Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

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25.2.2 Should the Goal of Environmental Protection Be Formulated as a Right?

In my view, if there were to be a constitutional environmental provision in any written New Zealand constitution, then it should be constituted as a right.[42] A specific right would give greater prominence to the environment[43] and it would help facilitate public discourse and make preservation of the environment a more personal issue by giving it a "human" face.[44] Without relating it back to people, "the environment" can, contrary to the words of the International Court of Justice,[45] seem something of an abstraction. The importance of winning the hearts and minds of people and thus of the role of rhetoric in protecting the environment cannot be overemphasised. Such a right would also provide a focus on the rights of Māori as the indigenous people of New Zealand and recognise the importance of the environment for Māori, culturally, economically and spiritually.[46]

Some argue that formulating any constitutional environmental protection provision as a right would not in fact add to environmental protection measures. At the risk of appearing trite, the immediate response is that every little bit helps. A more considered response would mention the impact that terminology has on human action and the systemic advantages of framing the goal of environmental protection as a right. With regard to the terminology point, there is more likely to be willing compliance with the overall regime if a person considers him or herself as enjoying a right rather than being subjected to regulation. In terms of systemic issues, framing environmental protection as a right also draws it into the more general rights framework, with consequent advantages for environmental protection. The

[42] It may be that, as statements of public policy and rights serve different functions, both should be included in the environmental context.

[43] Professor Stephen Marks suggests that the value of the right to development lies primarily in its rhetorical force – see Marks (2004), p. 156. The United Nations Development Programme (2000) recognises at p. 22 that, since the process of human development often involves great struggle, the empowerment involved in the language of claims can be of great practical importance. Similar comments can be made about any right to the environment.

[44] Australian Human Rights and Equal Opportunity Commission (2008), p. 12.

[45] See the comments in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 241.

[46] See discussion below and in particular principles 13 and 14 of the Draft Principles On Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994); art 25 of the Declaration on the Rights of Indigenous Peoples UN Doc A/RES/61/295 (2 October 2007); International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 (ILO Convention (No. 169)). Chapter 26 of Agenda 21, the global plan of action relating to sustainable development adopted by the UN Conference on Environment and Development 1992, entitled "Recognizing and Strengthening the Role of Indigenous People and Their Communities" also focuses on participation rights of indigenous peoples.

human rights concepts of "respect, protect and promote"[47] have particular resonance in the environmental context.

Some argue that framing environmental protection as a right draws attention away from the root causes of environmental degradation. I disagree. As humans are the cause of environmental degradation, a human rights approach, properly coupled with an emphasis on duties and responsibility, should provide impetus for addressing root (human) causes. The power of an explicit environmental right has been said to lie in its ability to trump individual greed and short-term thinking.[48]

It is true that there may be some difficulty in characterising the right. The right to the environment may need to be more fully textured than some other rights. For example, as discussed in more detail below, it must include the environment for its own sake, embrace communities, take into account inter-generational equity and stress responsibilities (of States, businesses, communities and individuals). Nevertheless, there is no reason why this cannot be encapsulated in the articulation of the right.[49] The difficulties in terminology have, in my view, been exaggerated. The basic concepts are well understood. The application to particular situations will be a matter of interpretation for supervisory institutions and courts, in the same way as for other human rights.[50]

25.2.3 Would Participation and Procedural Rights Suffice?

The proposition that environmental protection should be constituted as a right may be met with the argument that a substantive right to the environment is not necessary

[47] In the late 1990s, the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) and various UN independent experts consistently began to incorporate the "tripartite" framework of State obligation in relation to economic, social and cultural rights. This framework imposes three types of obligations on State parties: to respect, to protect and to fulfil human rights. For instance, the tripartite framework of State obligation was included in the Maastricht Guidelines on Violations of Economic, Cultural and Social Rights (22–26 January 1997).

[48] See Anderson (1996), p. 21. He also suggests, at p. 22, that it may stimulate political activism in the environmental area and provide a rallying ground for NGOs.

[49] The Asia Pacific Forum of National Human Rights Institutions (2007b), p. 38 provided recommendations for the types of considerations that should be included within the articulation of any such right. It suggested that the right should include: the right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity. For further discussion of this suggested formulation see Glazebrook (2009) pp. 324–328.

[50] See comments of Boyle (1996), pp. 50–51. As indicated above, this is not, however, to suggest that framing an environmental protection provision as a right necessarily would (or should) give it direct enforceability. It could, for example, merely inform the interpretation of legislation in the same way as occurs now under the New Zealand Bill of Rights Act 1990.

because procedural and participation rights suffice to guarantee adequate environmental protection. Such an argument is often made at the international level because of the view that procedural rights might enjoy greater support than any substantive right, in part because of their comparability with civil and political rights.[51] There has been international recognition of participation and procedural rights in the Rio Declaration, which was explicit in its support for procedural rights and emphasised in particular the need to secure the participation rights of women, youth, indigenous peoples and local communities.[52] The momentum behind procedural rights and participation culminated in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) which is open for signature to any State.[53]

At the national level it would be essential to deal, in any constitutional environmental provision, with participation and procedural rights concerning decisions relating to the environment.[54] Procedural rights include: the right to information concerning the environment, including all information necessary to enable effective public participation in environmental decision-making; and the right to participate in planning and decision-making activities (this includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions). Furthermore, as discussed in more detail below, the participation rights of

[51] Rodriguez-Rivera (2001), p. 16; Handl (2001), p. 318. Handl argues at pp. 318–328 that the rights to information, participation and access to remedies in the environmental area are gaining recognition as generally protected international entitlements because these rights rest on currently justiciable rights of international human rights law and are pivotal in the "trilateral relationship of human rights, democracy and environmental protection". He points in support to art 25 of the ICCPR. See also Sands (2003), p. 118; Asia Pacific Forum of National Human Rights Institutions (2007a), pp. 48–54 and The Asia Pacific Forum of National Human Rights Institutions (2007b), p. 12; and Douglas-Scott (1996), p. 112.

[52] Principles 20, 21, 22 respectively – see Shelton (2002a), p. 2.

[53] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998 and entered into force 30 October 2001). The Aarhus Convention concentrates on access to information, public participation and access to justice in the environmental area. See The Asia Pacific Forum of National Human Rights Institutions (2007b), p. 15.

[54] The RMA does contain the ability for the public to participate with regard to decisions regarding the environment. Under s 96(2) a person is able to make a submission on an application for a resource consent, if the application has been publicly notified. The Resource Management Amendment Act 2009 removed the presumption that a consent authority must publicly notify an application. Under s 95A(1), the consent authority has a discretion to decide whether to publicly notify an application. However, under s 95A(2) the consent authority must notify if it decides that the activity will have or is likely to have adverse effects on the environment that are more than minor; or the applicant requests public notification of the application; or if a rule or national environmental standard requires public notification of the application. Additionally, Schedule 1, cl 6 of the RMA provides that if a proposed policy statement or regional or district plan is publicly notified, any person is able to make a submission on it to the relevant local authority (with qualifications added for persons who would gain an advantage in trade competition through the submission).

indigenous peoples and minorities ought to be dealt with specifically.[55] Increased participation encourages transparency and accountability in policy decisions.

On the other hand, in my view, procedural rights alone would not suffice without a substantive right and effective remedies for breach. The Rio Declaration constructed the link between human rights and environmental protection in the field of procedural rights (access to information and participation rights) but also in terms of ensuring access to judicial and administrative proceedings and the development of effective redress and remedies.[56] Without being attached to an explicit right to environment, participation rights may exist in somewhat of a vacuum.[57] Thus, while it is clear that participation and procedural rights should be included within a constitution to ensure that New Zealanders can participate in environmental decision-making, the effectiveness of these rights will be significantly increased when they are linked with a substantive environmental right.

25.2.4 Will a Right to Environmental Protection Detract from Other Rights?

One of the arguments posed against having an explicit right to the environment is the possibility that it might detract from other rights. There will always be

[55] See the Aarhus Convention on participation rights and also Asia Pacific Forum of National Human Rights Institutions (2007b), p. 15. It must be noted that in New Zealand, when preparing or changing policy statements or regional/district plans, local authorities are required to take into consideration the interests of and consult with tangata whenua: ss 61(2A), 62, 65, 66(2A), 74(2A), Schedule 1, cls 2–3, 3B of the RMA. Under s 81 of the Local Government Act 2002, a local authority must establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and provide relevant information to Māori, while under s 82(2) of the Local Government Act a local authority must ensure that it has in place processes for consulting with Māori in relation to any decision or any other matter. More generally, it has been acknowledged in the environmental context that the Crown's obligations under the Treaty of Waitangi also require consultation with Māori to take place. As noted above, s 8 of the RMA states that the principles of the Treaty of Waitangi must be taken into account in the decision-making process. In *Walker v Hawkes Bay Regional Council* [2003] NZRMA 97 (EC) at [48], the Environment Court noted, in the context of an appeal against the spraying of weedkiller by a local authority, that the first consequence of s 8, in light of the fact that large parts of the land and lake to be sprayed were owned by the Crown (as they were vested in the Department of Conservation as a reserve), is that there was a duty under the Treaty of Waitangi on the department, or on the regional council as its agent, to consult with tangata whenua.

[56] See Principle Ten of the Rio Declaration. For discussion of the Rio Declaration see above footnote 9. See also Shelton (2002a), pp. 1–2.

[57] Participation rights may still result in a concentration on the short rather than long term. Anderson (1996), p. 10 says that democracies may even be structurally predisposed to unfettered consumption. See also Asia Pacific Forum of National Human Rights Institutions (2007a), p. 52.

difficulties balancing rights when they apparently conflict but that is the nature of human rights law. Indeed, according environmental protection the status of a right does not mean it is granted priority over (for example) economic and property rights. Rather, it ensures environmental concerns can be weighed against these potentially competing rights.[58]

All rights are indivisible and those who are in decision-making roles are always engaging in an exercise of weighing rights. If a right is not articulated, however, it may not be considered at all. Equally, if an issue is seen as being outside a human rights framework, it may assume disproportionate importance and overshadow human rights altogether. Thus, one of the reasons for including environmental protection as a right is that it would allow it to be balanced as a separate right against other rights, rather than being isolated in its own legal framework. In any event, given the fundamental importance of the environment as a foundation for other rights, there may well be less difficulty with balancing than there is with some other rights.

In light of the importance of balancing rights, although I am probably a lone voice in this, I am not a fan of including considerations of sustainable development within an environmental protection provision.[59] This is because there are two distinct concepts involved: the environment and development. Further, the concept of sustainable development could be seen as relating only to human use of the environment, to the exclusion of biodiversity and ecosystems generally.

In my view, if sustainable development is to be included in any constitutional provision, it is better to have two separate rights (i.e. both a sustainable development right and an environmental right) and then weigh them against one another when they are apparently in conflict. This allows a proper focus on the environment for its own sake as well as on its relationship with human development. Given that the concentration must be on long-term sustainable development in any development right, this should mean that the two rights are not often in conflict. Two separate rights, however, enable any residual conflicts to be identified rather than masked.[60]

It is also important to emphasise that any right to the environment should support the principles of international (and national) environmental law and not be incompatible or inconsistent with them. For example, de Sadeleer argues that what he calls "environmental directing principles" such as the polluter-pays, prevention and

[58] Anderson (1996). See also Brandl and Bungert (1992), p. 92.

[59] The focus on sustainable development internationally arises from the view of less developed nations that they have the right to "catch up" to developed nations without paying for the environmental degradation they see as having been caused by the developed nations. In developed countries the balance can better be seen as a balance between the environment on the one hand and property or economic rights on the other, except perhaps in the field of the building of infrastructure which can be seen as providing a platform for national development. But note the view, discussed above, that the environment is a necessary prerequisite for economic wellbeing.

[60] The aim of a stand-alone environment right must be to preserve the environment, both for its own sake and for the long-term development of current and future generations. That is not a clear cut focus of a development right, even couched as a sustainable development right. Hence the possible conflict.

precautionary principles, may strengthen constitutional provisions that recognise environmental protection.[61] The content of the right should thus be moulded by international environmental law and vice versa.[62]

25.2.5 Do Rights Suffice or Should There Be Duties Too?

In a number of contexts, concern is increasingly being expressed that the concentration on individual rights detracts from a focus on responsibilities and obligations. However, rights are not one-sided. Rights do impose requirements on individuals and communities to respect rights,[63] as well as obligations on States to ensure that happens.[64]

In my view, in any constitutional environmental right, there should also explicitly be a duty for all branches of government, as well as for individuals and the community (including businesses), to protect, promote and improve the environment. There needs to be some care with the concept of improving the environment, however. It should certainly include remedying environmental degradation. The concept should also include improvements in terms of better sanitation or infrastructure for example, but any such measures would need to limit any resulting damage to the environment.

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[61] de Sadeleer (2002) , p. 275. See also Asia Pacific Forum of National Human Rights Institutions (2007a), pp. 85–89.

[62] As pointed out by Boyle (1996), pp. 45–57, there is growing recognition of the need to internationalise the global environment based on notions of common concern and interest and the recognition of the global interdependence of many environmental issues. Tying in the environment with the human rights framework may help to accelerate that trend.

[63] It must not be forgotten that businesses must also respect rights. On 18 June 2008 the Human Rights Council was unanimous in "welcoming" the policy framework for business and human rights proposed by the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The policy framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies. For discussion of the framework see generally: http://www2.ohchr.org/english/issues/trans_corporations/index.html. For general discussion of corporate accountability for human rights violations see Asia Pacific Forum of National Human Rights Institutions (2008).

[64] For instance, the Supreme Court of the Philippines in *Oposa v Factoran*, above footnote 32, held, at 188, that the right to a balanced and healthful ecology carried with it the correlative duty to refrain from impairing the environment. It must also be noted that a State may be responsible for failing to take measures to prevent violations of human rights by private actors, since international human rights instruments place obligations on the State to address human rights violations by private actors. See the commentary provided in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts. For general discussion of the International Law Commission's Draft Articles see the Asia Pacific Forum of National Human Rights Institutions (2007a), pp. 63–72.

As discussed below, any duty must also recognise the need to preserve biological diversity and a balanced ecosystem – i.e. the protection of the environment and flora and fauna for their own sake. The other limbs of the tripartite framework of State obligations of "protect and promote" must always be given at least equal, if not greater, weight.[65]

25.2.6 Should There Also Be Collective Rights?

Any environmental right cannot be seen merely as an individual right. It must also be a right enjoyed by communities and peoples. This, however, strengthens rather than devalues the concept of an environmental right, although it may be necessary at times to balance individual (and particularly minority) rights against collective rights. However, the interests of the individual, communities and peoples will, if the right is properly constituted to include the environment for its own sake, usually coincide (which is not necessarily the case with a number of other rights). It is important to emphasise that the fact that there is an individual right does not mean that there is not a community right,[66] especially in respect of the so-called third generation rights like the right to the environment and the right to sustainable development.[67] Indeed, these may be best understood as community or collective rights.[68]

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[65] For discussion of the tripartite framework of State obligations see above footnote 47.

[66] Reeves (1998), p. 15.

[67] First generation rights are generally associated with civil and political rights, while second generation rights are seen to be the rights which guarantee the economic and social rights of individuals. Third generation rights or "solidarity" rights (which include peace, development and a good environment) are generally accorded to groups rather than individuals and may contain an element of redistributive justice among States. See generally, Boyle (1996), p. 46. See also Rosas (2001), pp. 119–120. In my view a hierarchy of rights is best avoided as it detracts from the principle of the indivisibility of all rights. Classifying economic, social and cultural rights as second generation implies that they are somehow of secondary importance. Economic, social and cultural rights are included in the Universal Declaration of Human Rights GA Res 217A(III) (1948) (the UDHR) alongside civil and political rights and the preamble to the UDHR refers to the "recognition of inherent dignity and of the equal and inalienable rights of all members of the human family". Further, the obligations as to human rights set out in arts 55 and 56 of the United Nations Charter 1945 do not distinguish between different types of rights. Article 55(c) refers to the duty of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 56 requires member States to take joint and separate action, in co-operation with the UN, for the achievement of the purposes in art 55. Moreover, the terminology "third generation" is somewhat odd, suggesting that such rights are separate from and inferior to the first and second generation rights. Instead, the so-called third generation rights can be seen as the foundation stones, without which all other rights are under threat.

[68] Thaman (1998), p. 3 – ". . .we need to approach the issue of collective human rights for Pacific peoples with a commitment to, and understanding of, cultural diversity and its implications for

The concept of collective rights has long had recognition at the international level. The preambles of both the International Covenant on Civil and Political Rights[69] and the International Covenant on Economic Social and Cultural Rights[70] and also art 29 of the Universal Declaration of Human Rights (the UDHR)[71] each recognise the notion of duties to the collective. For instance, art 29(1) of the UDHR recognises explicitly that everyone has "duties to the community in which alone the free and full development of his [or her] personality is possible". Recognition of the importance of collective rights is equally as important at the national level.[72] Any constitutional provision should therefore focus not only on individuals but also on communities and peoples.

25.2.7 Should the Issue of Indigenous Rights Be Dealt with Explicitly?

The intrinsic link that exists between Māori and New Zealand's environment not only provides support for the proposition that the goal of environmental protection should be considered to be a collective right, but also for the argument that there should be a constitutional environmental provision in any written constitution. The issue is whether there should be specific inclusion of indigenous rights relating to the environment in any such provision.[73]

collective problem solving. We need to talk not only about the role of 'custom' but also Pacific notions of community and group viability and consider an approach to human rights that recognises the duties and obligations of the individual to the group, as well as vice versa."

[69] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).

[70] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976). The Preamble states: "realizing that the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

[71] Universal Declaration of Human Rights GA Res 217 A (III) (1948).

[72] However, it is important to ensure that minority rights are not overborne by the community.

[73] It is also clear that inclusion of an environmental protection provision would ensure compliance with the principles of the Treaty of Waitangi. For instance, the Privy Council in *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [21], when examining s 8 of the RMA, noted that, as the Treaty of Waitangi guaranteed Māori the full exclusive and undisturbed possession of their lands and estates, forests and fisheries and other properties that they desired to retain, it should mean that special regard to Māori interests and values would be required in environmental policy decisions. Moreover, as outlined by Orange (2004), p. 150, the significance of the Treaty of Waitangi in the environmental context is illustrated by several major claims heard by the Waitangi Tribunal regarding environmental issues in the 1980s.

The link that exists between protection of the rights of indigenous people and protection of the environment is well recognised at the international level. For instance, biological diversity and cultural diversity are seen to exist in a mutually beneficial relationship. Throughout history different peoples have adapted to the ecosystems in which they live and this has played a significant role in the creation of different values, religions and traditions.[74] Similarly, cultural diversity plays an important role in ensuring the maintenance and conservation of biological diversity. The ethics and techniques of indigenous peoples have provided valuable information for scientists and experts on how to use and preserve biological resources.[75]

There is also a very important spiritual and cultural connection to the environment in indigenous cultures and a long history of recognition that resources are held on trust for future generations, a trust arising from the past. The need to maintain and strengthen indigenous culture, customs and spiritual beliefs is increasingly being recognised at international law.[76] For instance, art 4 of the International Labour Organisation Convention (No. 169),[77] places an obligation on States to protect indigenous peoples' environment from exploitation, while art 15 identifies the right of indigenous peoples to "participate in the use, management and conservation of resources". The Convention on Biological Diversity instructs States parties to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles which are relevant for the conservation and sustainable use of biological diversity,[78] while art 25 of the Declaration on Rights of Indigenous Peoples provides that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibility to future generations in this regard.[79]

[74] Olembo (1992), p. 9.

[75] Olembo (1992), p. 9.

[76] Gillespie 2003/2004, p. 69; United Nations (2004), para. 5 and Johannesburg Declaration, para. 25.

[77] ILO Convention (No. 169) (adopted 27 June 1989, entered into force 5 September 1991).

[78] Convention on Biological Diversity, art 8(j). It must be noted that, in order to ensure the effective implementation of art 8(j) and the other provisions in the Convention on Biological Diversity relating to access and benefit sharing, the World Summit on Sustainable Development, held in Johannesburg in September 2002, called for action to negotiate, within the framework of the Convention on Biological Diversity, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. In 2004, in response to this call for action, the Conference of the Parties (COP) mandated the Working Group on Access and Benefit-sharing to elaborate and negotiate the "international regime on access to genetic resources and benefit-sharing" and at its ninth meeting in May 2008, in Bonn, Germany, the COP agreed on a schedule of meetings to complete negotiations before its tenth meeting, held in 2010, in Nagoya, Japan: see generally, http://www.cbd.int/abs.

[79] Declaration on the Rights of Indigenous Peoples (adopted by General Assembly Resolution 61/295 on 13 September 2007). On 20 April 2010, the New Zealand government announced its intention to endorse the Declaration. However, Simon Power in his Ministerial Statement, Power

Thus, since cultural practices and spiritual beliefs are often rooted in the indigenous peoples' relationship with the land, waters, coastal seas and other resources, environmental law and indigenous cultural rights are fundamentally connected.[80] It must also be noted that environmental protection often has economic importance for indigenous peoples. For instance, art 23 of the International Labour Convention recognises the importance of traditional activities, such as hunting and fishing. It provides that:

> . . . [S]ubsistence economy and traditional activities of the [indigenous] peoples . . . such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.

In the New Zealand context, it is well acknowledged that Māori have a spiritual and cultural relationship with the environment. As Klein writes, Māori experience a close bond with nature and feel that human beings belong to nature rather than being ascendant to it. The term "whanaungatanga" (sense of belonging) is used to describe a familial relationship among New Zealand's natural resources.[81]

The connection that Māori have with the land is of particular significance. Māori have a close relationship with ancestral land and land is seen as a source of common and personal identity. The New Zealand Māori Council has written:

> Land provides us with a sense of identity, belonging and continuity. It is proof of our tribal and kin group ties. Māori land represents tūrangawaewae. It is proof of our link with the ancestors of our past and with generations to come. It is an assurance that we shall forever exist as a people, for as long as the land shall last.[82]

Moreover, Māori have a deep spiritual connection with nature. The Māori view of the world is holistic. Māori beliefs include mauri (physical life force), hau (breathing of the spirit), and the existence of a spiritual order among realities and the desirability of respectfully using natural resources.[83] As noted by the Waitangi Tribunal in its Wai 8 report:

(2010), noted that the Declaration would not apply in circumstances where New Zealand's existing legal framework governed the situation. For example, it was stated "where the Declaration sets out aspirations for rights to and restitution of traditionally held land and resources, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach. Further, where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon its own distinct processes and institutions that afford opportunities to Māori for such involvement. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate."

[80] See New Zealand Law Commission (2006), p. 66. See also New Zealand Human Rights Commission and Pacific Islands Forum Secretariat (2007), p. 24.

[81] Klein (2000), p. 107.

[82] Klein (2000), p. 108.

[83] Majurey and Whata (2005), pp. 821–822.

> It might be considered that Western society, although espousing a religion, is predominantly secular and individualistic in its world-view. Although there is a religious premise for the presumption that human kind has authority over nature, that view probably springs from the secular and rational characteristics of our society. Māori society on the other hand is predominantly spiritual and communal. The Māori world view emphasises the primacy of nature and the need for man to tread carefully when interfering with natural laws and processes.[84]

Similar sentiments have been recognised by the Environment Court, which has acknowledged that "in the world conceptualised by Māori, the spiritual and physical realms are not closed off from each other, as they tend to be in the European context."[85] New Zealand's environment and natural resources also have economic importance for Māori.[86] This is well illustrated by the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[87]

One way in which the unique connection between Māori and New Zealand's environment can be recognised is through explicitly granting Māori environmental participation[88] and procedural rights within a written constitution. Some commentators have, however, criticised the focus on participation of indigenous peoples in environmental issues, arguing that this obscures more important issues, such as property rights and self-determination.[89] This seems to be a valid concern, depending on the nature of the participation and procedural rights that are guaranteed under any constitutional provision. The mere existence of a right to be heard, for example, will not necessarily be sufficient to assure rights are not

[84] Waitangi Tribunal (1985).

[85] *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* A 91/98, 29 July 1998 at [95]. It must also be noted that, in 1991, the Wai 262 claim was brought against the New Zealand Crown by the members of six iwi (Ngāti Kuri, Ngāti Wai, Te Rarawa, Ngāti Porou, Ngāti Kahungunu and Ngāti Koata). The claimants asserted that the Crown had: failed actively to protect the exercise of tino rangatiratanga and kaitiakitanga by the claimants over indigenous flora and fauna and other taonga, and also over mātauranga Māori (Māori traditional knowledge); failed to protect the taonga itself; usurped tino rangatiratanga and kaitiakitanga of Māori in respect of flora and fauna and other taonga through the development of policy and the enactment of legislation; and breached the Treaty of Waitangi by agreeing to various international agreements and obligations that affect indigenous flora and fauna and intellectual property rights and rights to other taonga. Submissions on the claim closed in 2007, and the Waitangi Tribunal is now in the report writing phase of the Wai 262 claim. For discussion see: http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries2/florafauna/.

[86] See discussion in Orange (2004), p. 215.

[87] The Act provided for the settlement of Māori commercial fishing rights, as secured under the Treaty of Waitangi. Substantial assets, primarily quota and half ownership of Sealord Products Ltd were transferred to Māori. The Act also provided for 20% of quota holdings for all new species to be allocated to Māori.

[88] The nature of the participation rights would have to be a matter for discussion. Consistency with the Treaty of Waitangi would presumably be the governing consideration.

[89] Jeffery (2005), p. 11. However, as noted above, Māori subscribe to a holistic world view. Thus, it could be argued that the Māori notion of property would include within its scope promotion of the goal of environmental protection.