the conventional piracy definition to remotely conducted cyberattacks against unmanned vessels.[22]

On the other hand, art 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) provides a broader definition of illegal acts threatening maritime safety than UNCLOS' definition of piracy. The provision focuses on the illegality of the

19 Nilasari Nilasari and Lorna Steele "UNCLOS Definition of Piracy: Is it still Relevant for Modern Piracy?" (2022) 7 *Mulawarman Law Review* 89 at 92 <https://doi.org/10.30872/mulrev.v7i2.943>.

20 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), arts 101(a)(i) and 101(a)(ii).

21 Xenia Dhar "Crisis in the Red Sea: Does the International Law Protect Against UAV Attacks & Other Forms of Maritime Terrorism in the High Seas?" (25 February 2024) Cambridge International Law Journal <https://cilj.co.uk/crisis-in-the-red-sea-does-the-international-law-protect-against-uav-attacks-other-forms-of-maritime-terrorism-in-the-high-seas/>.

22 Xenia Dhar "Crisis in the Red Sea: Does the International Law Protect Against UAV Attacks & Other Forms of Maritime Terrorism in the High Seas?" (25 February 2024) Cambridge International Law Journal <https://cilj.co.uk/crisis-in-the-red-sea-does-the-international-law-protect-against-uav-attacks-other-forms-of-maritime-terrorism-in-the-high-seas/>.

act, the subjective intent of the perpetrator, and the resulting endangerment to navigation, without imposing specific requirements regarding the actor, location, means, or methods employed.[23]

Specifically, art 3 of the SUA Convention criminalises the unlawful and intentional seizure of, or exercise of control over, a ship by force, threat or other forms of intimidation.[24] The provision further encompasses a range of conduct where that conduct is capable of endangering the safe navigation of the ship, including acts of violence against persons on board, the destruction of or damage to a ship or its cargo, the placement on board of devices or substances capable of causing such destruction or damage, interference with maritime navigational facilities, and the knowing communication of false information.[25] The offence framework also extends to conduct resulting in the injury or death of a person in connection with the commission or attempted commission of the acts enumerated in art 3.[26] In this respect, the Convention adopts an effects-oriented approach, focusing not solely on the means employed by the perpetrator but also on whether the relevant conduct jeopardises the safety of maritime navigation.

A central question is whether malware may fall within the concept of a "device" for the purposes of art 3 of the 1988 SUA Convention.[27] Although the Convention was negotiated before contemporary forms of malicious software became a significant threat to maritime operations, art 3 does not define the term "device" or expressly limit its application to physical instruments.[28] The scope of the term must therefore be determined in accordance with the general rules of treaty interpretation. Under art 31(1) of the Vienna Convention on the Law of Treaties (VCLT), treaty terms are to be interpreted in good faith according to their ordinary meaning, considered in their context and in light of the treaty's object and purpose.[29] On this basis, there is at least a plausible argument that the concept of a "device" is sufficiently technologically neutral to encompass malware specifically designed or deployed to interfere with a ship's computerised systems.

Such an interpretation becomes particularly compelling where malware can produce the consequences contemplated by art 3, including damage to the ship or its cargo or interference with its safe navigation.[30] It would also appear consistent with the Convention's broader objective of suppressing unlawful acts that threaten the safety of maritime navigation. Nevertheless, extending the term "device" to intangible computer code raises questions concerning the limits of evolutionary treaty interpretation. The applicability of art 3 to malware should therefore depend not merely upon characterising malicious software as a "device", but upon establishing that its deployment satisfies

23 Linlin Chen "Maritime Rights, Obligations, and Liabilities of Intelligent Ships from the Perspective of Risk Distribution" (2023) 7 Journal of International Maritime Safety, Environmental Affairs, and Shipping <https://doi.org/10.1080/25725084.2023.2264566>.

24 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1678 UNTS 221 (opened for signature 10 March 1988, entered into force 1 March 1992), art 3(1)(a).

25 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1678 UNTS 221 (opened for signature 10 March 1988, entered into force 1 March 1992), arts 3(1)(b)–(f).

26 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1678 UNTS 221 (opened for signature 10 March 1988, entered into force 1 March 1992), art 3(2).

27 Michael Petta "Malware, a Device Under the 1988 SUA Convention" (2023) 100 International Law Studies 110 at 125–126 <https://digital-commons.usnwc.edu/ils/vol100/iss1/3/>.

28 Michael Petta "Malware, a Device Under the 1988 SUA Convention" (2023) 100 International Law Studies 110 at 126 <https://digital-commons.usnwc.edu/ils/vol100/iss1/3/>.

29 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31.

30 Michael Petta "Malware, a Device Under the 1988 SUA Convention" (2023) 100 International Law Studies 110 at 127 <https://digital-commons.usnwc.edu/ils/vol100/iss1/3/>.

the remaining constituent elements of the relevant offence, including the requisite nexus with the safety of navigation.[31]

Moreover, the allocation of responsibility for cyberattacks affecting MASS must be considered in light of the jurisdictional and regulatory framework established by other UNCLOS provisions. Under art 92, ships on the high seas fall under the exclusive jurisdiction of their flag State, thereby designating a primary locus of legal authority in the event of a cyber incident.[32] This is complemented by art 94, which imposes a duty on flag States to exercise effective jurisdiction and control over vessels flying their flag, including ensuring their safe operation.[33] While these provisions were not conceived with digital threats in mind, they may be interpreted as extending to cybersecurity risks, particularly where vulnerabilities in onboard systems compromise navigational safety or operational integrity.[34]

However, the application of these provisions to cyberattacks on MASS remains problematic. The decentralised and transnational nature of cyber threats, combined with the involvement of multiple actors such as software developers and remote operators, challenges the traditional assumption of a single State exercising effective control. As a result, UNCLOS provides a foundational but ultimately incomplete framework for addressing liability in the context of cyber incidents involving autonomous vessels.[35]

In this regard, art 91 of UNCLOS requires a "genuine link" between a vessel and its flag State, understood as the effective exercise of jurisdiction and control in administrative, technical, and social matters.[36] However, in the context of MASS, this link may be weakened where key operational functions, such as remote control, are conducted from a different jurisdiction. This fragmentation of control risks undermining the flag State's effective authority over the vessel, potentially leading to reduced regulatory oversight and the emergence of vessels operating outside established safety and environmental standards.[37]

A question nevertheless arises as to whether the absence of a genuine link between a MASS and its flag State could affect the vessel's nationality and, in the extreme, result in its characterisation as a stateless ship, thereby potentially exposing it to the exercise of jurisdiction by other States.[38] This issue assumes particular significance from the perspective of coastal States, given the jurisdictional and regulatory concerns associated with the operation of MASS within maritime zones subject

31 Michael Petta "Malware, a Device Under the 1988 SUA Convention" (2023) 100 International Law Studies 110 at 132 <https://digital-commons.usnwc.edu/ils/vol100/iss1/3/>.

32 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994, art 92.

33 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 94.

34 Yongmin Jin and others "Navigating the Digital Seas: Legal Challenges and Global Governance of Maritime Cyber Operations" (2025) 12 Frontiers in Marine Science at 11 <https://doi.org/10.3389/fmars.2025.1616906>.

35 Oleksiy Melnyk, Oleksandr Drozdov and Serhii Kuznichenko "Cybersecurity in Maritime Transport: An International Perspective on Regulatory Frameworks and Countermeasures" (2025) 11(1) Lex Portus 7 at 12–13 <https://doi.org/10.62821/lp11101>.

36 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 91.

37 Iva Parlov "Remotely Controlled Maritime Autonomous Surface Ships (MASS), the 'Genuine Link' Requirement, and the 'Effectiveness' of Flag State Jurisdiction: Key Problems and Prospects" (2025) 56 Ocean Development & International Law 214 <https://doi.org/10.1080/00908320.2025.2474551>.

38 Iva Parlov "Remotely Controlled Maritime Autonomous Surface Ships (MASS), the 'Genuine Link' Requirement, and the 'Effectiveness' of Flag State Jurisdiction: Key Problems and Prospects" (2025) 56 Ocean Development & International Law 214 at 219 <https://doi.org/10.1080/00908320.2025.2474551>.

to differentiated allocations of competence.[39] International and European jurisprudence, however, militates against treating the absence of a genuine link as sufficient, per se, to deprive a vessel of its nationality.

In *M/V "Saiga" (No 2)*[40] and *Commission v Hellenic Republic*,[41] International Tribunal for the Law of the Sea and the Court of Justice of the European Union respectively rejected the proposition that deficiencies in the genuine link between a vessel and its flag State entitle other States to disregard the nationality conferred upon that vessel. The absence of a genuine link should not, therefore, be equated with statelessness. This does not necessarily render the genuine-link requirement devoid of legal consequences; rather, it indicates that such consequences must be located elsewhere within the framework governing the duties and responsibilities of the flag State, rather than in the denial of the vessel's nationality by third States.[42]

One possible response to the regulatory uncertainty surrounding maritime cyberattacks would be the adoption of a supplementary instrument within the broader UNCLOS framework such as an UNCLOS Implementing Agreement or Protocol on Maritime Cybersecurity.[43] Such an instrument could, inter alia, clarify the legal characterisation of maritime cyberattacks and, crucially, distinguish them from piracy as defined under art 101 of UNCLOS. In particular, it could delineate the circumstances in which coastal States may respond to cyber incidents affecting interests protected within their Exclusive Economic Zones, subject to appropriate safeguards for flag-State jurisdiction and mechanisms of interstate cooperation. It could also clarify questions of State responsibility and the obligations of flag States in relation to cyber activities connected with vessels flying their flag.[44]

B. From Seaworthiness to Cyberworthiness: Adapting Maritime Safety Obligations to MASS

The rapid development of digital technologies has prompted a reconsideration of the traditional concept of seaworthiness, extending it beyond the physical condition of the vessel, its crew, and its documentation. In the contemporary maritime environment, many onboard operations, particularly within engines and control systems, are increasingly performed through integrated software and digital infrastructure rather than solely through human intervention.[45]

In this context, both hardware and software systems have become essential components of a vessel's operation and commercial function and should therefore be considered within the scope of the obligation to ensure seaworthiness. This has led to the emergence of the concept of

39 Henrik Ringbom "Legalizing Autonomous Ships" in Aldo Chircop, Scott Coffen-Smout and Moira McConnell (eds) *Ocean Yearbook 34* (Brill Nijhoff, Leiden, 2020) 431 at 445 <https://doi.org/10.1163/9789004426214_019>.

40 *M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea) (Merits)* [1999] ITLOS Rep 10.

41 *Case C-62/96 Commission v Hellenic Republic* [1997] ECR I-6725.

42 Iva Parlov "Remotely Controlled Maritime Autonomous Surface Ships (MASS), the 'Genuine Link' Requirement, and the 'Effectiveness' of Flag State Jurisdiction: Key Problems and Prospects" (2025) 56 Ocean Development & International Law 214 at 219 <https://doi.org/10.1080/00908320.2025.2474551>.

43 Yongmin Jin and others "Navigating the Digital Seas: Legal Challenges and Global Governance of Maritime Cyber Operations" (2025) 12 Frontiers in Marine Science at 14 <https://doi.org/10.3389/fmars.2025.1616906>.

44 Yongmin Jin and others "Navigating the Digital Seas: Legal Challenges and Global Governance of Maritime Cyber Operations" (2025) 12 Frontiers in Marine Science at 15 <https://doi.org/10.3389/fmars.2025.1616906>.

45 Murat Yorulmaz and Mehmet Derici "Gemi 4.0: Kavramsal İnceleme ve Gemi Kaptanlarının Görüşleri" (2023) 12(23) Balkan Sosyal Bilimler Dergisi 1 <https://izlik.org/JA57AM86SH>.

"cyberworthiness", referring to a vessel's capacity to protect its systems and networks against unauthorised access and malicious interference.[46]

To support this development, industry stakeholders have issued guidance, including the *Guidelines on Cyber Security Onboard Ships*, complemented by measures adopted by the IMO. These instruments outline the steps required of shipowners and operators to secure onboard digital systems.[47] In particular, IMO Resolution MSC.428(98) requires that cyber risk management be incorporated into the ship's Safety Management System (SMS) in accordance with the International Safety Management (ISM) Code.[48] In addition, cyber risk considerations are to be integrated into Ship Security Plans (SSP) under the International Ship and Port Facility (ISPS) Code, reflecting the increasing recognition of cybersecurity as an integral element of maritime safety and security.[49]

The requirement that a vessel be properly manned forms an integral part of the obligation of seaworthiness under several international conventions. In particular, art 3(1)(b) of the Hague and Hague-Visby Rules obliges the carrier to exercise due diligence before and at the beginning of the voyage to properly man, equip, and supply the ship.[50] Although the Hamburg Rules do not expressly refer to seaworthiness in the same terms, art 5 establishes a general fault-based liability regime, under which the carrier is responsible unless it proves that all reasonable measures were taken to avoid the occurrence, thereby encompassing deficiencies in crew competence by analogy.[51] Similarly, art 14 of the Rotterdam Rules explicitly requires the carrier to ensure that the ship is properly manned, equipped, and supplied, extending this obligation throughout the voyage rather than limiting it to its commencement.[52]

Despite these provisions, the conventions do not provide detailed requirements concerning the training, competence, or certification of seafarers. These matters are instead governed by the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), which establishes internationally harmonised standards to ensure the safe operation of vessels.[53] Shipowners are therefore required to ensure that crew members meet these standards.[54] However, the STCW Convention does not expressly mandate cybersecurity training. Nonetheless, cybersecurity risk management may fall within its scope insofar as it relates to the performance of

46 iur Bülent Sözer "Seaworthiness: In the Context of Cyber-Risks or 'Cyberworthiness'" in Baris Soyer and Andrew Tettenborn (eds) *Ship Operations: New Risks, Liabilities and Technologies in the Maritime Sector* (Informa Law from Routledge, Abingdon, 2021) 99 <https://doi.org/10.4324/9781003000754>.

47 International Maritime Organization "Guidelines on Maritime Cyber Risk Management" (MSC-FAL.1/Circ.3/Rev.2, 7 June 2022); BIMCO and others *The Guidelines on Cyber Security Onboard Ships* (version 5, 14 November 2024) at 9–19.

48 International Maritime Organization "Maritime Cyber Risk Management in Safety Management Systems" (Resolution MSC.428(98), 16 June 2017).

49 International Maritime Organization "Report of the Maritime Safety Committee on its 101st Session" (MSC 101/24, 12 July 2019).

50 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 120 LNTS 155 (opened for signature 25 August 1924, entered into force 2 June 1931) [Hague Rules], art 3(1)(b); Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1412 UNTS 127 (opened for signature 23 February 1968, entered into force 23 June 1977) [Hague-Visby Rules], art 3(1)(b).

51 United Nations Convention on the Carriage of Goods by Sea 1695 UNTS 3 (opened for signature 31 March 1978, entered into force 1 November 1992) [Hamburg Rules], art 5.

52 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (opened for signature 23 September 2009, not yet in force) [Rotterdam Rules], art 14.

53 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1361 UNTS 2 (adopted 7 July 1978, entered into force 28 April 1984).

54 Victor Hugo Chacón *The Due Diligence in Maritime Transportation in the Technological Era* (Springer, Cham, 2017) at 56–91 <https://doi.org/10.1007/978-3-319-66002-8>.

maritime functions.[55] In this respect, the ISM Code is also relevant, as it requires that personnel be adequately trained and qualified for their duties, a requirement that may be interpreted as extending to cybersecurity awareness.[56]

Furthermore, the STCW Convention applies primarily to seafarers on board and does not address the training or certification of shore-based personnel.[57] This limitation becomes particularly significant in the context of MASS, where remote operators may play a direct role in navigation. It has therefore been suggested that such personnel should be subject to equivalent standards.[58] Although the absence of cybersecurity training among shore-based personnel would not in itself render a vessel unseaworthy, industry guidance, such as the *Guidelines on Cyber Security Onboard Ships*, recommends extending cybersecurity training and awareness to both onboard and shore-based personnel involved in vessel operations.[59]

Under the International Regulations for Preventing Collisions at Sea (COLREGs), the term "vessel" is defined broadly to include any watercraft capable of being used for transportation on water, without reference to human operation.[60] Similarly, instruments such as the Hague-Visby Rules and the Rotterdam Rules define a ship in functional terms, focusing on its use for the carriage of goods by sea, while the Hamburg Rules do not provide a specific definition.[61] Comparable definitions in other maritime conventions, including the Safety of Life at Sea (SOLAS) Convention, International Convention for the Prevention of Pollution from Ships (MARPOL Convention), the ISM Code, and the STCW Convention, likewise adopt a broad and functional approach, generally without treating the presence of a human operator as an essential element.[62]

A vessel capable of making autonomous decisions does not conflict with the legal definition of a ship, and such vessels are generally recognised as ships under prevailing views.[63] Consequently, in terms of both seaworthiness and cyberworthiness, MASS are treated similarly to conventional manned ships, as the absence of onboard crew does not affect these obligations. Nevertheless, the

55 BIMCO and others *The Guidelines on Cyber Security Onboard Ships* (version 5, 14 November 2024) at 47−56.

56 International Maritime Organization "Guidelines on Maritime Cyber Risk Management" (MSC-FAL.1/Circ.3/Rev.2, 7 June 2022).

57 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1361 UNTS 2 (adopted 7 July 1978, entered into force 28 April 1984), art 3.

58 Xu Changqing "Study on the Applicability of STCW Convention to MASS and Updating ETO's Standard of Competence" (MSc in Maritime Affairs Dissertation, World Maritime University, 2020) at 11–27.

59 Özgenur Kara Balci, Izel Varan Samut and Ademuni-Odeke "An Evaluation of Cyber-Worthiness and Related Factors in Maritime Safety and Maritime Security" (2024) 8 Journal of International Maritime Safety, Environmental Affairs, and Shipping at 11 <https://doi.org/10.1080/25725084.2024.2411180>.

60 Convention on the International Regulations for Preventing Collisions at Sea 1050 UNTS 16 (adopted 20 October 1972, entered into force 15 July 1977), art 2(1).

61 Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1412 UNTS 127 (opened for signature 23 February 1968, entered into force 23 June 1977) [Hague-Visby Rules], art 1(d); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (opened for signature 23 September 2009, not yet in force) [Rotterdam Rules], art 1(25).

62 International Convention for the Safety of Life at Sea 1184 UNTS 2 (adopted 1 November 1974, entered into force 25 May 1980), ch I regs 2–3; International Convention for the Prevention of Pollution from Ships 1340 UNTS 184 (adopted 2 November 1973, entered into force 2 October 1983), art 2(4) (MARPOL 73/78); *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* 1361 UNTS 2 (adopted 7 July 1978, entered into force 28 April 1984), art 2(g); International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code) IMO Res A.741(18) (4 November 1993), art 1(3).

63 Ishii Yurika "Attacks on Commercial Maritime Autonomous Surface Ships at Sea" (2023) 8 Asia-Pacific Journal of Ocean Law and Policy 266 <https://doi.org/10.1163/24519391-08020005>.

operation of unmanned vessels may give rise to new liability and criminal law considerations.[64] In the absence of a dedicated legal framework specifically addressing unmanned vessels, existing liability and criminal regimes must be applied by analogy. Accordingly, any interpretation of applicable rules, particularly in light of rapid technological developments, should take these advancements into account.[65]

Nevertheless, a joint working group at the IMO, comprising the Legal Committee, Maritime Safety Committee (MSC), and Facilitation Committee, has been established to address regulatory issues related to MASS. The group aims to develop a mandatory MASS Code by 1 January 2028, which will define the roles, responsibilities, and required competencies of both the vessel's captain and crew, as well as the functions and obligations of remote operators.[66]

C. The Potential Recognition of Cyberattacks as Force Majeure in Maritime Law

Cyberattacks pose a tangible risk of collisions in the context of MASS. These vessels rely on sophisticated software systems to navigate, monitor surroundings, and make real-time operational decisions. A successful cyber intrusion could compromise sensor inputs, automatic identification systems (AIS), or route-planning algorithms, causing the vessel to follow unsafe courses or misinterpret traffic conditions.[67]

Under art 4 of the COLREGs, liability for collisions is traditionally apportioned according to the degree of fault attributable to each vessel, with equal distribution where fault cannot be determined.[68] This framework presupposes human control and fault-based responsibility. However, its application to fully autonomous ships raises significant challenges, as the absence of human decision-making complicates the assessment of fault.[69]

Established doctrines, such as the Pennsylvania Rule, which presumes fault in cases of regulatory breach, may be difficult to apply or insufficient in this context.[70] Moreover, the complexity and opacity of autonomous systems make it particularly challenging for claimants to establish causation between system failure and the resulting damage. Considering these difficulties, strict liability has been proposed as a more appropriate framework for fully autonomous vessels.[71]

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64 Ishii Yurika "Attacks on Commercial Maritime Autonomous Surface Ships at Sea" (2023) 8 Asia-Pacific Journal of Ocean Law and Policy 266 at 269 <https://doi.org/10.1163/24519391-08020005>.

65 Hakan Karan *The Carrier's Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (Edwin Mellen Press, Lewiston (NY), 2004).

66 International Maritime Organization "Development of a Goal-Based Instrument for Maritime Autonomous Surface Ships (MASS)" (MSC 108/4/1, 8 November 2023); see also International Maritime Organization International Code of Safety for Maritime Autonomous Surface Ships (MASS Code) (Resolution MSC.595(111), 22 May 2026), effective 1 July 2026; International Maritime Organization "IMO adopts first global Code for autonomous ships" (22 May 2026) https://www.imo.org/en/MediaCentre/PressBriefings/pages/IMO-adopts-MASS-Code.aspx

67 Nimra Tabish and Tsai Chaur-Luh "Maritime Autonomous Surface Ships: A Review of Cybersecurity Challenges, Countermeasures, and Future Perspectives" (2024) 12 IEEE Access at 17123 <https://doi.org/10.1109/ACCESS.2024.3357082>.

68 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (signed 23 September 1910, entered into force 1 March 1913), art 4.

69 Chia-Hsun Chang and others "COLREG and MASS: Analytical Review to Identify Research Trends and Gaps in the Development of Autonomous Collision Avoidance" (2024) 302 Ocean Engineering <https://doi.org/10.1016/j.oceaneng.2024.117652>.

70 Ship Law Matters "Pennsylvania Rule in Maritime Law" (6 November 2023), available at <https://shiplawmatters.com/pennsylvania-rule-in-maritime-law/>.

71 Fan Xiaobo and Chen Yijie "Analysis on the Liability of AI Navigation Systems under the Trend of Unmanned Ships" (2021) 32(4) Chinese Journal of Maritime Law 39 <https://doi.org/10.3969/j.issn.1003-7659.2021.04.006>.

At the same time, cyberattacks introduce additional complexity: while they may be invoked as force majeure due to their unpredictability, the extent to which they should absolve liability is debatable, given that system resilience against such risks can be enhanced through preventive measures.[72]

Arda assesses the potential characterisation of cyber incidents as events of force majeure through a three-pillar framework centred on control, anticipation or unpredictability, and irresistibility.[73] The first element of control requires consideration of whether the relevant event falls beyond the sphere of control of the party invoking force majeure.[74] The second − anticipation or unpredictability − concerns the extent to which the event could reasonably have been anticipated, thereby distinguishing the general foreseeability of cyber risk from the predictability of the particular incident in question.[75] The third element, irresistibility, addresses whether the event or its consequences could reasonably have been prevented, resisted or overcome notwithstanding the adoption of appropriate precautionary measures.[76]

Applied to maritime cybersecurity, these criteria preclude the automatic characterisation of a cyber incident as force majeure. The mere fact that an attack originates externally does not necessarily place it beyond the affected party's sphere of responsibility, particularly where inadequate cybersecurity arrangements contributed to its occurrence or consequences. Equally, although cyber threats have become an increasingly foreseeable feature of contemporary shipping, this does not necessarily render the specific nature, scale, or consequences of an individual attack reasonably predictable. The decisive inquiry is therefore dependent on the context and turns upon the relationship between the particular cyber incident, the affected party's capacity to anticipate and mitigate the relevant risk, and the extent to which its consequences could reasonably have been resisted or overcome.[77]

72 Linlin Chen "Maritime Rights, Obligations, and Liabilities of Intelligent Ships from the Perspective of Risk Distribution" (2023) 7 Journal of International Maritime Safety, Environmental Affairs, and Shipping at 11 <https://doi.org/10.1080/25725084.2023.2264566>.

73 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 407–410 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

74 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 407–408 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

75 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 408–409 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

76 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 409–410 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

77 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 410–412 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

III. Maritime Liability and Cyberattacks in MASS: From Fault-Based Regimes to Emerging Models

Traditional maritime liability has historically relied on the principle of fault, holding the master or crew responsible for accidents caused by negligence or carelessness.[78] This approach has been largely effective, as human error accounts for roughly 80 per cent of maritime incidents.[79] However, the advent of MASS challenges this fault-based framework. Accidents involving such ships may result from software errors, flawed algorithmic decisions, sensor malfunctions, or cyberattacks, rather than human negligence.[80]

Consequently, liability may shift from the conventional parties such as shipowners, masters, or crew to software and hardware developers or remote operators.[81] If an autonomous system fails to perform safely for its intended purpose, its designers and manufacturers could potentially be held directly liable.[82] Reflecting this shift, the European Union is developing regulations that introduce strict liability for operators of high-risk AI systems, allowing compensation without proving fault. Yet, this also complicates the allocation of responsibility, as existing maritime law does not recognise vessels themselves as legal entities.[83]

A. Cyberattack Governance in Maritime Law: Regulatory, Contractual and Insurance Dimensions

The IMO has assumed a central role in strengthening cybersecurity within the global maritime sector. In 2017, it introduced the *Guidelines on Maritime Cyber Risk Management* (MSC-FAL.1/Circ.3), which were subsequently updated in 2021 and 2022 to respond to the increasing prevalence of cyber threats.[84] These guidelines were further incorporated into the framework of the ISM Code through Resolution MSC.428(98), which encourages the integration of cyber risk management into ship safety management systems by January 2021.[85]

These guidelines encourage shipping companies and port authorities to enhance their cybersecurity measures, promote awareness, and address specific vulnerabilities such as the protection of submarine cables. However, the role of the IMO remains primarily normative, as it focuses on establishing standards and offering guidance on training and best practices, while

78 Luci Carey *Contractual and Tortious Maritime Liability Regimes and the Introduction of Autonomous Vessels* (NUS Centre for Maritime Law Working Paper 23/03, March 2023) at 4–10.

79 Ying Zhou and others "Human Errors Analysis for Remotely Controlled Ships during Collision Avoidance" (2024) 11 Frontiers in Marine Science <https://doi.org/10.3389/fmars.2024.1473367>.

80 Antonio Emiliozzi *Civil Liability in the Context of Autonomous Shipping: An Analysis* (University of Macerata e-Prints, 2024).

81 Yuma Sakamoto *The Roles and Responsibilities of Master and Remote Operator in Maritime Autonomous Surface Ship (MASS) under the COLREGS* (MSc Dissertation, World Maritime University, 2025) at 38–46.

82 Mark Jones "Autonomous Ships and Liability Issues: Maritime Law Will Need to Navigate Uncharted Waters" (13 November 2024) Vassallo Associates <www.hvassallo.com/autonomous-ships-and-liability-issues-maritime-law/>.

83 Sebastiano Gianino "Liability in the Age of Autonomous Vessels: Challenges and Opportunities in International, EU and National Maritime Law" (2025) 127 Il Diritto Marittimo 516 at 534–541.

84 International Maritime Organization "Guidelines on Maritime Cyber Risk Management" (MSC-FAL.1/Circ.3/Rev.2, 7 June 2022).

85 International Maritime Organization "Maritime Cyber Risk Management in Safety Management Systems" (Resolution MSC.428(98), 16 June 2017).

lacking direct enforcement powers in relation to cyber incidents.[86] Adherence to these regulatory frameworks is essential for shipowners and operators to evidence the exercise of due diligence in the management of cyber risks.[87]

Within the European Union (EU) context, Directive (EU) 2016/1148 on the security of network and information systems (NIS Directive) acknowledged the significance of cybersecurity in the maritime sector by designating key actors, such as passenger and freight water transport companies, port authorities, and vessel traffic service providers, as Operators of Essential Services (OES), thereby requiring them to enhance their cybersecurity capabilities.[88] Building upon this framework, the subsequent Directive (EU) 2022/2555 (NIS2) further strengthens the regulatory approach by expressly recognising maritime transport as a critical sector and imposing more comprehensive cybersecurity obligations within the broader system of critical infrastructure protection.[89]

Specifically, NIS2 requires national cybersecurity strategies to address, *inter alia*, supply-chain security, vulnerability management, and cyber hygiene, while introducing mechanisms such as peer review to facilitate regulatory convergence and the exchange of expertise. NIS2 also reinforces the institutional role of ENISA, assigning it additional responsibilities relating to vulnerability management, cross-border cooperation and cyber-crisis coordination, including support for the European Cyber Crises Liaison Organisation Network (EU-CyCLONe) and the preparation of reports on the state of cybersecurity within the EU. Taken together, these measures reflect a shift towards a more integrated and coordinated model of cybersecurity governance, extending regulatory obligations across a broader range of economically and societally critical sectors.[90]

A concrete implementation step could involve formally designating ports and relevant shipping companies as "critical entities" within the European regulatory framework. Such designation could provide a basis for introducing cybersecurity requirements for vessels entering EU ports, potentially informed by internationally recognised standards such as ISO/IEC 27001, thereby contributing to the establishment of a consistent baseline of maritime cyber resilience. A comparable regulatory logic can be observed, albeit in a different context, in mechanisms such as Emission Control Areas (ECAs), which impose specific technical requirements within defined maritime zones. While the analogy should be approached with caution, given the distinct legal basis and regulatory objectives of ECAs, it illustrates how differentiated requirements may be applied within particular maritime areas to address specific transboundary risks.[91]

Moreover, commercial contracts between shipowners, operators, and charterers frequently

86 Anastasia Dimakopoulou and Konstantinos Rantos "Comprehensive Analysis of Maritime Cybersecurity Landscape Based on the NIST CSF v2.0" (2024) 12(6) Journal of Marine Science and Engineering 919 <https://doi.org/10.3390/jmse12060919>.

87 Rory Hopcraft and Keith M. Martin "Effective Maritime Cybersecurity Regulation – the Case for a Cyber Code" (2018) 14(3) Journal of the Indian Ocean Region 354 <https://doi.org/10.1080/19480881.2018.1519056>.

88 Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1.

89 Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union [2022] OJ L333/80; Stavros Karamperidis, Chronis Kapalidis and Tim Watson "Maritime Cyber Security: A Global Challenge Tackled through Distinct Regional Approaches" (2021) 9 Journal of Marine Science and Engineering 1323 <https://doi.org/10.3390/jmse9121323>.

90 Dimitrios Argyropoulos Charalampos *New Threats to Maritime Security: Cyberattacks & Uncrewed Vessels* (LLM Thesis, National and Kapodistrian University of Athens, 2024) at 25–26.

91 Guangnian Xiao and others "Evaluating the impact of ECA policy on sulfur emissions from the five busiest ports in America based on difference in difference model" (2025) 12 Frontiers in Marine Science <https://doi.org/10.3389/fmars.2025.1609261>.

incorporate provisions addressing cybersecurity.[92] For instance, the Baltic and International Maritime Council (BIMCO) Cyber Security Clause 2019 obliges parties to establish and periodically review cybersecurity measures, ensure that third-party service providers comply with these standards, and promptly notify each other of any incidents affecting cyber systems. The clause also sets a default liability cap of USD 100,000, which may be exceeded only in cases of gross negligence or wilful misconduct. Integrating such provisions serves to clarify responsibilities and limit liability, provided that the stipulated cybersecurity requirements are properly implemented.[93]

The BIMCO clause seeks to strengthen maritime cyber resilience by encouraging shipowners to implement appropriate cybersecurity risk management measures, clarifying the contractual allocation of responsibilities in the event of a cyber incident, and embedding cybersecurity considerations within the broader framework of maritime operations.[94]

The relevant obligations of this clause may be classified into three categories: preventive, reparative, and communicative. The allocation of responsibilities concerning both onboard and onshore systems, and the corresponding applicability of these obligations, should therefore be assessed by reference to this tripartite framework. The central issue lies in identifying the respective preventive, reparative, and communicative responsibilities of the parties concerned and determining how they operate in the circumstances at hand. This allocation assumes particular significance in the context of remotely controlled ships, whose increased reliance on interconnected onboard and shore-based systems may considerably expand the potential cyberattack surface compared with conventionally crewed vessels. Cyber risk may consequently constitute a persistent feature of their operation and, arguably, may be conceptualised as a navigational risk analogous, in certain respects, to traditional perils of the sea. The responsibilities associated with the identification, mitigation, and management of such risks should therefore be appropriately allocated at the managerial and contractual levels.[95]

Relatedly, marine insurance policies frequently exclude losses arising from cyber incidents unless specific provisions are incorporated. For instance, the LMA 5402 Marine Cyber Exclusion Clause generally removes coverage for cyberattacks carried out with malicious intent, while instruments such as the JCC Cyber Attack Exclusion Clause and accompanying write-back provisions may restore limited coverage under certain conditions. Consequently, shipowners and operators must carefully assess their insurance arrangements to ensure adequate protection against cyber risks.[96]

With particular regard to the LMA5402 Marine Cyber Exclusion, the clause is intended to override inconsistent contractual provisions and broadly excludes loss, damage, liability or expense

92 Daewon Kim and others "Potential Liability Issues of AI-Based Embedded Software in Maritime Autonomous Surface Ships for Maritime Safety in the Korean Maritime Industry" (2022) 10(4) Journal of Marine Science and Engineering 498 <https://doi.org/10.3390/jmse10040498>.

93 Chronis Kapalidis and others "A Vulnerability Centric System of Systems Analysis on the Maritime Transportation Sector Most Valuable Assets: Recommendations for Port Facilities and Ships" (2022) 10 Journal of Marine Science and Engineering 1486 <https://doi.org/10.3390/jmse10101486>.

94 Lushita Banik "The Challenge of 'Silent Cyber' in Maritime Logistics" (2026) 8 Indian Journal of Law and Legal Research 8359 at 8364.

95 Aslı Arda "Testing the Water: Applying BIMCO AUTOSHIPMAN to Remotely Controlled Ships, Cyber Incidents and Events of Force Majeure" (2021) 27(6) Journal of International Maritime Law 399 at 402 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174266>.

96 Shlok Mhatre and Vedanti Shete "Cybersecurity in Maritime Law: Legal Liability for Cyber Attacks on Ships and Ports" (2025) 7(3) International Journal of Legal Science and Innovation 85 at 92 <https://ijlsi.com/article/view/cybersecurity-in-maritime-law-legal-liability-for-cyber-attacks-on-ships-and-ports>.

arising directly or indirectly from the failure or malfunction of computer systems, software or other electronic systems, whether operating as the sole or a contributing cause of the loss.[97] Significantly, the exclusion also extends to losses associated with the intentional use of computer systems, software, malicious code, viruses or other electronic processes as a means of inflicting harm.[98] LMA5402 thus seeks to address both accidental technological failures and deliberately induced cyber incidents within a single exclusionary framework. Its formulation reflects an attempt to reduce uncertainty concerning the allocation of cyber risk by excluding losses connected, whether directly or indirectly, with specified forms of electronic system failure or malicious cyber activity.[99]

These challenges are further compounded by the increasing complexity of autonomous vessels and digitally dependent port infrastructures. Traditional marine insurance frameworks often exclude losses resulting from "war, strikes, and malicious acts," categories that may encompass state-sponsored or anonymous cyberattacks.[100] As a result, in the absence of targeted sectoral reforms or risk-sharing mechanisms, such as reinsurance schemes or guarantee funds, insurers may be reluctant or unable to provide coverage for large-scale cyber-related losses.[101]

B. Allocating Liability for Cyberattacks on MASS: The Role of the Product Liability Directive

Cybersecurity assumes a heightened significance for MASS due to their varying levels of autonomy, which entail a strong dependence on information and communication technologies for vessel navigation and control. In contrast to conventional vessels, where regulatory frameworks and operational practices have historically focused on human oversight, the cybersecurity of autonomous vessels has received comparatively limited attention in legal and regulatory discussions.[102]

Regarding MASS, a major concern is the ambiguity surrounding liability when cyberattacks cause navigational failures or incidents at ports. Determining responsibility, whether it lies with software developers, equipment manufacturers, fleet operators, or vessel owners, is often complex. The challenge of attributing cyberattacks, combined with increasingly sophisticated hacking techniques, creates a risk that victims may not receive compensation without the presence of comprehensive insurance coverage or a dedicated guarantee fund.[103]

In the absence of a dedicated global regime addressing liability in the event of cyberattacks on MASS, regional instruments such as the EU Product Liability Directive (PLD) may help to partially address this gap within the European context. In contrast to the traditional maritime

97 Aglaia Rafaela Katsimani *Cyber-Attacks as a Covered Risk in Marine Insurance* (Master's Thesis, University of Piraeus, 2025) at 33.

98 Aglaia Rafaela Katsimani *Cyber-Attacks as a Covered Risk in Marine Insurance* (Master's Thesis, University of Piraeus, 2025) at 34.

99 Aglaia Rafaela Katsimani *Cyber-Attacks as a Covered Risk in Marine Insurance* (Master's Thesis, University of Piraeus, 2025) at 34.

100 Feng Wang "The Warranty of Seaworthiness and Cyber Risk of Unmanned Ships" (2020) Journal of Business Law 311.

101 Robert Veal and Henrik Ringbom "Unmanned Ships and the International Regulatory Framework" (2017) 23 Journal of International Maritime Law 100 at 100–113.

102 Sungbaek Cho and others *Cybersecurity Considerations in Autonomous Ships* (NATO Cooperative Cyber Defence Centre of Excellence, September 2022) at 13.

103 Ahmed Hany M Abuelenin "Cybersecurity Breaches in Connected and Autonomous Vehicles: Rethinking Liability and Insurance Frameworks" (2025) 19(4) TransNav: The International Journal on Marine Navigation and Safety of Sea Transportation 1211 <http://dx.doi.org/10.12716/1001.19.04.19>.

liability framework, which is largely fault-based and often subject to liability limitations, the EU PLD adopts a strict liability approach for defective products.[104] Under the PLD, producers can be held fully accountable for personal injury or certain property damage caused by a defective product, without the need for victims to prove fault. This system differs significantly from conventional maritime liability, which generally limits the scope of compensation.[105]

Applying the PLD to autonomous vessels raises the question of whether a ship can be considered a "product". Article 4 of the Directive defines a product broadly as "all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software".[106] This suggests that a vessel, as a movable object, could fall within the scope of the PLD.[107] If an autonomous ship is deemed defective (for example, due to software malfunctions) the shipyard could potentially be held liable, provided it delivered the ship with the integrated software. Conversely, if the software was installed later by a third-party IT provider, liability for software defects would likely not extend to the shipyard.[108]

The PLD considers a product defective if it does not meet the safety expectations of a reasonable person. This definition combines objective and normative elements, leaving courts the task of determining acceptable safety standards.[109] In the context of autonomous vessels, three main scenarios may arise: first, clear defects stemming from programming errors or technical non-compliance, which would likely trigger producer liability; second, systems functioning as designed but producing less-than-optimal outcomes, which would generally not constitute defects; and third, advanced systems that remain inherently imperfect despite cutting-edge design, raising questions about whether residual imperfections amount to a defect.[110] In the latter case, the development risk defence may offer limited protection, as it is acknowledged that autonomous technologies cannot be completely risk-free even when designed according to the highest standards.[111]

A potentially relevant legal principle in this context is the concept of system errors, which is recognised in certain legal traditions, notably in Scandinavian jurisdictions. This doctrine acknowledges that some products inherently carry risks, but these risks are socially tolerated because the benefits of the technology outweigh them.[112] To rely on this defence, three conditions

104 Directive (EU) 2024/2853 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2024/2853, art 1.

105 Directive (EU) 2024/2853 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2024/2853, art 5.

106 Directive (EU) 2024/2853 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2024/2853, art 4.

107 Felix Collin "Unmanned Ships and Fault as the Basis of Shipowner's Liability" in Henrik Ringbom, Erik Røsæg and Trond Solvang (eds) *Autonomous Ships and the Law* (Routledge, London, 2020) 85 at 85–95 <https://doi.org/10.4324/9781003056560>.

108 Felix Collin "Unmanned Ships and Fault as the Basis of Shipowner's Liability" in Henrik Ringbom, Erik Røsæg and Trond Solvang (eds) *Autonomous Ships and the Law* (Routledge, London, 2020) 85 at 86–89 <https://doi.org/10.4324/9781003056560>.

109 Sven Förster and D Gashi "The EU's New Product Liability Directive (from a German perspective)" (4 April 2024) Clyde & Co <https://www.clydeco.com/en/insights/2024/04/the-eu-s-new-product-liability-directive>.

110 Gerald M Weinberg *Perfect Software: And Other Illusions About Testing* (Dorset House Publishing, New York, 2008) at 4–11.

111 Gerald M Weinberg *Perfect Software: And Other Illusions About Testing* (Dorset House Publishing, New York, 2008) at 24−27.

112 Product Liability Act 1989 (Denmark) (Act No 371 of 7 June 1989); see also Product Liability Act 1992 (Sweden) (SFS 1992:18).

typically need to be satisfied: the risk must be unavoidable, it must be widely known, and it must be accepted by society.

In the case of autonomous vessels, this approach could be particularly pertinent for addressing situations where certain operational risks are inevitable yet generally understood and tolerated as part of the trade-off for technological advancement. If the system error defence is successfully invoked, it may exempt manufacturers or software developers of autonomous ships from liability when harm results from these unavoidable risks.[113] Consequently, the notion of defectiveness under the EU PLD provides a degree of flexibility for emerging technologies, allowing for limited liability in circumstances where society has accepted the inherent risks associated with autonomous systems.[114]

Overall, by establishing strict liability for defective products, the PLD could hold manufacturers or software developers accountable when vulnerabilities in an autonomous vessel's hardware or software contribute to a cyber-induced incident. While the Directive does not encompass all forms of cyberattacks, particularly those exploiting otherwise secure systems, it provides a legal mechanism within the EU to attribute responsibility in cases where a defect facilitates damage, thereby mitigating the liability gap that exists at the international level.

IV. Conclusion

The emergence of MASS challenges a maritime legal architecture traditionally structured around human control, physical interference and identifiable relationships between vessels, operators and States. As this article has demonstrated, cyberattacks expose these structural limitations with particular clarity. The increasing dependence of MASS on interconnected software, communication and navigation systems expands both the range of actors capable of contributing to maritime casualties and the difficulties associated with attributing responsibility when such incidents occur. The resulting liability problem cannot therefore be adequately addressed through the straightforward extension of conventional fault-based principles alone.

At the international level, UNCLOS provides an important but incomplete foundation for addressing these risks. The requirements embedded in the conventional definition of piracy under art 101 (particularly its emphasis on violence, the two-ship requirement and private purposes), substantially constrain its application to remote and non-physical cyberattacks. The 1988 SUA Convention offers a potentially more adaptable framework because its emphasis on conduct endangering the safe navigation of a ship may accommodate certain forms of cyber interference, including, arguably, the deployment of malware where the constituent elements of the relevant offence are otherwise satisfied. Nevertheless, neither instrument establishes a comprehensive regime specifically designed to address the distinctive jurisdictional and liability consequences of maritime cyber operations.

These difficulties become particularly pronounced in the context of MASS. Although UNCLOS continues to place primary jurisdictional responsibility upon the flag State, the geographical and functional separation of the vessel, remote-control centre, software providers and other

113 Marta dos Santos Silva and others "Relevance of Risk-Benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems" (2021) 29(1) European Review of Private Law 91 at 104–111 <https://doi.org/10.54648/erpl2021005>.

114 Gerhard Wagner "Liability Rules for the Digital Age – Aiming for the Brussels Effect" (2022) 13(3) Journal of European Tort Law 191 <https://doi.org/10.1515/jetl-2022-0012>.

technological actors complicates the traditional assumption that effective jurisdiction and control are concentrated within a single State. The genuine-link requirement does not resolve this difficulty: the absence or attenuation of such a link does not render a MASS stateless, but it may expose weaknesses in the effective exercise of flag-State oversight. A supplementary instrument within the UNCLOS framework could therefore provide greater clarity by defining maritime cyberattacks, distinguishing them from piracy, clarifying the respective jurisdictional competences of flag and coastal States, and strengthening mechanisms of interstate cooperation and responsibility.

At the operational level, the traditional concept of seaworthiness must similarly respond to the technological characteristics of autonomous shipping. Where the safe navigation and operation of a vessel depend upon digital infrastructure, cybersecurity can no longer be treated as conceptually separate from seaworthiness. The emerging notion of cyberworthiness captures this development by extending the relevant inquiry to the resilience of onboard and shore-based systems and to the competence and cybersecurity awareness of the personnel responsible for their operation. This is especially important for remotely controlled vessels, for which the regulatory treatment of shore-based operators remains less developed than the established international standards applicable to seafarers.

The same emphasis on preventive capacity informs the treatment of cyberattacks as potential events of force majeure. Cyber incidents should not automatically relieve the affected party from liability merely because they originate externally or possess a degree of unpredictability. Rather, the assessment should turn upon whether the particular incident was genuinely beyond the party's control, could reasonably have been anticipated and could have been resisted or its consequences mitigated through appropriate cybersecurity measures. The increasingly foreseeable nature of cyber risk in maritime operations consequently strengthens the importance of preventive measures in determining the eventual allocation of responsibility.

The analysis ultimately suggests that liability for cyberattacks affecting MASS is likely to become increasingly distributed among multiple actors rather than transferred wholesale from shipowners to technology providers. Shipowners and operators remain responsible for matters within their sphere of control, including appropriate cyber risk management, system maintenance and operational preparedness. Remote operators may bear responsibility where their conduct contributes to an incident, while manufacturers and software developers may become relevant where vulnerabilities or defects in hardware or software facilitate the resulting harm. Within the EU, the Product Liability Directive is particularly significant in this respect because its strict-liability framework may provide a basis for holding producers accountable where defective digital or physical components contribute to cyber-induced damage, without requiring the claimant to establish fault. Its reach nevertheless remains limited where an attack successfully compromises a system that cannot itself be characterised as defective.

Regulation must therefore be complemented by contractual and insurance mechanisms capable of allocating risks that cannot readily be attributed through conventional liability rules. The BIMCO Cyber Security Clause illustrates how preventive, communicative and reparative responsibilities can be contractually distributed among commercial parties, while marine cyber exclusions demonstrate the continuing significance of insurance in determining where the economic consequences of cyber incidents ultimately fall. At the European level, NIS2 further contributes to this emerging architecture by embedding maritime transport within a broader framework of cybersecurity governance. Together, these mechanisms demonstrate that the appropriate response

to cyber risk lies not in a single liability rule but in a multi-layered system combining public regulation, private contractual allocation, insurance and product liability.

Overall, the legal treatment of cyberattacks in the context of MASS reflects an ongoing evolution from human-centred fault-based liability toward a more technology-aware framework that incorporates regulatory, contractual, and insurance mechanisms. Ensuring safe, resilient, and legally accountable MASS operations will require continued harmonisation of international standards, expansion of cyber risk governance, and adaptation of liability principles to the unique characteristics of autonomous maritime technologies.

To this purpose, since the forthcoming MASS Code does not presently provide explicit provisions regarding cybersecurity, it would be advisable that the Code incorporate comprehensive mandatory standards for cyber risk management. Such standards should encompass clearly defined obligations for both onboard and shore-based personnel, establish requirements to ensure the resilience and integrity of autonomous systems, and delineate robust procedures for the reporting and management of cyber incidents. The integration of these measures would contribute to greater legal clarity, enhance the overall safety and security of autonomous maritime operations, and facilitate a coherent and consistent framework for the attribution of liability in the event of cyberattacks affecting MASS.[115]

Furthermore, a global Maritime Cybersecurity Code could provide an opportunity to establish minimum cybersecurity standards within binding international instruments. Such a framework might require measures including encryption, authentication protocols, and incident reporting. Periodic reviews could ensure that these standards remain aligned with technological developments. From an operational perspective, vessels would be subject to audits, while legal frameworks would underpin enforcement. This adaptive approach would integrate regulatory oversight with technological practice, embedding resilience in maritime governance and ensuring that cybersecurity obligations are consistently acknowledged and enforced across the sector.[116]

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115 Su Wai Mon *MASS and Maritime Cybersecurity* (Centre for International Law, National University of Singapore, September 2025).

116 HWGC Geethamali Chandrasiri *The Intersection of Vessel Monitoring Technologies, UNCLOS, and Data Protection: A Comparative Analysis of the Legal Framework Requirements to Address Emerging Challenges* (United Nations–Nippon Foundation Ocean Affairs and Law of the Sea Fellowship, 2025) at 75–76.