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A Deeper Understanding of the Constitutional Status of Māori and Their Rights Required: A Reply to Christian Riffel

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Abstract

In his recent article, Christian Riffel makes the important argument that New Zealand's free trade agreements (FTAs) with the European Union and the United Kingdom constitute a form of constitutional law-making. However, in my view, Riffel misconstrues Māori rights under domestic and international law and associated context and law. He does not take sufficiently seriously the unique right of Indigenous peoples to self-determination and, in relation to Māori specifically, to tino rangatiratanga under New Zealand's founding constitutional document, te Tiriti o Waitangi. This means that Indigenous peoples have rights to exercise public and governance power alongside a state. In this way, Indigenous peoples' rights are fundamentally and qualitatively different from other minorities or groups in New Zealand and must not be conflated. There are several consequences that result from Riffel's omission. For example, Riffel's argument that Indigenous peoples' rights under the FTAs challenge democracy does not adequately address Indigenous peoples' rights to govern or the state's legally questionable claim to sovereignty. I have some other less fundamental gripes. For example, Riffel's comments on whether Māori in this field have considered the importance of the 'Māori provisions' is somewhat condescending.

1 Introduction

Provisions requiring Māori participation in trade, in cooperation activities and in review processes, and the protection of rights under New Zealand's founding te Tiriti o Waitangi (the Māori provisions) in trade agreements between New Zealand and the European Union (EU) and the United Kingdom (UK), are, as Christian Riffel claims,

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of constitutional and international legal significance.[1] They are unique. They have some potential to facilitate much needed protection of Māori rights. And they might inspire greater inclusion of Indigenous peoples in trade globally. As Riffel maintains, the Māori rights provisions constitute constitutional 'law-making', as do all new legal measures, international or domestic, to protect Māori rights.

However, it is essential to understand the nuances of the domestic legal, political, social and cultural context in which Māori rights sit, as well as the content of Indigenous peoples' rights internationally, to accurately evaluate and assess the significance of the 'Māori provisions'. I worry that Riffel sometimes misconstrues this context, especially the nature of Māori rights to self-determination, governance and public power in New Zealand and internationally. On the contrary, he seems to equate Māori with other minority groups. Consequently Riffel overstates and mis-characterizes the challenge that Indigenous peoples' rights pose to democracy. Riffel is sometimes condescending in his comments on whether Māori players in this field appreciate the Māori provisions. And he potentially exaggerates the difficulties in applying tikanga/Māori law.[2] These concerns undermine his critical assessment of the Indigenous provisions in trade agreements between New Zealand and the EU and the UK.

2 The Sovereignty Question

Perhaps the most fundamentally problematic aspect of Riffel's analysis is the basic premise on which it is written. Riffel assumes that the Crown has the right to exercise sovereignty in New Zealand. He writes near the beginning of his article that,

> The Treaty of Waitangi, or te Tiriti o Waitangi in te reo Māori, concluded between the British Crown and Māori chiefs in 1840, has had a troubled history, partly due to the differing language versions and partly due to changing attitudes towards Māori, its status oscillating from 'nullity' to a foundational document. The discrepancies of the two language versions go to the heart of NZ's nationhood, to wit: whether Māori ceded sovereignty and what level of Māori authority is guaranteed.[3]

Little more is written about the question of whether Māori ceded sovereignty. Despite noting the question whether sovereignty has been ceded, his analysis proceeds on the basis that the Crown is sovereign. This might be the orthodox 'myth' of the previous generation of scholars and the general populace.[4] However, it has been debunked.[5] Indeed, the contrary is true. Under te reo text of te Tiriti o Waitangi, which takes precedence under the legal doctrine of *contra proferentum*, Māori retain their tino rangatiratanga as a matter of law and legitimacy.

[1] Treaty of Waitangi / Te Tiriti o Waitangi between the British Crown and Māori Chiefs (signed 6 February 1840); Riffel, 'Constitutional Law-making by International Law: The Indigenization of Free Trade Agreements', 35 *European Journal of International Law* (2024) 445, especially Table 1 at 466 (which is particularly helpful).

[2] *Ibid.*, at 467.

[3] *Ibid.*, at 447 (footnotes omitted).

[4] P. Joseph, *Joseph on Constitutional and Administrative Law* (2021).

[5] Waitangi Tribunal, Tino Rangatiratanga me te Kāwanatanga, Doc. Wai 1040 9 December 2023.

In a similar vein, later, Riffel focuses on the 'principles of the Treaty of Waitangi'.[6] The 'principles', rather than the text of te Tiriti, is the language that Parliament has used to recognize te Tiriti in legislation. Here, again, Riffel – like Parliament in using the language of principles – obfuscates the priority that should be afforded to the text of te Tiriti in the Māori language as a matter of international legal rules of interpretation and its guarantee of Māori sovereignty. The 'principles' aggravate the myth that Māori ceded sovereignty to the Crown.

The suspect claim by the Crown to sovereignty undermines – profoundly – New Zealand's authority to negotiate and agree to international treaties. I would expect this to underlie any analysis of the constitutional elements of trade agreements between New Zealand and other states, especially when they focus in on requirements for Māori inclusion and participation in the exercise of public power. More specifically, if the provisions providing for Māori inclusion and participation in trade are evaluated from the perspective that Māori retain their tino rangatiratanga, they fall considerably short of what should be necessary under New Zealand's Constitution.

In this context, it is also remarkable that Riffel only refers cursorily – three times – to the work of one of the main Māori organizations that work on trade and Māori interests, Ngā Toki Whakarururanga,[7] which has highlighted the 'sovereignty questions'. It was established under an agreement between the Crown and Māori in relation to a Waitangi Tribunal claim that the Crown was in breach of te Tiriti o Waitangi and has become an authoritative voice for Māori on trade.[8] Ngā Toki, in stark contrast to Riffel, has analysed the New Zealand and UK free trade agreement (FTA) and the New Zealand and EU FTA as falling short of the requirements of te Tiriti o Waitangi and the retention by hāpu Māori of tino rangatiratanga.[9]

3 The Democratic Objection

Riffel highlights at various points the 'democratic objection' to the 'Māori provisions':

> The salient issue is whether Māori involvement – in the sense of organized entities as opposed to an individual capacity – in political decision-making should be given heightened weight and even include veto rights for matters concerning the whole country (not just intra-Māori affairs) – in other words, parity between Māori and Pākehā, irrespective of the fact that Māori make up around 17 per cent of the NZ population.[10]

[6] Riffel, *supra* note 1, at 467.

[7] 'Who We Are', *Ngā Toki Whakarururanga*, available at https://ngatoki.nz/about/who-we-are/.

[8] 'Ministry Statements and Speeches: 21 December 2020', *New Zealand Foreign Affairs and Trade* (2020), available at www.mfat.govt.nz/en/media-and-resources/joint-press-release-by-waitangi-tribunal-claimants-and-the-ministry-of-foreign-affairs-and-trade/.

[9] 'Tiriti Analyses', *Ngā Toki Whakarururanga*, available at https://ngatoki.nz/tiriti-analysis/; Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (signed 28 February 2022, entered into force 31 May 2023); Free Trade Agreement between the European Union and New Zealand (signed 9 July 2023, entered into force 1 May 2024).

[10] Riffel, *supra* note 1, at 446 (footnotes omitted).

This quote, and also the comment, based – oddly – on the work of a scholar based in the USA rather than in New Zealand, that te Tiriti/Indigenous rights are pitted against 'democratic considerations' does not engage with Māori tino rangatiratanga at all. First, Māori do not have a veto right in the trade agreements under analysis or, one might argue, in any decision-making impacting both Māori and non-Māori. And, further, Riffel's corresponding footnote seems to rely on a piece of legislation that does not require, in fact, 50/50 representation of Māori and non-Māori.[11] To suggest that a veto power is in play misconstrues a few policies under the previous government that enabled Māori participation in limited areas of decision-making where Māori interests are especially in play.

Second, even if Māori did have a veto over governmental decision-making, a veto would seem appropriate if we start from the premise, as outlined above, of the legitimacy of Māori sovereignty recognized by the Crown under New Zealand's founding constitutional treaty. Further, and this will be canvassed in more depth below, Indigenous peoples' consent is required in some circumstances under the United Nations (UN) Declaration on the Rights of Indigenous Peoples (UNDRIP).[12]

Third, the democracy question needs to be unpacked. On what definition of democracy do Indigenous peoples' rights abridge democracy? You could argue that any legitimate understanding of democracy should protect rights of minorities and Indigenous peoples, as the Canadian and US Constitutions do, amongst others. This is even more essential when we consider the number of times that Māori rights have been breached by the Crown as a result of 'tyranny of the majority'. I discuss this some more below.

4 Paternalism

There are a few instances in the article where Riffel suggests that Māori should appreciate more the 'Māori provisions', especially the so-called 'Treaty of Waitangi exception':

> Criticism levelled against the Treaty of Waitangi exception from a Māori perspective, calling for further concessions towards Māori (business) interests, should also consider the commercial interests of NZ's trading partners against the background that the importance of Māori businesses to the NZ economy as a whole is on the rise. To basically exclude big parts of the economy, notably the primary sectors, from the purview of (reciprocal) FTA obligations may not be acceptable, or fair, to them. The exception, by shielding te Tiriti – 'a foundational document of constitutional importance' – from FTA commitments, has as a consequence the reversal of a fundamental principle of international law – namely that, from the vantage point of international law, it is international law that takes precedence over domestic constitutional law. Put differently, under the exception clause, NZ can invoke its own constitutional law as a justification for its failure to perform its FTAs; te Tiriti and acts of the NZ state fulfilling it do not need to be compliant with the country's FTA commitments.[13]

[11] *Ibid.*, at 446. The Waitangi Tribunal defines co-governance as meaning '50/50' representation. See Interim Report on Māori Appointments to Regional Planning Committees, Doc. WAI 2358, 1 September 2022, paras 2.4.2, 2.6.

[12] United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/49, 13 September 2007.

[13] Riffel, *supra* note 1, at 456–457 (footnotes omitted).

It is condescending to suggest that Māori have not considered the 'Māori provisions' from the perspective of Māori commercial interests or the novelty of these clauses from an international legal perspective. This is especially true when one considers the organizations and individuals he cites as 'critical'. They include New Zealand's leading, globally recognized, international economic law scholar,[14] pre-eminent Māori lawyers,[15] an internationally acclaimed Indigenous jurisprudential giant,[16] not to mention the current president of the New Zealand Law Commission, who is an international expert on international arbitration.[17]

5 The Novelty of the Māori Rights Provisions

Riffel suggests that with the 'Māori provisions', New Zealand is leading the way with respect to Indigenous peoples' rights clauses in trade agreements:

> NZ thus takes a more sweeping approach towards securing policy space for the domestic implementation of Indigenous rights than other countries with an Indigenous population, such as Australia. … That said, the use of a specific Indigenous rights exception seems to gain some currency. The USMCA [United States-Mexico-Canada Agreement] employs an exception clause for measures deemed 'necessary to fulfill … legal obligations to indigenous peoples', be they of a constitutional or international nature.[18]

The USMCA has arguably much stronger protections – at least greater than having 'some currency' – in that formal and guaranteed protections of Indigenous peoples' rights in the Mexican, US and Canadian constitutions are far stronger than New Zealand's.[19] They include rights to consultation and accommodation of Indigenous peoples, rights to lands and the right to self-determination,[20] and they take precedence over other domestic law to the contrary, which is enforceable in the courts. New Zealand law is much weaker on all accounts.

[14] 'Jane Kelsey', available at https://profiles.auckland.ac.nz/j-kelsey/publications.

[15] 'Annette Sykes', available at https://en.wikipedia.org/wiki/Annette_Sykes.

[16] 'Moana Jackson, CRSNZ', available at https://en.wikipedia.org/wiki/Moana_Jackson.

[17] 'Amokura Kawharu', *Law Commission*, available at www.lawcom.govt.nz/about-us/our-people/.

[18] Riffel, *supra* note 1, at 455 (footnotes omitted).

[19] United States-Mexico-Canada Agreement (signed 30 November 2018, entered into force 1 July 2020).

[20] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 35. For cases on the right to consulation and accommodation, see, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153. The constitutional protections extend to Article 2, section IX(B), of the Mexican Constitution 2015 which establishes the obligation of Mexican authorities to consult people and communities when implementing institutional and public policies to protect their rights. At the state level, see, e.g., Ley de consulta previa, libre e informada de los pueblos y comunidades indígenas y afromexicanas para el estado de Oaxaca (2020, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.cndh.org.mx/sites/default/files/doc/Programas/Indigenas/OtrasNormas/Estatal/Oaxaca/Ley_CPLIPCIAE_Oax.pdf). Indigenous peoples' inherent sovereignty is recognized under US constitutional law, including in accordance with treaties between Native Americans and the USA.

6 The UNDRIP

Riffel takes a restrictive interpretation of the UNDRIP:

> Under the universally supported UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Indigenous peoples have the 'right to participate fully, if they so choose, in the political, economic … life of the State'. While it may be questionable whether an institutionalized role in government decision-making ensues from this 'right to participate', it would be a stretch to derive veto powers from 'participation'. Participatory rights under the UNDRIP are subject to two limitations: first, the principle of democracy and, second, a confinement to internal Indigenous matters whenever special consideration must be given to the interests of Indigenous peoples.[21]

In my view, Riffel overstates the extent to which Indigenous peoples' rights can be justifiably limited by democracy:

> The first limitation can be inferred from Article 46(2) thereof, which provides for the restriction of Indigenous rights 'for meeting the just and most compelling requirements of a democratic society'. This is buttressed by the preamble to the UNDRIP, which calls for 'cooperative relations between the State and indigenous peoples, based on principles of … democracy'. In a legal instrument dedicated to the protection of Indigenous rights, a limitation clause is exactly the place where one would expect to find a reference to democracy in accordance with general human rights drafting practice. The fact that democracy is couched as a limitation on Indigenous rights does not entail that the former is secondary to the latter. That is to say, a hierarchy of values – a categorical prioritization of Indigenous rights over democratic principles – does not follow, even when taking account of the Siracusa Principles.[22]

I have two concerns here: first, that the limitations on rights, such as those in Article 46(2), are to be construed narrowly, shown to be necessary and interpreted in a way that does not jeopardize the 'essence of the right'. Under the Siracusa Principles, mentioned by Riffel,

> 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
> 3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.

The same principles apply in New Zealand domestic law.[23] In other words, there is indeed a basic hierarchy afforded to the Indigenous peoples' right in question over any justification to limit a right, including democracy.[24]

Second, whether Indigenous peoples' rights constitute an incursion on democracy depends on how we understand democracy. As alluded to above, in most states in the world, democratic decisions – as in decisions by a legislative majority – can be trumped by the rights of minorities, including Indigenous peoples, and enforced by courts. We see this in most Western liberal democratic jurisdictions that include human rights in

[21] Riffel, *supra* note 1, at 459 (footnotes omitted), referring in the first instance to article 5 of DRIP and then, in the second instance, to article 46(2).

[22] *Ibid.*, at 460 (footnotes omitted).

[23] *Hansen v. R.*, [2007] NZSC 7, [2007] 3 NZLR 1.

[24] United Nations (UN) Commission on Human Rights, The Siracusa Principles on the Limitation and Derogatoin Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, 28 September 1984, at 2–3.

their constitutions. In other words, democratic objectives might require enforced consistency with Indigenous peoples' rights rather than the reverse.

While Riffel distinguishes Indigenous peoples' participatory rights on the basis that they might lead to 'tyranny of the minority', this is a question that would have to be determined when assessing whether the Māori right to participation should be limited by 'democracy'. Here, I emphasize again the priority to be afforded to the participatory right over the justification for incursion on a right. I also refer back to my earlier point that Māori do not have 'veto rights' under New Zealand law, even if consent is required in some circumstances in the UNDRIP, so the point is somewhat moot. Moreover, context is, as ever, important. Māori have been subject to majoritarian decision-making for many centuries now, which has frequently led to breaches of their human rights and rights under te Tiriti o Waitangi.[25]

Moving to the question of consent, Riffel does not recognize that Indigenous peoples' consent can be necessary on issues that affect them and/or argues that there are very limited circumstances where matters 'affect them'. Overall, he gives the impression that the language 'in order to obtain their free, prior and informed consent' is restricted to a right to consultation. This interpretation does not align with the text or the purpose of the UNDRIP, jurisprudence or scholarship. On the 'veto' element of his argument, he elaborates further:

> in accordance with Article 27, second sentence, Indigenous peoples have a right to participate in adjudication processes 'pertaining to their lands, territories and resources' and, more generally, as per Article 18, 'in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'. In addition, the UNDRIP requires consultation with Indigenous peoples and 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' and 'prior to the approval of any project affecting their lands or territories and other resources'. Other provisions in the UNDRIP establish the requirement of 'free, prior and informed consent' – which implies consultation as a necessary step – in relation to matters affecting Indigenous peoples, such as relocation or 'storage or disposal of hazardous materials … in the[ir] lands or territories'.[26]

First, the two main articles on participation in state governance are Article 18, which he mentions, and, especially, Article 19. Under Article 19, '[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'. Riffel does not cite Article 19 in full. He then mixes the language from Article 19 with language from obligations to acquire Indigenous peoples' consent, or consult for that purpose, in relation to specific rights found in other articles in other parts of

[25] See, e.g., Foreshore and Seabed Act, 2004; see also UN Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), Decision 1(66) on New Zealand Foreshore and Seabed Act 2004, Doc. CERD/C/66/NZL/Dec.1, 11 March 2005.

[26] Riffel, *supra* note 1, at 460–461 (footnotes and emphasis omitted).

the UNDRIP and on different issues, such as lands, territories and resources. In doing so, he gives the impression that the obligation to consult Indigenous peoples to obtain their consent is confined only to some specific situations. Article 19 applies generally to decisions that affect them, not to specific situations.

Similarly, in the quote above, Riffel writes that the right to consent is confined to 'internal Indigenous matters whenever special consideration must be given to the interests of Indigenous peoples'. He does not justify how he can narrowly read the plain text – 'legislative or administrative measures that may affect them' – in this way. Finally, on the point that free, prior informed consent 'implies consultation', he cites paragraph 14 of the UN Expert Mechanism's report on the topic.[27] This paragraph states:

> Free, prior and informed consent is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.

In other words, paragraph 14 of the Expert Mechanism's report does not imply that the requirement for consent is met when Indigenous peoples are consulted. In fact, the contrary is true. The point is that consultation is *ipso facto* required in order to obtain Indigenous peoples' consent. On the question of the 'veto', which is Riffel's main concern, the Expert Mechanism writes in the same report that Indigenous peoples:

> may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. Arguments of whether Indigenous peoples have a 'veto' in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept.[28]

Finally, Riffel refers to the UNDRIP as non-binding and soft law.[29] Suffice to say, many scholars and international lawyers argue that much of the UNDRIP is indeed binding as repetition of human rights included in binding instruments such as the International Covenant on Civil and Political Rights – for example, the right to self-determination.[30] And they argue that several provisions have reached the threshold of customary international law.[31] Even if the UNDRIP in and of itself remains 'soft law', its reach goes far beyond this classification. It has stimulated law changes globally and has been given effect domestically in several jurisdictions.[32]

[27] Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent, UN Doc. A/HRC/39/62, 10 August 2018.

[28] *Ibid.*, at para. 26(a).

[29] Riffel, *supra* note 1, at 461.

[30] International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Rodriguez Pinero, '"Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration', in C. Charters and R. Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples* (2009) at 314.

[31] International Law Association, Report on the Implementation of the Rights of Indigenous Peoples' Rights (2020), at 2.

[32] Mexico, Ecuador, Canada, Bolivia and so on.

7 Tikanga Māori

To finish, Riffel writes in relation to references to tikanga Māori / Māori law that 'tikanga systems can differ among iwi'[33] and then states:

> Under the FTAs, Indigenous customary protocols – tikanga Māori – have gained international significance in that international cooperation has to be 'where appropriate informed by … tikanga Māori', and an international committee has to be run 'in a manner sensitive to tikanga Māori' when dealing with Māori trade and economic cooperation with Māori. In light of this enhancement, accessibility to tikanga, which is often oral, becomes an issue, especially for NZ's trading partners. Furthermore, it is not clear how to address conflicting tikanga when different iwi follow differing protocols.[34]

In my view, this passage suggests a failure to appreciate that fundamental basis of all tikanga Māori in a set of principles and practices that are shared across Aotearoa and beyond. Moreover, the best evidence of tikanga is in literature by experts in tikanga Māori rather than in a magazine for lawyers or cases determined by the state judiciary. Experts might have been better cited as authority for Riffel's claims.

8 Conclusion

Riffel's argument that the 'Māori provisions' in trade agreements amount to a form of constitutional law-making via international law is, in my view, sound. Any legal or political recognition or protection of Māori rights is inherently constitutional, especially in New Zealand's constitutional landscape where the Constitution is unwritten and constitutional change occurs incrementally. However, returning to my first point about hāpu Māori's retention of tino rangatiratanga, Riffel's argument is flawed in that he does not take seriously the fundamental constitutional illegality and illegitimacy of New Zealand's claim to authority, including to enter into trade agreements. He does not put Māori's ongoing sovereignty at the fore of his analysis. These failures explain, in part, Riffel's basic objection, which he states in his conclusion, that Māori rights privilege Māori over other groups, including other minorities:

> Whereas Indigenous rights, like other minority group rights, are designed '[t]o ensure the cultural survival of vulnerable groups and to protect group identities from assimilation pressures' – that is, to preserve the Indigenous realm – Māori rights rise above it: they approach the exercise of public power and, as far as foreign trade is concerned, external powers.[35]

And:

> Every country with an Indigenous population will need to find its own path towards the recognition of Indigenous rights and the consideration of Indigenous interests in political decision-making, including in the fields of foreign trade and investment. As expounded above, the NZ situation is exceptional due to the interstitial constitutional position of te Tiriti. This makes it difficult to transpose NZ legal thinking and its novel treaty drafting to other parts

[33] Riffel, *supra* note 1, at 463.
[34] *Ibid.*, at 466–467 (footnotes omitted).
[35] *Ibid.*, at 467–468 (footnotes omitted).

> of the world. Whatever the regulatory approach chosen, negotiators representing Indigenous interests will face the task of explaining to their counterparts in what way Indigenous trade differs from other trade, and following from this, why it should be treated differently.[36]

As is widely reflected in international law, such as the UNDRIP, te Tiriti o Waitangi and the jurisprudence of human rights treaty bodies,[37] Indigenous peoples are self-determining peoples who retain their inherent sovereignty; they are not minorities – they are peoples. Recognition of this distinction was one of the primary rationales for the development of the UNDRIP, adopted by the General Assembly. Their rights include, accordingly, to exercise public power, not only rights derived from equality. That is exactly why the 'Māori provisions' are, if anything, a weak form of protection of Māori rights. It is also why international and domestic law require that Indigenous peoples, to quote Riffel, 'be treated differently'.

[36] *Ibid.*, at 468 (footnote omitted).

[37] Similarly, the CERD Committee's General Recommendation on Indigenous Peoples requires states to respect Indigenous peoples' rights to further the goal of freedom from racial discrimination. CERD Committee, General Recommendation XXIII: Indigenous Peoples, UN Doc. A/52/18, 18 August 1997, Annex V. Moreover, when considering New Zealand's state report in 2007, the CERD Committee noted that measures specifically directed towards Māori should not even be framed as 'special measures' because such measures are only justified for as long as is necessary to attain equality for disadvantaged groups. In contrast, Indigenous peoples' rights are permanent, it stated, and are thus required for reasons above and beyond simply achieving parity between citizens. It stated: 'The Committee draws the attention of the State party to the distinction to be drawn between special and temporary measures for the advancement of ethnic groups on the one hand and permanent rights of indigenous peoples on the other hand.' CERD Committee, Concluding Observations: New Zealand, UN Doc. CERD/C/NZL/CO/17, 15 August 2007.