Post-Settlement Dispute Resolution: Time to Tread Lightly

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> Te Arikinui said '*Enough is enough!*' She said that we had had three months to sort out our problems and queried '*what are we doing in the Courts?*' ... She challenged us for wanting an independent chair for the Te Kauhanganui meeting. She posed the question '*Why aren't our people good enough?*' ... She queried '*what is money if we haven't got mana?*'[1]

> [A] proper respect ... for tribal sovereignty ... cautions that we tread lightly.[2]

I: Introduction

Te Arikinui Dame Te Atairangi Kāhu's poignant protest is recorded in *Porima v Te Kauhanganui o Waikato Inc* ("*Porima*").[3] This is the first in a series of cases which illustrate the limitations of litigation in the context of intra-iwi disputes.

At the time of writing, fifteen Māori groups have concluded settlements with the Crown in respect of breaches of the Treaty of Waitangi.[4] Three others have ratified settlements and are awaiting settlement legislation.[5] As the process of creating settlement entities and of transferring assets to them gathers momentum, further disputes among settlement group members are inevitable. The Law Commission, in a recent report,[6] has highlighted various post-settlement issues, one of which is that at present there is no model mechanism that facilitates the resolution of such disputes.

This article considers the susceptibility of settlement entities to judicial review. The focus is on intra-iwi disputes, and on judicial review in its classic formulation, rather than constitutional review.[7] Part II acknowledges that, in theory, entity decisions could be reviewable. Part III surveys the cases in which

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1 *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472, 483 (HC) ["*Porima*"]. Emphasis in the original.

2 *Santa Clara Pueblo v Martinez* 436 US 49, 60 (1978) per Marshall J ["*Martinez*"].

3 *Porima*, supra note 1.

4 Waikato and Tainui raupatu, Ngāi Tahu, Te Uri o Hau, Pouakani, Ngāti Tūrangitukua, Te Maunga, Rotoma, Waimakuku, Ngāti Whakaue, Haui, Commercial Fisheries, Ngāti Rangiteaorere, Waitomo, Ngāti Ruanui, Ngāti Tama.

5 Ngāti Awa, Ngāti Tūwharetoa, Ngā Rauru.

6 Law Commission, *Treaty of Waitangi Claims: Addressing the Post-settlement Phase: an advisory report for Te Puni Kōkiri, the Office of Treaty Settlements and the Chief Judge of the Māori Land Court*, No 13 (2002) ["*Treaty of Waitangi Claims*"].

7 See generally Joseph, "Constitutional Review Now" [1998] NZ L Rev 85.

Māori groups have already used judicial review in an attempt to resolve disputes within a settlement group.

Part IV suggests that, as a matter of principle, settlement entities should not be subject to judicial review. The objections to judicial review are fourfold. First, as a matter of constitutional principle settlement entities should be recognized as exercising tino rangatiratanga as guaranteed by Article Two of the Treaty. Secondly, litigation is an inefficient option in this context. Thirdly, the judicial expertise rationale does not hold when the correctness of the decision-making depends on an assessment of tikanga Māori. Finally, the concept of justiciability recognizes that judicial review of complex political and policy decisions may not be appropriate. A line of cases already recognizes the non-justiciability of Crown actions in the settlement process. This principle could be extended.

Part V outlines the position in the United States, where tribal sovereignty is recognized, and a jurisprudence of deference has allowed tribal courts to become highly effective in resolving disputes. This part suggests that the New Zealand common law could develop a similar, principled, 'hands-off' approach based on the Treaty's guarantee of tino rangatiratanga.

Finally, part VI reviews the alternative dispute resolution possibilities suggested by the Law Commission: a domestic tribunal, or the Māori Land Court. Settlement groups can reduce their susceptibility to judicial review by specifying an agreed dispute resolution mechanism.

II: Settlement Entities in Theory Subject to Judicial Review

In theory, the decisions of settlement entities could be subject to judicial review. Joseph notes[8] that the range of administrative bodies amenable to review has broadened to include incorporated bodies[9] and unincorporated domestic bodies.[10]

In *Royal Australasian College of Surgeons v Phipps*[11] the Court of Appeal held that in some situations a combination of contractual and constitutional powers might be amenable to review. It was held that judicial review is available for decisions that are "in substance ... public or have important public consequences".[12] The Court referred to the line of cases establishing this principle,

8 Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, 2001) 748-749 ["*Constitutional and Administrative*"].

9 Citing *Cripps v SPCA* (1983) 4 NZAR 202 and *Winstanley v National Union of Railwaymen's IUW* (17 November 1982) unreported, High Court, Wellington Registry, A283/80.

10 Citing *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA); *Nagle v Feilden* [1966] 2 QB 633 (CA); *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (HC & CA) ["*Finnigan*"].

11 [1999] 3 NZLR 1 (CA) ["Phipps"].

12 Ibid 11.

including *R v Panel on Take-overs and Mergers, ex parte Datafin* ("*Datafin*"),[13] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* ("*Mercury Energy*")[14] and *Webster v Auckland Harbour Board* ("*Webster*").[15]

While this line of cases would seem to have significantly widened the scope of judicial review, the essential purpose of judicial review must never be forgotten. Judicial review is a manifestation of the court's duty to uphold the rule of law over executive government.[16] It has an essentially public function. The fact that New Zealand has a unitary judicial structure does not render the basic public-private dichotomy otiose. The distinction between public and private powers underpins the availability of judicial review.

It is quite appropriate for judicial review to extend to ostensibly private bodies that are fulfilling public functions, as is often the case post-devolution. In *Mercury Energy*, for example, the Privy Council rejected the argument that the Electricity Corporation's power to determine its contractual arrangements was purely contractual, and held that as a state-owned enterprise it was a public body. When such a body makes decisions in the public interest, which adversely affect individuals without affording them redress, its decisions are amenable to judicial review. Similarly, in the *Webster* decision the exercise of a contractual power by the Auckland Harbour Board was held to be reviewable because, as a public body exercising statutory powers, it was constrained by public law responsibilities.[17]

It is appropriate for judicial review to lie when a private body makes decisions that, in the circumstances, have important public consequences. In *Datafin* the unincorporated Panel on Take-overs and Mergers was held to be subject to judicial review because of the nature and importance of its functions, and the "public law consequences"[18] of its decisions. Another example is *Finnigan v New Zealand Rugby Football Union Inc*[19] in which the Council of the (technically private) New Zealand Rugby Football Union was held to be in a position of "major national importance"[20] in the context of its decision to send the All Blacks to South Africa.

It is quite another thing however to apply judicial review to private bodies in their private capacities, when, for example, they are deciding on policy, making allocative decisions, or regulating internal procedures. To do so is to ignore the raison d'être of the whole institution. Section 4(1) of the Judicature Amendment Act 1972[21] makes it clear that that Act, and its 1977 amendments – which extended the definition of "statutory power of decision" to include powers derived from a

13 [1987] 1 QB 815 (CA).
14 [1994] 2 NZLR 385 (PC).
15 [1987] 2 NZLR 129 (CA).
16 *Entick v Carrington* (1765) 19 St Tr 1029.
17 *Webster*, supra note 15, 134 per Casey J.
18 *Datafin*, supra note 13, 847.
19 Supra note 10.
20 Ibid 179.
21 On an application for review the court may grant "any relief that the applicant *would be entitled to*" under public law remedies (emphasis added).

constitution – were not intended to confer extended jurisdiction to review.[22] They were intended to simplify procedure. The proper ambit of judicial review is determined by the common law, and necessitates an examination of whether the powers exercised are public or private. Even in *New Zealand Stock Exchange v Listed Companies Association Inc*[23] (which seemed to suggest, in obiter, that a decision might be reviewable if it came within the section 3 definitions) the Court concluded that the 1977 amendments were not intended to extend judicial review to every decision of an incorporated body.[24]

The settlement process is operating to create incorporated bodies that will hold and manage iwi assets. Consequently, their powers are potentially within the section 3 definition of "statutory power of decision" in the Judicature Amendment Act 1972.[25] Given the immediate source of the settlement funds and the Crown concern that settlements be enduring, it is arguable that the decisions of such entities are "in substance ... public or have important public consequences".[26] By this reasoning, their decisions would be susceptible to judicial review.

It is contended that such reasoning, while superficially attractive, ignores the constitutional context. This objection will be elaborated upon in part IV of this article.

III: Survey of Current New Zealand Situation

In this part, recent cases where judicial review has been applied to intra-iwi disputes will be reviewed. Cases arising post-settlement and cases arising as a result of the settlement process will be examined, as well as cases which seem to have arisen out of an intra-iwi dispute, even though the action was against the Crown. Two categories of case are apparent; cases in which the court held it had jurisdiction to review, and cases in which the dispute was held to be non-justiciable.

1. Cases in which the Court Found Jurisdiction to Review

(a) Porima

This decision is the first in a series of cases reviewing the actions of Tainui's settlement entity, Te Kauhanganui o Waikato Inc ("Te Kauhanganui"). It was an application, brought by six dismissed members of Te Kauhanganui's Executive

22 Taggart, "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?" [1993] NZ Recent L Rev 343, 356-359.

23 [1984] 1 NZLR 699 (CA).

24 Ibid 706-707.

25 As amended in 1977.

26 *Phipps*, supra note 11, 11.

Committee, for interim relief whilst the court determined who was entitled to control that body.

(i) Factual background

Eleven of Te Kauhanganui's 12 executive committee members were elected by 61 entitled marae under an electoral college system. Te Arikinui appointed the twelfth member, Sir Robert Mahuta. Te Kauhanganui was sole shareholder in Waikato Raupatu Trust Co Ltd, which was trustee of lands returned to Tainui in a settlement with the government.

Early in 2000 Tainui was experiencing financial difficulties. Five members of the Executive Committee resigned. The six remaining elected members stripped Sir Robert of his directorships.

The Executive Committee was then at an impasse. A quorum of seven was required yet Sir Robert refused to attend meetings. On 12 August 2000 an ordinary resolution was passed pledging allegiance to Te Arikinui and returning all functional issues to her control, including the power to appoint an administrative committee. The six remaining elected members of the Executive Committee were dismissed. They applied for an interim order to prevent effect being given to that resolution and the order was granted.

On 1 September 2000 the plaintiffs made a second application for interim relief from decisions taken at a special general meeting of Te Kauhanganui. That meeting was called to consider two special resolutions: one for the removal of the plaintiffs from the Executive Committee, and another to fill the vacancies. An agreement was made (recorded in Hammond J's minute (No 6)) that the Special General Meeting would be members only (plus limited observers) with an independent chairman. It would be held at Hopuhopu, the traditional meeting place of Te Kauhanganui and would be preceded by a hui at Turangawaewae, the traditional meeting place of Tainui.

The meetings did not proceed according to plan. Those present at the Turangawaewae hui agreed to hold the Special General Meeting at Turangawaewae. Te Arikinui strongly condemned the plaintiffs' actions, and nominated ten new members to the Executive Committee (in breach of the incorporated society's rules). The meeting voted to remove the plaintiffs and to elect the nominees.

When the matter came to a hearing, the Court held that the plaintiffs were entitled to interim relief. They had a legitimate expectation that the meeting would be held at Hopuhopu and had assented to settlement of their claim on that basis. The balance of convenience was in the plaintiffs' favour. It was desirable to maintain the status quo, and to ensure compliance with the agreement minuted by the Court. The Court directed that the Executive Committee be authorized to act with a quorum of six, pending a lawful vote for the plaintiffs' removal at a special general meeting. Notably, the plaintiffs had requested that the Court make orders barring Te Arikinui from the meeting, and appointing a commissioner, or similar functionary, to supervise the meeting. The Court declined to make those

orders. Even so, this decision firmly asserts the primacy of the general law of New Zealand over Māori protocol.[27]

(ii) Comment

Surprisingly, no submissions were presented on the question of whether the actions of Te Kauhanganui were subject to judicial review.[28] Hammond J acknowledged that the applicability of judicial review to private corporations must always be questionable, but, he cited *Dawkins v Antrobus* ("*Dawkins*")[29] and *Peters v Collinge* ("*Peters*")[30] as authority for the availability of judicial review where there is an "error of law through the breach of the rules of a society".[31] In Hammond J's view, relief was available to the extent that the dismissals were really disciplinary, or the issues genuinely 'constitutional' in character.

An analysis of the two cases relied upon shows that both were based on contract. These were not situations in which private bodies were subject to judicial review because they were exercising quasi-public functions, or considering actions of significant public impact. In *Peters* the Court was very clear that the plaintiff's rights, with regard to National Party procedure, must be found in the terms of his contract with the other party members (that being the National Party Constitution). The Court approached the question of whether natural justice obligations applied as a matter of contractual construction. The starting point was reference to the express terms, but factors such as the severity of the sanction to be imposed could be important in deciding whether such a term could be implied. The Court noted that differences of opinion could be resolved according to the party rules, and that these were internal matters for the National Party to decide.[32] Likewise, in *Dawkins*, the Court declined to assess the reasonableness of an expulsion, reached according to the rules of a club, so as not to interfere with the club's decision. It found no evidence of malice. It was unnecessary to consider the basis or extent of a possible natural justice obligation as the evidence showed that there was ample opportunity to be heard. The Court did, however, make obiter comments to the effect that it could assess whether the rules had been properly passed and the meeting properly convened.

It would seem therefore that the authorities relied on in *Porima* fell short of mandating thoroughgoing judicial review. It is difficult to see that the Court had jurisdiction to make an order that effectively (if temporarily) altered Te Kauhanganui's rules. Hammond J claimed jurisdiction under section 8 of the Judicature Amendment Act 1972. Section 8 gives the court a discretion to make

27 Porima, supra note 1, 490.
28 Ibid 486.
29 (1881) 17 Ch 615 (CA).
30 [1993] 2 NZLR 554 (HC).
31 Porima, supra note 1, 486.
32 Peters, supra note 30, 574.

such orders as are considered necessary to maintain the applicants' position[33] and contemplates "a wide variety of preservation orders".[34] However, section 8 specifies only three purposes for which such orders can be granted. These are: prohibiting any further action consequential to the exercise of the statutory power, staying any proceedings, or declaring any revoked or suspended licence to have continued in force. The order granted in *Porima* did not fall within any of these three purposes.

Hammond J went on to invoke the inherent jurisdiction of the court to "preserve assets or resolve deadlock situations".[35] He cited *Te Runanganui o Ngāti Kahungunu Inc v Scott* ("*Ngāti Kahungunu*").[36] In that case, the Court used its equitable jurisdiction to appoint a receiver as an interim measure when the incorporated society's board was deadlocked. The Court emphasized that this jurisdiction was to be used sparingly, and only as a last resort.[37] However, placing a society's affairs in the hands of a court-appointed receiver is very different to handing over control to the remaining faction of a dysfunctional committee.

Hammond J also cited *R v Moke & Lawrence*.[38] In that case, the Court exercised its inherent jurisdiction to control its own procedure in order to admit video evidence. The relevance of this case is questionable. Hammond J acknowledged that the precise extent of the inherent jurisdiction was arguable, but stated that it "must be exercised in a judicial way, and on proper juristic principles".[39] He did not, however, attempt to set out the principles by which he was guided.

Hammond J did not seek to resolve the issues of tikanga Māori raised. Although he made some statements that seemed to recognize the Māori context of this dispute,[40] noting for example the importance of the Kīngitanga to Tainui, he concluded that "Tainui still have to operate in the modern world of commerce and technology".[41] He went on to determine the case as if Te Kauhanganui were an ordinary incorporated society. He concurred with the plaintiffs' stating that a meeting at Turangawaewae, the traditional place for decision-making within Tainui, would be a "hugely constrained one".[42] This was despite the fact that the independent Chair had deposed that those Tainui who gathered for the hui before the Special General Meeting were "solidly in support"[43] of the meeting being held at Turangawaewae. Apparently, the "free and fair vote which should [be]

33 *Porima*, supra note 1, 486.
34 Ibid 489.
35 Ibid 486.
36 [1995] 1 NZLR 250 (HC).
37 Ibid 253.
38 [1996] 1 NZLR 263 (CA).
39 *Porima*, supra note 1, 489.
40 Ibid 474.
41 Ibid 475.
42 Ibid 487.
43 Ibid 482.

obtain[ed] in a voluntary organisation"[44] was only possible at Hopuhopu. No doubt, Hammond J was influenced by the fact that Turangawaewae is also the seat of the Kīngitanga. Yet one of the stated aims of Te Kauhanganui is to "uphold and support"[45] just that institution.

(iii) Postscript – Mahuta v Porima ("Mahuta")[46]

In a separate judgment issued on the same day, Hammond J dismissed an application to prevent the sale of the Auckland Warriors Rugby League Club Ltd by the Waikato Raupatu Trustee Company Ltd for $400,000. The club had cost Tainui $6.277 million. It was held that Sir Robert Mahuta (the applicant) did not have standing as he was neither a director nor a shareholder and had no relevant interest other than as a member of Tainui.

(b) Mahuta v Porima ("Mahuta II")[47]

This case considered further cross-claims relating to Te Kauhanganui's Special General Meeting. Hammond J expressed his reluctance to intrude into Tainui's affairs any further than was strictly necessary.[48] The Court held that the plaintiff's agenda, which called for the removal of the existing committee members, lacked sufficient signatories[49] and was therefore invalid. An injunction was granted to restrain the plaintiff from putting that agenda to the meeting. The Court ordered that the meeting proceed on the defendants' agenda, that being the election of additional members to the Executive Committee. Yet the Court declined to issue a declaration to validate the regional voting process proposed by the defendants – a process that did not comply with the rules. Hammond J pointed out to the defendants that the order made on 22 September 2000 conferring full authority on them would lapse as soon as any additional member was elected to the Executive Committee. He concluded with a comment about the inability of litigation to resolve "the real questions which have arisen".[50]

(i) Postscript

In November 2000 a special meeting of Te Kauhanganui voted five of Sir Robert Mahuta's supporters onto the Executive Committee.[51]

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44 Ibid 487.
45 Ibid 475.
46 (22 September 2000) unreported, High Court, Hamilton Registry, M238/00.
47 (9 November 2000) unreported, High Court, Hamilton Registry, M290/00.
48 Ibid [31].
49 Eighty-eight valid signatures were obtained, 89 were required by the Constitution.
50 Ibid [65].
51 "Tainui – a nation divided" *The New Zealand Herald*, Auckland, New Zealand, 9 January 2001.

(c) Porima v Waikato Raupatu Trustee Co Ltd ("Porima II")[52]

This case concerned cross-claims relating to the validity of an adjourned meeting of the Executive Committee. The original Tuesday meeting had been adjourned for want of a quorum. Clause 12.5.3 of the company's Constitution required three working days' notice for an adjourned meeting. If a quorum were not present within 15 minutes of the appointed time, the directors present would constitute a quorum. The Constitution defined "working day" so as to exclude weekends. The directors who attended the Tuesday meeting adjourned the meeting until Saturday 16 December.

The Court held that three clear days notice was required, including all of Friday. However, as the provision emphasized time measured in working days, it followed that the meeting should have taken place on a working day, not a Saturday. The Saturday meeting was not lawful and the decisions taken at it had no validity.

Notably, Robertson J made obiter comments questioning the adequacy of the notice given for a substantial number of the resolutions passed at the Saturday meeting. He considered that the agenda item "appropriate disciplinary action"[53] was insufficient to give notice of an intention to remove three directors, appoint three others, dismiss the Chief Financial Officer, replace the Secretary of the Board and terminate the services of a firm of solicitors. Robertson J also admonished the parties for constantly resorting to litigation, which he termed "ineffective", and "destructive and draining",[54] rather than talking and listening to each other to resolve the problems.

(d) Te Rūnanga o Te Atiawa v Te Atiawa Iwi Authority ("Te Atiawa")[55]

This was an application for both judicial review and the liquidation of the defendant, Te Atiawa Iwi Authority ("TAIA"). TAIA was the incorporated society set up to negotiate Te Atiawa's treaty claim. The claim had progressed to the stage of a Heads of Agreement, which was ready to be signed. The Rūnanga was unhappy with the proposed terms and attempted to stop the settlement process. It sought judicial review of TAIA's actions, alleging that it had failed to promote the mana of the iwi, ignored tikanga, failed to give value to speaking rights, ignored the policy adopted at its Annual General Meeting ("AGM"), predetermined how it would vote, and that its decision was irrational. Apparently the Executive, who consisted of one representative from each hapū, had not voted in accordance with the indicative voting undertaken at the preceding hui and at the AGM.

52 (20 February 2001) unreported, High Court, Hamilton Registry, M327/00 and M330/00.
53 Ibid [44].
54 Ibid [46].
55 (10 November 1999) unreported, High Court, New Plymouth Registry, CP13/99.

Robertson J held that there was no basis for judicial review. TAIA's constitution gave full power to the Executive. Although individuals had speaking rights, only the six hapū representatives had power to vote at meetings. The constitution neither specified how the representatives were to exercise their powers, nor required them to consult. Therefore no rights had been denied.

(i) Comment

On the question of jurisdiction, it is submitted that the decision shows some confusion. Robertson J rejected an argument, based on *Kai Tohu Tohu o Puketapu Inc v Attorney-General* ("*Kai Tohu Tohu*"),[56] that the matter was not amenable to judicial review. He referred to counsel's acknowledgement in that case that TAIA "could be reviewable"[57] under the Judicature Amendment Act 1972. He also referred to *Greensill v Tainui Māori Trust Board* ("*Greensill*"),[58] a case with similar facts to *Te Atiawa.* He noted that Hammond J had decided that "the matter was a political one and therefore is an area in which the courts would tread with caution and circumspection".[59] While Robertson J said he "did not disagree with that approach", he was unsure as to whether it was "necessary or appropriate" to apply it.[60] Robertson J seems to have been influenced by the possibility of leaving people without a remedy.[61]

Later, in his consideration of the appropriate test by which to review the decision, his Honour refers to *Finnigan* and considers the issue of public importance. He admits that the issues before him do not equate with the wide implications of the Springbok tour decision, but counters "that what is at stake here is a matter of prime importance to the people of this iwi".[62] Given that an iwi is descent based, this is rather like arguing that because a matter is important to this family, public law remedies should lie.

Basing himself on the statements of principle regarding the nature of judicial review in *Mercury Energy*, Robertson J stated that the matter was clearly reviewable[63] as the defendant was exercising a statutory power. Yet when he came to look closely at whether TAIA was in fact exercising a statutory power of decision (a necessary component of the ability to review in the circumstances)[64] he could find no rights, powers, privileges, or immunities that had been affected.[65]

The decision is interesting in its treatment of tikanga. Clause 2.10 of TAIA's Constitution provides that TAIA was established to "uphold, preserve and

56 (5 February 1999) unreported, High Court, Wellington Registry, CP 344/97.
57 Ibid 13.
58 (17 May 1995) unreported, High Court, Hamilton Registry, M117-95.
59 *Te Atiawa*, supra note 55, [23].
60 Ibid.
61 Ibid.
62 Ibid [22].
63 Ibid [20].
64 See the definition of "statutory power" in s 3 Judicature Amendment Act 1972.
65 Te Atiawa, supra note 55, [55].

practise tikanga according to Te Atiawa lore".[66] Robertson J was presented with conflicting evidence as to what this entailed, but held that it was unnecessary to decide the issue as the Constitution placed the power of decision clearly with the Executive. It is interesting to speculate about whether a body with expertise in tikanga might have given more weight to tikanga requirements. One cannot help but wonder whether the apparently unfettered power given to the Executive – a lacuna much commented on[67] – was not intended to operate according to Te Atiawa tikanga. A Māori dispute resolution forum might have been more likely to find an implied term here.

One final point of note is that Robertson J acknowledged that this is not the type of dispute with which lawyers should be involved.[68] He mentions the Kaumātua Committee proposed in the redrafted TAIA Constitution, as a possible way forward, and suggests that it would provide a "more appropriate" forum to resolve disputes.[69]

(e) Hayes v Waitangi Tribunal[70]

The plaintiffs sought judicial review of a Waitangi Tribunal report and interim orders preventing the Crown and the Ngāti Ruanui Muru me te Raupatu Working Party from acting upon the report. In the *Pakakohi and Tangahoe Settlement Claims Report*[71] the Tribunal had upheld the Crown's decision to accept the Working Party's mandate to settle claims in South Taranaki on behalf of Pakakohi and Tangahoe.

The plaintiffs, who represented Pakakohi, alleged apparent bias on the part of Chief Judge Williams of the Māori Land Court, in his capacity as acting chairperson of the Waitangi Tribunal.[72] The allegation arose due to his attendance at a prior Working Party meeting. That allegation was rejected. It was held that there was no evidence of apparent bias. Although Chief Judge Williams had presented his firm's credentials in the hope of being instructed to act for the Working Party, he was never so instructed.

Goddard J noted, in obiter, that even if there was a danger of apparent bias, she would not have exercised her discretion to grant relief for three reasons: the plaintiffs' delay, the high level of support in the claimant community for ratification of the settlement, and the questionable justiciability of the claim. She recognized that what the claimants were in fact seeking was review of the Crown's decision to recognize the mandate of the Working Party. The plaintiffs'

66 Ibid [26].
67 Ibid [39], [48].
68 Ibid [11].
69 Ibid [69].
70 (10 May 2001) unreported, High Court, Wellington Registry, CP 111/01 ["Hayes"].
71 Waitangi Tribunal, *Pakakohi and Tangahoe Settlement Claims Report - Wai 758 and Wai 142* (2000).
72 Chief Judge Williams is now the official chairperson of the Waitangi Tribunal.

claim would be non-justiciable because the process was "essentially political, involving questions of policy and political judgment".[73] *Kai Tohu Tohu, Greensill and Wellington City Council v Woolworths New Zealand (No 2)* ("*Woolworths*")[74] were cited.

2. Cases in which the Dispute has been held to be Non-Justiciable

(a) Greensill

The plaintiffs, a group of Tainui individuals, sought interlocutory orders to prevent the Tainui Māori Trust Board from entering a deed of settlement with the Crown based on the Heads of Agreement relating to the Tainui raupatu claim. They alleged that the Board had no appropriate mandate for the proposed settlement.

Hammond J stated that the Heads of Agreement was a purely political document and as such not justiciable. Nothing was to be effected without an Act of Parliament. For the Court to intervene now "would be an outright interference in what is nothing more or less than an ongoing political process; as opposed to a distinct matter of law".[75]

The Court held that the plaintiffs' claim failed because there was no cognizable right that could be enforced. No particular method for procuring a mandate was prescribed by the Heads of Agreement.

(b) Kai Tohu Tohu

The second defendant, TAIA, was set up by a working party of six Te Atiawa hapū, one of which was the plaintiff hapū, Puketapu. TAIA had a mandate to represent the other five hapū in claims negotiations. Its Constitution provided for Puketapu membership, but Puketapu had no representation within TAIA, and did not recognize TAIA's right to negotiate on behalf of Te Atiawa. Puketapu sought separate hapū-based negotiations with the Crown, but the Crown refused to negotiate with hapū. That being so, Puketapu advised that it was conditionally prepared to negotiate as part of Te Atiawa so long as a satisfactory representative structure was established. However, on the basis of a Te Puni Kōkiri report, the Minister of Treaty Negotiations decided that TAIA had an appropriate structure to represent Te Atiawa and accepted their Deed of Mandate, on the condition that they retain provision for Puketapu, and keep them informed of progress. Negotiations then commenced.

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73 *Hayes*, supra note 70, [37].
74 [1996] 2 NZLR 537 (CA), applied in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
75 *Greensill*, supra note 58, 12–13.

Puketapu sought a declaration that the Minister could not negotiate with TAIA in respect of the Puketapu claim. It challenged the validity of the Deed of Mandate. It also sought a declaration that TAIA could not represent Puketapu, and an injunction to prevent TAIA from doing so.

The Court held that the Minister's decisions were non-justiciable because Treaty claims were entertained as part of a "political and not a legal process".[76] The courts had no role in the process unless it was so flawed that the courts were obligated to intervene. This was not the case. As the courts had held that they had no role to play at later stages in the process, a fortiori, the courts should not intervene at an earlier stage where any steps taken would not lead to an enforceable decision. The Court declined to make any orders against TAIA. It was within its constitutional powers to represent the Te Atiawa iwi.

(c) Watene v Minister in Charge of Treaty of Waitangi[77]

The plaintiffs, individuals from Ngāti Ruanui hapū, sought an interlocutory declaration that the Minister, the Attorney-General, and the Crown not proceed with the signing or confirmation of the proposed Deed of Settlement with the Ngāti Ruanui Muru me to Raupatu Working Party. The plaintiffs claimed that the Deed did not sufficiently protect the interests of their hapū. They had related claims before the Waitangi Tribunal and wanted the settlement deferred until such claims had been considered, and a structure giving hapū a governing role had been set in place for the settlement entity.

The Court held that there was no justiciable basis upon which it could intervene.[78] The settlement process involved "decisions based on questions of policy and matters requiring political judgment. Such political decisions are not amenable to the supervision of the Courts in the absence of clear evidence of fraud or the like".[79]

The plaintiffs were essentially seeking to interfere in the political process. The Court applied *Kai Tohu Tohu* and declined to intervene.

3. A Note on Common Themes

The situation revealed by these cases is unsatisfactory. The courts have declined to intervene in intra-iwi disputes where Crown action has been involved. However, where the intra-iwi dispute is presented more nakedly, the courts have regarded the matter as justiciable. The result is a mess. Judges are in the invidious position of attempting to assist, whilst struggling with the complex cultural parameters involved in the disputes. They express their reluctance to

76 *Kai Tohu Tohu*, supra note 56, 15.
77 (11 May 2001) unreported, High Court, Wellington Registry, CP 120/01.
78 Ibid [36].
79 Ibid [33].

intervene in the first place,[80] and their increasing unhappiness as the litigation proceeds.[81]

4. Existing Dispute Resolution Mechanisms in Settlements

At this point it is appropriate to review the extent to which alternative dispute resolution mechanisms are already defined in settlements. The Law Commission has noted that, at present, there is no model dispute resolution mechanism available that can resolve disputes within a settlement group promptly and consistently with cultural expectations.[82] An attempt to prescribe a model dispute resolution mechanism for iwi was contained in the Rūnanga Iwi Act 1990. This Act provided a method by which iwi could incorporate. A dispute resolution mechanism was one of the required provisions of any charter.[83] The Act was met with fierce resistance by Māori on various grounds; in particular Māori argued that it was a paternalistic attempt to impose inflexible Pākehā structures upon iwi.[84] The Act was repealed the following year. Although the attempt to impose uniform structures was rejected, the Act was acknowledged as having some positive features.[85] One of these was its provision regarding the composition of the Māori Land Court, which had been given jurisdiction to resolve disputes.[86] The Act provided for a Māori Land Court judge sitting with two appointees, and required consultation with the parties as to the "knowledge and experience" that these appointees would require.[87]

In practice, settlement groups have used a range of settlement entities. Te Kauhanganui and Te Atiawa Iwi Authority were registered under the Incorporated Societies Act 1908. No dispute resolution regime is set out in the Act and this is not one of the matters the Act requires to be set out in the rules. However, the Act allows the inclusion of other provisions if they are consistent with the Act.[88] As mentioned, Te Atiawa was redrafting its Constitution to put disputes in the hands of a kaumātua committee.[89] Te Ṟūnanga o Ngāi Tahu was incorporated by a private Act,[90] which also does not specifically set out a dispute resolution mechanism. However, it provides for the Rūnanga to specify its own rules in a charter.[91] Te Rūnanga o Ngāti Ruanui Trust was established by deed. Ngāti Tūrangitukua and Pouakani are both registered charitable trusts.

80 *Porima*, supra note 1, 486; *Mahuta II*, supra note 47, [31].
81 *Porima II*, supra note 52, [46].
82 Law Commission, *Treaty of Waitangi Claims*, supra note 6, 1.
83 Rūnanga Iwi Act 1990, s 9.
84 Gover and Baird, "Identifying the Māori Treaty Partner" (2002) 52 UTLJ 39, 47.
85 Ibid 48.
86 Rūnanga Iwi Act 1990, ss 23, 30-33, 70.
87 Ibid s 75.
88 Incorporated Societies Act 1908, s 6.
89 *Te Atiawa*, supra note 55, [11].
90 Te Rūnanga o Ngāi Tahu Act 1996.
91 Ibid s 16.

Most of these structures presume recourse to the courts in the event of a dispute. It would appear that no dispute resolution mechanisms are specifically set out in the settlement legislation. Yet all of the settlement entities would allow the express provision of an agreed dispute resolution mechanism within their governing rules.

IV: Objections To Judicial Review

While decisions of settlement entities are in theory susceptible to judicial review, it is contended that, as a matter of principle, this should not be the case. The first objection is one of constitutional principle. The other objections are based on efficiency and administrative law principles.

1. Tino Rangatiratanga

Article Two of the Treaty's Māori text guarantees "tino rangatiratanga" to Māori. When the Treaty was signed, tino rangatiratanga described the sovereignty, the full and absolute chiefly authority, enjoyed by a tribe over its territory.[92] The Waitangi Tribunal has defined the term as "full authority"[93] and the right of Māori "to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State".[94]

Kingsbury suggests that in developing practice tino rangatiratanga includes "a presumption of exclusivity of deliberation and governance in certain matters involving only members of the group".[95] In the *Taranaki Report* the Tribunal noted that tino rangatiratanga included the right of Māori "to determine [for] themselves such domestic matters as their own membership, leadership, and land entitlements".[96] The government's presumption that it could "determine matters of Māori custom and polity better than Māori", and the process by which "decisions particular to Māori are made not by Māori but on their behalf", were said to be "profoundly wrong".[97]

As a matter of constitutional principle, to extend judicial review to iwi settlement entities is to infringe tino rangatiratanga. The Treaty guarantees Māori the right to manage their own policies, and deal with their own assets as they see fit, subject only to the minimum interference necessary for the proper operation of the State. Just as the courts have been developing constitutional review to ensure that administrative decisions are not in breach of Treaty principles, so

92 See e.g. Sir Hugh Kawharu's translation, "the unqualified exercise of their chieftainship": *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 691.
93 Waitangi Tribunal, *Ngāi Tahu Report – Wai 27* (1991), ch 4.6.6 ["*Ngāi Tahu Report*"].
94 Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi – Wai 143* (1996), ch 1.4 ["*Taranaki Report*"].
95 Kingsbury, "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 UTLJ 101, 113.
96 Waitangi Tribunal, *Taranaki Report*, supra note 94, ch 1.4.
97 Ibid.

also the courts should guard against extending their own function in breach of those principles. Sir Robin Cooke (former President of the Court of Appeal, later Lord Cooke of Thorndon) has suggested extra-judicially that there is a constitutional presumption that decisions made in breach of Treaty principles will be reviewable.[98] A presumption that iwi have an exclusive right to govern their own domestic affairs would be consistent with this argument.

The whole purpose of the settlement process is to give redress for past Treaty breaches by the Crown. It would be deeply ironic if the result of the process were to expose iwi decisions to judicial supervision in an unreflective fashion, as such mirroring some of the breaches that are being redressed. The danger is that redress of one set of Treaty breaches will give rise to another.

2. Inefficiency of Litigation

Another objection is that litigation is an inefficient option for resolving this type of dispute.[99] There are two reasons for this. First, these disputes are political and involve complex cultural questions that do not fit neatly into available causes of action. The real issues tend to be obscured rather than elucidated. Secondly, litigation is inappropriate when the parties are in an ongoing relationship.

As to the first problem, the cases show that the parties sometimes have great difficulty presenting their objections as justiciable issues. An example of this phenomenon can be seen in the *Kai Tohu Tohu* case: [100]

> The Puketapu hapū can point to no right that has been breached, no duty that has been unfulfilled, no decision capable of review where there has been a flawed process, and no justification for the court to possibly grant relief.

As a result of framing objections to fit the available legal boxes, the court is often presented with side issues rather than the heart of the matter.[101] Thus, in the Te Atiawa cases the court finds itself considering the number of people affiliated to each hapū, and how people voted at various hui, rather than the appropriate structure for the settlement entity, or whether hapū are adequately represented.[102] In the Tainui situation, the court was presented with a series of cases about meeting procedure rather than the underlying conflict as to the position of the Kīngitanga. Given this skewed focus, it was highly unlikely that litigation would resolve the dispute. As Hammond J commented: "The legal process as such is not ultimately

98 Joseph, *Constitutional and Administrative*, supra note 8, 779 citing Cooke, "Empowerment and Accountability: The Quest for Administrative Accountability" (Judicial Colloquium, Balliol College, Oxford, 21-24 September 1993) 10.

99 See e.g. Wainwright, "Māori Representation Issues and the Courts" (2002) 33 VUWLR 603, 613-615.

100 *Kai Tohu Tohu*, supra note 56, 18.

101 Christian Whata, Martin Dawson and Gina Rangi, "Inter and Intra Tribal Debate" (Paper presented to Business Information in Action Public Law Conference, Wellington, 16-17 April 2002), 16.

102 See also *Hayes*, supra note 70. In that case the same underlying issue was presented as presumed bias.

capable of resolving the real questions which have arisen, because the range of alternatives at law are too narrow, and the human factors run too deep."[103]

Indeed, litigation may well exacerbate the problem. The parties are unavoidably in an ongoing relationship. Litigation by its very nature creates winners and losers. This tends to increase tensions rather than assisting to resolve them. The Tainui dispute, chronicled above, presents the clearest illustration of this effect.

The courts do seem to be aware of this danger. In *Ngāti Kahungunu*, for example, it was noted that "this costly litigation ... shows every sign of being the catalyst for further disputes".[104] In *Porima II* Robertson J admonished: "These warring groups of plaintiffs must one day understand that constantly running to the law is an ineffective way to deal with their problems."[105]

However, so long as judicial review is available, it will be used, whatever the impact upon relationships. It is also possible that holding out the court option could militate against a successful negotiated solution. When the court clearly expresses an expectation that negotiations will fail, it is not too surprising when that is what eventuates. For example, in *Porima* Hammond J recorded: "I urged the parties to continue their endeavours to resolve this matter within Tainui. However, in case they could not do so I felt it necessary to allocate a fixture for Friday".[106]

Various writers have observed that the settlement process itself has put iwi relationships under strain.[107] Judge Wainwright of the Māori Land Court, writing extra-judicially, has reviewed a selection of cases about representation and concludes that the disputes were in essence about the breakdown of relationships. She notes that in every case the disputants left the courtroom with "their conflict ... perfectly intact".[108] Moreover, "the misgivings ... remain there to fester and breed, and the rents and tears in the fabric of relationships become ever more difficult of repair".[109] The survey of cases in part III of this article suggests the same conclusion.

3. Judicial Review Principles

The third objection to judicial review of settlement entity decisions is based on administrative law principles. The essential focus of judicial review, as set out in *Chief Constable of the North Wales Police v Evans*,[110] involves sitting in judgment on the correctness of the decision-making process. Whether the courts

103 *Mahuta II*, supra note 47, [65].
104 *Ngāti Kahungunu*, supra note 36, 255.
105 *Porima II*, supra note 52, [46].
106 *Porima*, supra note 1, 479.
107 Whata, supra note 101, 17–18.
108 Wainwright, supra note 99, 614.
109 Ibid 615.
110 [1982] 3 All ER 141, 155 (HL) per Brightman LJ.

of general jurisdiction have sufficient expertise in tikanga Māori to assess this issue, in the context of settlement entity decisions, is questionable.

Joseph, outlining the North American approach, suggests that the crucial question is whose interpretation should prevail "that of the reviewing court or the mandated decision maker?"[111] In general, the courts have great expertise in ensuring that decisions do not exceed the mandate granted by Parliament. In the case of a settlement entity however, although enshrined in statute, the mandate is given by the iwi itself. Construing that mandate is not a straightforward exercise in statutory interpretation. Important cultural factors come into play. Quite simply, the general courts do not have the expertise to review compliance with that mandate, because they do not have expertise in tikanga Māori. This was acknowledged by the Law Commission: "Few judges of the High Court have sufficient experience in issues of tikanga, or in the social dynamics of a kin group, to engender public confidence in the outcome of any such review."[112]

The clearest illustration of this is the *Te Atiawa* decision. In that case Robertson J declined to rule on conflicting evidence of tikanga and instead construed the TAIA Constitution as giving unfettered power to the elected hapū representatives; ignoring the clause which provided that one of TAIA's objectives was to uphold and practice tikanga.[113]

Another example is *Porima*. There the defendants argued that Tainui was facing an emergency situation and that according to tikanga, authority should revest in Te Arikinui to find customary resolutions to the divisions within the tribe.[114] That argument does not seem to have been specifically addressed by the Court. This is not surprising, perhaps, given that the Court translates tikanga as "[t]he Māori way of doing things",[115] and suggests that this entails a laissez-faire approach. Later in the judgment it was noted that, at least while acting in the context of a registered society, Te Arikinui "was not entitled to blind obedience".[116]

4. Justiciability

Joseph notes that the concept of justiciability presupposes the power of judicial review, but focuses on whether the use of judicial review is appropriate.[117] Similarly, in *Woolworths* the Court of Appeal acknowledged that there were "constitutional and democratic constraints"[118] on judicial review in public policy areas. Rating involved complex economic assessments and political judgment

111 Joseph, *Constitutional and Administrative*, supra note 8, 745.
112 Law Commission, *Treaty of Waitangi Claims*, supra note 6, 23.
113 *Te Atiawa*, supra note 55, [29].
114 *Porima*, supra note 1, 478.
115 Ibid 474.
116 Ibid 487.
117 Joseph, *Constitutional and Administrative*, supra note 8, 742.
118 *Woolworths*, supra note 74, 546.

most appropriately weighed by elected decision-makers. The courts should defer to their decisions except in extreme cases. The Court then made a significant point:[119]

> The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

Woolworths involved deference to the policy decisions of an elected council, however the same deference could be applied to iwi decision-making bodies. The constitutional constraints are different, an application of Treaty principles rather than the separation of powers doctrine, but no less compelling.

In the line of cases in section III(2) above, disaffected groups have attempted to stall the negotiation process for Treaty claims. The courts have declined to interfere in what is "essentially a political process" and have held that the actions of the Crown are non-justiciable. The same principles should also apply to iwi decisions. These are political judgments most appropriately weighed by the iwi itself and its appointed decision-makers. The courts should defer to their decisions. The decision-making is within the customary sphere of those entrusted with the decision and the courts are not well equipped to re-weigh the considerations involved. For example, in *Porima* the underlying tension was between two of the stated objectives of Te Kauhanganui; the advancement of the iwi, and support of the Kīngitanga.[120] Decision-makers in Tainui are best placed to resolve this conflict.

V: United States Jurisprudence

1. The Position in the United States

Although the constitutional structure in the United States is different to that in New Zealand, the sophisticated jurisprudence of deference developed by United States courts could assist New Zealand courts to find a way forward.

(a) Background

In the United States the inherent sovereignty of Native American tribes has long been recognized. In *Worcester v Georgia*[121] the Supreme Court held that state legislation purporting to apply to the Cherokee was void. It was held that

119 Ibid.
120 *Porima*, supra note 1, 475.
121 31 US 515 (1832).

the tribe had inherent residual sovereignty[122] and that repeated treaties with them recognized this fact. The Cherokee had not surrendered their inherent residual sovereignty by accepting the protection of the United States. Marshall CJ cited Vattel in support of the proposition that a weaker state did not surrender its sovereignty by seeking protection from a stronger one.[123] He stated that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights".[124]

The court's stance had shifted somewhat by *United States v Kagama*.[125] Although Indian tribes no longer possessed "the full attributes of sovereignty", they remained a "separate people, with the power of regulating their internal and social relations".[126] The Court asserted congressional plenary authority over Indian tribes, based on the necessity of protecting a dependant people and those among whom they lived. Thus the powers of self-government held by Indian tribes were regarded as subject to the powers of Congress. Congress could modify, limit, or eliminate Indian self-government.

Nevertheless, as separate sovereigns Indian tribes were regarded as unconstrained by the constitutional limitations on federal or state authority. Thus, in *Talton v Mayes* ("*Talton*")[127] the Supreme Court held that the grand jury requirements of the Fifth Amendment did not apply to "the powers of local self-government"[128] exercised by the Cherokee. The murder of one Cherokee Indian by another within the jurisdiction of the Cherokee nation was therefore not an offence against the United States, but an offence against Cherokee law. Indian courts were immune to constitutional review. Federal courts then applied the *Talton* decision to other provisions of the Bill of Rights.

The jurisdiction of Indian tribal courts was at first defined by the territorial limits of the reservation. Within the reservations, tribal courts exercised broad criminal and civil jurisdiction. In *Williams v Lee*,[129] for instance, the Supreme Court held that a state court did not have jurisdiction to entertain the suit of a non-Native American retailer collecting a debt owed by a reservation Indian and incurred on the reservation. The Court said that to allow state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves".[130]

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122 Ibid per Marshall CJ. While M'Lean J is more reticent about using the term "sovereignty," he acknowledges that "having the right of self-government they, in some sense, form a State. In the management of their internal concerns they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace." Ibid 581.

123 Ibid 561.

124 Ibid 559.

125 118 US 375 (1886).

126 Ibid 382.

127 163 US 376 (1896).

128 Ibid 384.

129 358 US 217 (1959) ["*Williams*"].

130 Ibid 223.

Importantly, although the reservations are geographical areas, they comprise different types of land, some of which have been subdivided into individual titles under the General Allotment (Dawes) Act 1887[131] and sold to non-Indians. This has led to a checkerboard jurisdiction and increasing resistance to Indian authority. As a result, the Indian Civil Rights Act 1968 ("ICRA") was passed.[132] The ICRA was enacted despite the objections of Native American representatives who argued that tribal traditions of justice and fairness rendered the Act an unwarranted intrusion.[133] The ICRA modified the effect of *Talton* by imposing some, but not all, of the constitutional restrictions in the Bill of Rights on Native American governments. The only remedy expressly provided by Congress was the writ of habeas corpus to test the legality of detention by order of an Indian tribe.

The ICRA was used as an inroad for federal jurisdiction into the reservations. In the first case, *Dodge v Nakai*,[134] the Federal Court invalidated an order of banishment imposed by the Navajo Tribal Council. The Tribal Council had banished the director of a legal services programme for encouraging individual Navajo to contest the authority of the Council and for disrupting Council proceedings with scornful laughter. The Court held that the banishment was unreasonable and in breach of the ICRA because it lacked due process. The banishment was also held to be an unlawful bill of attainder. Despite the lack of any express remedy in the ICRA, other than habeas corpus, the Court permanently restrained the tribe from enforcing the banishment order. Subsequent cases have regularly held that the ICRA has impliedly abrogated tribal sovereign immunity from suit.[135] In such cases the courts have granted a range of remedies not expressly provided in the Act.

In *Santa Clara Pueblo v Martinez* ("*Martinez*")[136] the Supreme Court halted this trend. The Court refused to interpret the ICRA as impliedly authorizing civil actions for injunctive and declaratory relief. *Martinez* concerned a challenge to the membership ordinance of the Santa Clara Pueblo, on the grounds of breach of the ICRA equal protection measure. The Court discerned two "distinct and competing purposes"[137] in the ICRA. First, the protection of individual tribal members and secondly, the promotion of tribal self-government[138] – that is, the protection of tribal sovereignty from undue interference.[139] The Court reviewed the legislative history and found that the omission of any remedy apart from

131 Indian General Allotment Act ch 119, 24 Stat 388 (1887) codified as 25 USC 461-479 (1994).
132 Indian Civil Rights Act 1968 25 USC 1301-1341.
133 McCarthy, "Civil Rights in Tribal Courts: the Indian Bill of Rights at Thirty Years" (1998) 34 Idaho L Rev 465, 470.
134 298 F Supp 26 (1969).
135 *Daly v United States* 483 F 2d 700, 705 (8th Cir 1973); *Luxon v Rosebud Sioux Tribe* 455 F 2d 698, 700 (8th Cir 1972).
136 *Martinez*, supra note 2.
137 Ibid 62.
138 Ibid.
139 Ibid 63.

habeas corpus was deliberate.[140] The Court declined to imply other remedies into the Act. It was stated that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent".[141]

Tribal courts were available to enforce rights created by the ICRA. The Court cited previous decisions[142] as authority for the proposition that subjecting a dispute between reservation Indians to "a forum other than the one they have established for themselves",[143] may undermine the authority of tribal courts and hence infringe the right of self-government. It was acknowledged that resolution of ICRA issues would depend on questions of tribal custom, questions which tribal forums were better placed to evaluate than the federal courts.[144]

The Supreme Court has significantly eroded tribal sovereignty in more recent decisions. In *Oliphant v Suquamish Indian Tribe*[145] the Court held that tribal courts have no criminal jurisdiction over non-Indians resident on the reservation. In *Montana v United States*[146] it was held that the tribe in question did not have authority to regulate non-Indian hunting and fishing on non-Indian lands within the reservation. Inherent tribal sovereignty only existed in so far as it was necessary to protect tribal self-government. The effect of these decisions is that tribal court jurisdiction is now both territorially and personally defined.

An exception to *Martinez* was articulated in *Dry Creek Lodge v Arapahoe & Shoshone Tribes* ("*Dry Creek*").[147] It was found that federal jurisdiction is permitted where there is an alleged breach of the ICRA, where the matter is not purely internal, and where the tribal forum is denied. Later cases have narrowly construed this finding.[148]

(b) Effectiveness of Tribal Courts

There has been a huge increase in the number of tribal courts since *Martinez*. In 1978 there were 119,[149] by 2000 there were 511.[150] McCarthy notes that virtually all of the federally recognized tribes have some system of civil dispute resolution and most have criminal courts.[151]

140 Ibid 67-70. The Court also noted the objections that tribal representatives expressed at Senate hearings and subsequent changes to the legislation.

141 Ibid 60.

142 *Fisher v District Court* 424 US 382 (1976); *Williams*, supra note 129.

143 *Martinez*, supra note 2, 59.

144 Ibid 71.

145 435 US 191 (1978).

146 450 US 544 (1981).

147 623 F 2d 682 (10th Cir, Wyo, 1980).

148 *Enterprise Management Consultants Inc v United States* 883 F2d 890 (D Mont, 1983).

149 McCarthy, supra note 133, 486.

150 Rosen, "Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act" (2000) 69 Fordham L Rev 479, 507 and n 97. Note that the courts were defined as per the definition in the Indian Tribal Justice Act.

151 McCarthy, supra note 133, 486.

An empirical study of all reported decisions of the tribal courts over a 13 year period, conducted by Rosen, concluded that these courts were highly effective in protecting civil rights.[152] In construing the ICRA's provisions the tribal courts had regard to relevant federal case-law and the evidence showed that they had assimilated many "Anglo" constitutional values. Moreover they had interpreted those values in ways that gave expression to tribal values and thus supported tribal culture. An example is *Atcitty v District Court for the Judicial District of Window Rock.*[153] In deciding whether a group of applicants had standing to bring a claim, the Court applied the federal standard of a 'legitimate claim'. However, the Court assessed this by reference to the Navajo concept of *k'e*, which concerns "one's unique, reciprocal relationships to the community and the universe".[154] Navajo values of community coherence, harmony and distributive justice dictated that the group had the right to bring the claim. Rosen points out that by articulating tribal values in a way that gives them force of law, an important community building effect is achieved.[155] This is despite the fact that the result may not have been very different had the federal test been applied.

Some tribes have also retained or re-instituted traditional dispute resolution forums, which offer culturally based mediation rather than adversarial litigation. An example is the Navajo Peacemaker Court.[156] This division of the Navajo courts uses a traditional process by which the disputants and community members 'talk things out' with the help of a respected community member. The aim is to reach a consensual settlement, which restores community harmony. The tribal court has a list of certified peacemakers, but the disputants themselves may unanimously agree on a peacemaker who is not on the list.[157] The peacemaker, who is not strictly neutral, may express a point of view grounded in Navajo values and often uses traditional tales that powerfully evoke these.[158] Agreements reached can be entered as court judgments and enforced as such. Brown reports that the Peacemaker Division has been very successful[159] and is increasingly used.[160]

152 Rosen, supra note 150.

153 24 Indian L Rep 6013 (Navajo 1996).

154 Ibid 6014 cited in Rosen, supra note 150, 514.

155 Rosen, supra note 150, 494.

156 Brown, "The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum" (1999/2000) 24 Am Indian L Rev 297.

157 Ibid 303.

158 See e.g. Pommersheim, "Liberation, Dreams and Hard Work: An essay on Tribal Court Jurisprudence" (1992) Wis L Rev 411, 431. Pommersheim writes on the place and effect of narrative within Native American culture.

159 Brown, supra note 156, 307. Brown reports that one judge referred more than 50 cases between 1986 and 1990 and only two of these were not successfully resolved.

160 Ibid. A comparison of cases from the first three months' in consecutive years revealed an almost 400 per cent increase in caseload.

(c) Exhaustion of Remedies

Since the 1980s the growth of tribal courts has been fostered by the exhaustion of remedies doctrine. In *National Farmers Union Insurance Co v Crow Tribe of Indians* ("*National Farmers*")[161] the Supreme Court held that exhaustion of the remedies available in the tribal courts was required before federal question jurisdiction could be invoked. The existence of the tribal court's jurisdiction was a federal question involving, as it did, an examination of tribal sovereignty and the extent to which that had been diminished by statute or common law. However, congressional policy of support for tribal self-government dictated that this inquiry should be conducted in the first instance by the tribal court itself. The federal court should stay its hand until the tribal court has had a full opportunity to determine its own jurisdiction and to correct any errors. Other courts could then have the benefit of its expertise. The Court set out four exceptions: where the assertion of tribal jurisdiction is motivated by a desire to harass; where there bad faith is present; where the action patently violates express jurisdictional prohibitions; and where exhaustion is futile for lack of an opportunity to challenge jurisdiction.[162]

Two years later, in *Iowa Mutual Insurance Co v LaPlante*[163] the Supreme Court extended the ruling in National Farmers to cases alleging diversity of citizenship as the basis for federal jurisdiction. The Court rejected arguments that the diversity statute manifested an intention to override the policy of deference to tribal courts. It endorsed the vital role that tribal courts play in self-government and noted that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs".[164] The Court said that "tribal courts are best qualified to interpret and apply tribal law",[165] and that "proper deference to the tribal court system precludes re-litigation of issues ... resolved in the Tribal Courts".[166] However, it was asserted that exhaustion was required as a "matter of comity",[167] rather than as a prerequisite to jurisdiction. In addition, although civil jurisdiction over the activities of non-Indians on the reservation lay presumptively with the tribe, and tribal remedies must first be exhausted, the tribal courts' determination of jurisdiction would ultimately be subject to federal review.[168]

161 471 US 845 (1985).
162 Ibid 856, n 21.
163 480 US 9 (1987).
164 Ibid 16.
165 Ibid.
166 Ibid 19.
167 Ibid 16.
168 Ibid 19.

2. Comparisons

The doctrine of deference developed by the courts in the United States offers considerable advantages. It allows the courts to stay out of intra-tribal controversies best resolved by those with expertise in tribal law and a full understanding of the background to the dispute. It prevents the courts from being clogged up with long-running feuds that are unlikely to be resolved by litigation. It nurtures the development of an authoritative forum for intra-tribal disputes. It builds communities by allowing them to give binding effect to cultural norms.

It is submitted that there is no reason why New Zealand judges could not develop a similar common law principle, or one that produces the same result. Although the United States doctrine was founded upon recognition of the Indian tribes' residual sovereignty, the cases have framed the doctrine as a protection of the right to self-government. That right, is commonly conceptualised as deriving from historical sovereignty. However, it could also be based on the international law concept of 'aboriginal self-government', which the Waitangi Tribunal has equated with tino rangatiratanga as guaranteed by Article Two of the Treaty.[169]

The concept of sovereignty is problematic. Anghie examines the way in which the positivist construction of this concept both legitimated, and was shaped by, the colonial encounter, revealing its inherent contradictions and ironies.[170] Legal sovereignty, as conceptualised by Dicey, is absolute and indivisible.[171] This poses some problems for the argument that Article two reserves sovereignty to Māori. The Waitangi Tribunal has reviewed the arguments and has concluded that, despite the differences in wording between the English and Māori texts, legal sovereignty was ceded to the Crown.[172]

By avoiding the concept of sovereignty entirely, however, and by basing the principle of deference instead upon the evolving concept of tino rangatiratanga, its benefits can be secured without the baggage. In fact, as most of the exhaustion of tribal remedies cases use the terminology of protecting the right to self-government, the development of a deference principle based on tino rangatiratanga would not be a huge conceptual leap.

A second point to make is that a necessary pre-condition to the development of the doctrine of deference in the United States, was the existence of an effective alternative dispute resolution forum. In the United States this was the tribal court.

Two significant differences between the United States and New Zealand make it highly unlikely that the tribal court system could be replicated here. First, the United States Constitution has a very different form to the New Zealand one.

169 Waitangi Tribunal, *Taranaki Report*, supra note 94, ch 1.4.

170 Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv Int'l L J 1.

171 McHugh, *The Māori Magna Carta* (1991), 15.

172 Waitangi Tribunal, *Ngāi Tahu Report*, supra note 93, ch 4.6.5.

The federal system in the United States creates exclusive and independent spheres of jurisdiction for state and federal governments. Sophisticated jurisprudence preserves the balance of power between the two and a degree of legal pluralism is the norm.[173] Full recognition of tribal sovereignty sits more comfortably within this framework. This can be compared with New Zealand's unwritten Constitution, which has never been genuinely federal.[174] The second difference is that Native American society is based on the reservation. The jurisdiction of tribal courts is defined primarily by its territorial limits. In New Zealand, although iwi do have recognized tribal boundaries that cover the whole country, contemporary Māori society is not marked by territorial cohesion.[175]

While an iwi court system is not a tenable option here, the creation of binding dispute resolution mechanisms by agreement certainly is tenable. One possibility would be to enshrine such processes in settlement legislation. An alternative would be to spell them out in the rules of a settlement entity. If judges are to exercise deference, there must be something to which they may defer.

A third point is that, undoubtedly, the development of the United States doctrine was encouraged by the fact that tribal courts were applying the ICRA; they had proved to be highly effective and protective of the civil rights of members. Questions as to the court's position may be raised, however, if the nominated forum adopted processes that infringed basic constitutional norms, or upheld the actions of a settlement entity that did so.

Such concerns, however, should not deflect us from taking a principled approach. In the United States, the *Dry Creek* exception and the availability of post-exhaustion review furnish some limitations to the ambit of judicial deference. In New Zealand, the guarantee of tino rangatiratanga must be balanced against the cession of kāwanatanga. This may allow for the possibility of constitutional review if basic constitutional rights are infringed.

The proper ambit of constitutional review in these circumstances is beyond the scope of this article, however two comments may be made. Many of the values of due process would already seem to be inherent within Māori culture, certainly the ideal of all parties to a dispute being heard. However, there would seem to be a fundamental tension between provisions of the New Zealand Bill of Rights Act 1990, which are based on individual entitlements, and tikanga Māori, which emphasizes community rights and reciprocity.[176]

The United States cases recognize that the tribal courts are the appropriate forum for the resolution of reservation disputes. This is based on their expertise in tribal custom and on their being better placed to assess the effects of decisions on the tribe. The author suggests that a Māori forum would be more appropriate

173 See e.g. Rosen, supra note 150. Rosen shows that this extends even to multiple and diverse authoritative interpretations of the Federal Constitution.

174 Under the Constitution Act 1852 (until abolished in 1875) provinces had some autonomy but no exclusive power.

175 This is a result of massive land losses and rapid urbanization post-World War II.

176 Durie, "Will the Settlers Settle?" (1996) 8(4) Otago L Rev 449, 454.

for the resolution of post-settlement disputes within an iwi for the same reasons. The development of a doctrine of deference by the courts of general jurisdiction would facilitate this.

VI: Alternatives – Treading Lightly

A question then arises as to what shape this forum might take. The Law Commission has identified two main options: a 'domestic tribunal' set up by the settlement group themselves or Māori Land Court judges sitting with pūkenga (experts).[177] This part examines these alternatives.

1. Domestic Tribunal Option

The first option identified by the Law Commission was a domestic tribunal comprised of pūkenga appointed by the settlement group. It was recognized that such experts in tikanga would "enjoy both legitimacy and confidence"[178] and "may be better placed by reason of their knowledge of relevant tikanga to make decisions affecting the group if consensus has not been reached".[179] It was also noted that there was a potential public law objection on the grounds of their relationship with the group, and a need to ensure that decisions would not be set aside on this basis. It was acknowledged that this approach "would better accord with Māori customary practices".[180] It should be added that this approach is also in accord with the guarantee of tino rangatiratanga.

In traditional Māori society tikanga provided the normative standards by which correct behaviour was judged and disputes settled. It was based on principle rather than precedent.[181] Chief Judge Williams, writing extra-judicially, identifies five underlying principles: whanaungatanga (the centrality of kin relationships), mana (leadership values), kaitiakitanga (stewardship), utu (balance and reciprocity) and tapu (spiritual value).[182] He notes that its application was kin group based, and that to have it divined by a non-member judge "would be the antithesis of tikanga".[183] There is obvious tension here between the dictates of tikanga, and administrative law principles about bias.

Traditionally, although the whole group discussed some matters, rangatira and kaumātua played a central role in dispute resolution.[184] Rangatira were usually born

177 Law Commission, *Treaty of Waitangi Claims*, supra note 6, 22.
178 Ibid 22.
179 Ibid 21.
180 Ibid 22.
181 Joe Williams, "The Māori Land Court - A Separate Legal System?" (Paper presented to Victoria University of Wellington Public Law Seminar Series, Wellington, New Zealand, 10 July 2001) 8.
182 Ibid 8–9.
183 Ibid 8.
184 Tomas and Quince, "Māori Disputes and their Resolution" in Spiller (ed), *Dispute Resolution in New Zealand* (1999) 205, 212.

to the role, trained from youth to look after the welfare of their people.[185] Their words were tapu, their authority immense and rarely challenged.[186] In resolving disputes according to tikanga, they aimed to restore harmony to the group, and to restore and enhance its mana.[187] Although the authority of a rangatira was absolute, there was an emphasis on consensus.[188] Rangatira were judged on their ability to assess and articulate the views of their people.[189] This is reflected in the etymology of the word: "ranga" means to weave, while "tira" refers to a group of people travelling – thus a rangatira is a weaver of the people.[190]

Colonization led to massive disruption of Māori society. The role and authority of the rangatira was diminished by the breakdown of traditional structures, and the rise of individualism.[191] Forced reliance on the Pākehā courts in matters of land tenure, and the extension of criminal jurisdiction to Māori, assisted in the destruction of traditional dispute resolution systems.[192]

That said, it is clear that Māori society has continued to resolve many disputes according to tikanga. The Ministry of Justice Māori Perspectives team presented their analysis of several traditional dispute resolution case studies in a recent report.[193] These were based on interviews with kaumātua about events in the 1930s and 1940s. Notably, the same principles and processes are still applied today: the role of kaumātua and rangatira, the involvement of the wider community, the obligations of whanaungatanga, and the importance of restoring balance to the community. Māori faith in traditional processes is illustrated by repeated calls for a return to a marae-based (and hence tikanga-based) dispute resolution process.[194]

Tikanga varies between tribes. Although based on the same fundamental principles, it may be expressed differently in different iwi.[195] More importantly, nowhere is tikanga frozen as it was prior to European contact. It continues to change and adapt to different conditions and needs. With that in mind, Tomas and Quince suggest that an effective Māori dispute resolution system created today should be based on six elements derived from tikanga: community input and responsibility, reciprocity and balance, a principle of inclusiveness and

185 Although a rangatira who ignored the wishes of the people or who was ineffective could be displaced. See Ministry of Justice, *He Hinātore ki te Ao Māori - A Glimpse into the Māori World: Māori Perspectives on Justice* (2001) n 106 and accompanying text ["*He Hinātore*"].

186 Tomas, supra note 184, 212.

187 Ibid 215.

188 Durie, *Te Mana, Te Kāwananga* (1998), 219.

189 Tomas, supra note 184, 232.

190 Law Commission, *Māori Custom and Values in New Zealand Law* SP9 (2001) 36 ["*Māori Custom*"].

191 Tomas, supra note 184, 232.

192 Ibid 218.

193 Ministry of Justice, *He Hinātore*, supra note 185, Part 2.

194 See e.g. Law Commission, *Treaty of Waitangi Claims*, supra note 6, 68. This report refers to the hui called by the Law Commission in relation to its succession project.

195 Law Commission, *Māori Custom*, supra note 190, 4.

accountability, a marae forum, the use of te reo Māori,[196] and proper mandating of leaders and representatives.[197]

An iwi-created tribunal would have the potential to embrace all of these elements. The iwi could define the system to best accord with tikanga so as to maximize the acceptability of the outcome. It would own the process. The aim of the process would be to restore harmony to the group and to restore the disputants to the community. All parties to a dispute could be represented and given the opportunity to be heard. A marae is the obvious forum at iwi level and the use of te reo Māori a given in this setting. The iwi itself is best placed to determine representation. The process would enhance rather than undermine iwi leadership structures.

In contrast, the present courtroom process fails to achieve the six elements devised by Tomas and Quince. Indeed, a potential side effect of litigation is the further erosion of traditional leadership. Certainly, many within Tainui viewed the institution of proceedings against Te Arikinui in *Porima* as an attack on her mana.[198] In that case, the insistence on a venue apart from Tūrangawaewae[199] and the request for orders that Te Arikinui be banned from the executive committee meeting, or that it be held under court supervision,[200] would suggest that the plaintiffs' intention was to use the court to neutralize her influence.

The efficacy of a traditional dispute resolution forum, which offers culturally based mediation, is demonstrated by the Navajo Peacemaker Court.[201] Traditional Māori dispute resolution also involved disputants and community members 'talking things out' with the aim of the rangatira being to reach consensus, and restore community harmony. It is not only expertise in tikanga, but also the ability to appeal to iwi values, and to access narrative[202] that could make such a forum hugely effective.

Of course, it may be argued that the present situation has arisen precisely because traditional dispute resolution procedures are not adequate for the task. Indeed, it is unlikely that such an option will flourish while the courts stand ready and willing to entertain disgruntled iwi members. If the courts are prepared to develop a jurisprudence of deference, the milieu may be more propitious. However, an agreed forum needs to be created ahead of time, rather than after the dispute has arisen.

196 Tomas, supra note 184, 231–232. Tomas and Quince acknowledge however that because less than 20 per cent of Māori are fluent speakers English would also be used.

197 Ibid 228–233.

198 *Porima*, supra note 1, 477-478.

199 Ibid 479.

200 Ibid 489.

201 Brown, supra note 156.

202 Hond, "Resort to Mediation in Māori-to-Māori Dispute Resolution" (2002) 33 VUWLR 579, 589.

2. The Māori Land Court Option

The second option identified by the Law Commission was to give the Māori Land Court judges, sitting with pūkenga, jurisdiction to hear such disputes. The progression seems logical as the Māori Land Court has already been given jurisdiction to mediate representation issues. The Law Commission acknowledged that the skill and expertise that these judges have, in terms of Māori issues, is rare. It was suggested that Māori Land Court decisions could be deemed final, subject to judicial review for illegality, irrationality or flawed process.[203]

That the Māori Land Court should be seen as a viable option by the Law Commission and by other writers[204] is a measure of how far the Court has come since its creation. Its history is beyond the scope of this article. Suffice to say that, the Waitangi Tribunal in the *Rekohu Report* concluded that the creation of the Court was itself a breach of the Treaty principle of rangatiratanga,[205] which, it was said, entailed the right to develop Māori institutions for the resolution of inter-tribal disputes.

Notably, although the Māori Land Court deals with matters of tikanga, it is not a court of Māori custom law.[206] As Chief Judge Durie of the Māori Land Court (now Durie J) noted extra-judicially in 1993, the specialist knowledge that the Court possesses is not knowledge of tikanga per se but "of the complex laws introduced to replace customary tenure".[207] In 1994, he recorded that in his 20 years as a Māori Land Court judge there had been no training in customary law, although he noted that some knowledge of customary preference "inevitably rubs off".[208]

There has been a significant shift of focus in the Māori Land Court today. The preamble to Te Ture Whenua Māori Act 1993 recognizes the special significance of land to Māori, and sets out principles of promoting the retention of Māori land, and of facilitating its utilization for the benefit of its owners. Chief Judge Williams speculates that if these principles had been present from the beginning, the Court would have been able to apply tikanga and focus on the development of principles for land and asset administration by iwi.[209]

Despite the body of jurisprudence shaped by its history, there is some scope for the Court to apply tikanga in its pure form, but "only in the interstices".[210]

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203 Law Commission, *Treaty of Waitangi Claims*, supra note 6, 22.
204 Williams, supra note 181, 11.
205 Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngāti Mutunga claims in the Chatham Islands - Wai 64* (2001), 144.
206 Law Commission, *Māori Custom*, supra note 190, 60.
207 Durie, "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" (1994) 24 VUWLR 325, 326.
208 Ibid.
209 Williams, supra note 181, 6.
210 Ibid 7.

Examples of statutory direction to do so include section 115 of Te Ture Whenua Māori Act 1993 in relation to whāngai and section 6A of the Treaty of Waitangi Act 1975 which provides for the Waitangi Tribunal to refer matters of Māori custom or tribal boundaries to the Court.

There is now also more emphasis on ensuring that the judiciary has expertise in tikanga, or access to it. Since July 2002 new judicial appointments to the Māori Land Court have been required to be "suitable, having regard to the person's knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi".[211] Section 32 of Te Ture Whenua Māori Act 1993 provides for the appointment of two or more additional members with knowledge of tikanga to the Court where a matter referred to the Court under section 29 concerns tikanga. Section 33 similarly provides for appointees with relevant "knowledge and experience" when the matter is one of representation.

In addition, the use of mediation to resolve representation disputes is encouraged.[212] This expanded jurisdiction allows for participation by the affected community,[213] and for the parties to agree on a mediator[214] who is able to follow any procedure considered appropriate.[215] Any resulting agreement can be issued as a sealed order of the court.[216] Mediation, however, is not a panacea. Hond notes that it is highly dependent on the cultural skills of the mediator,[217] and vulnerable to distortion where the parties are not on a level playing field.[218] Nevertheless, this flexible option would seem to allow for a more traditional form of dispute resolution (talking out the issues) similar to the Navajo peacemaker division.

The reality would seem to be that despite its history and limitations the Māori Land Court is already being used to resolve disputes according to tikanga to the fullest extent possible. Chief Judge Williams reports that in his experience, parties come to the court armed with arguments based on tikanga, the opinions of kaumātua are given weight, sometimes despite the absence of entitling shares, and hapū imperatives often prevail over strict beneficial entitlements.[219] He concludes: "Judges will always find a way to defer to tikanga unless the statute and the tikanga are in direct conflict and even then there is often room for creativity".[220]

Chief Judge Williams points out that the Māori Land Court is already dealing with many of the sorts of disputes that will arise post-settlement in its present

211 Subsection 2A inserted by s 6 Te Ture Whenua Māori Amendment Act 2002/Māori Land Amendment Act 2002 (2002 No 16).
212 Ibid s 30A–J.
213 Ibid s 30E(1A), s 30J.
214 Ibid s 30D(2).
215 Ibid s 30D(2)(a).
216 Ibid s 30F(2).
217 Hond, supra note 202, 588-589.
218 Ibid 586.
219 Williams, supra note 181, 7-8.
220 Ibid 8.

workload. He notes that there is effectively no law covering the issues that will arise, and no appointed dispute resolution forum or process. He argues that meeting this need is "a logical extension of the Māori Land Court's role"[221] and suggests a new form of court - a judge sitting with two or more pūkenga - to facilitate, mediate, or adjudicate the issues that arise. The Law Commission seems to have taken up this suggestion.

3. Treading Lightly

It is for iwi groups themselves to choose the appropriate dispute resolution mechanism, but some observations can be made. The domestic tribunal option would seem to be preferable in principle. It would seem to have greater potential to tap into the healing power of traditional dispute resolution processes. It does not infringe tino rangatiratanga, as it represents the minimum disturbance on iwi autonomy necessary for the functioning of the state. To apply the spirit of *Martinez*,[222] to subject an intra-iwi civil dispute to a forum other than the one the iwi has established for itself, may infringe its right of self-government.

On the other hand, the Māori Land Court option may have some practical advantages. In some cases, the traditional dispute resolution mechanisms may have broken down to the extent that it would be difficult to constitute a forum that would have the confidence of all the people. This may be more likely in iwi groups that have already attempted to resolve post-settlement disputes by litigation. The Māori Land Court is uniquely placed to apply a mix of tikanga and common law principles. This may have the advantage of strengthening the case for deference by allaying any judicial concern about standards of adjudication.

There may also be scope for a two-tier dispute resolution process – an iwi-based tribunal at first instance with a right of appeal to the specially constituted Māori Land Court of judge sitting with two pūkenga from the local iwi.

Whatever the choice, by constituting the dispute resolution forum and process as part of the settlement, the iwi will decrease the susceptibility of its decisions to judicial review. The courts are more likely to review decisions where individuals are left without any other redress.[223] If a dispute resolution mechanism is specified in the settlement, this will not be the case.

When parties to a contract have provided for themselves a dispute resolution process, the courts will strive to give effect to their intentions. Many commercial contracts, for example, contain arbitration clauses. The courts consider that the contractual source of an arbitrator's power severely restricts the availability of judicial review.[224] Part of the rationale for that is deference to the parties' choice of a more efficacious mechanism and to the special expertise of the arbitrator. The

221 Ibid 11.

222 *Martinez*, supra note 2, 59.

223 *Mercury Energy*, supra note 14, 388; *Datafin* supra note 13; *Te Atiawa* supra note 55, 9.

224 *Kenneth Williams & Co Ltd v Martelli* [1980] 2 NZLR 596, 606 (HC).

courts of general jurisdiction can best assist in post-settlement dispute resolution by developing their own jurisprudence of deference. They may find it useful to draw on the United States doctrine of exhaustion of remedies as a basis for this development.

VII: Conclusion

Although the decisions of settlement entities are potentially subject to judicial review, in principle, the courts of general jurisdiction should decline to intervene. As a matter of constitutional principle, to subject the internal decision-making of an iwi to judicial review infringes tino rangatiratanga as guaranteed by the Treaty. Ideally, settlement entity decisions should be regarded as non-justiciable, because the administrative law principles upon which judicial review is predicated do not hold.

The survey of recent cases reveals a muddy mess. It illustrates the shortcomings of the judicial review process in resolving these disputes, and the potentially destructive effect on the relationships involved. The judges are clearly uncomfortable with their task of reassessing complex political and policy decisions that involve reference to tikanga Māori.

A path out of the mire could be the development of an exhaustion of iwi remedies doctrine, similar to that applied in the United States. But a necessary pre-condition to this is that a viable alternative dispute resolution mechanism is set in place. By specifying this process in the settlement itself, or in the governing rules of the settlement entity, iwi can reduce their susceptibility to judicial review. By making the standards of due process clear, the case for deference becomes more compelling. To adopt the words of Marshall J, a proper respect for tino rangatiratanga cautions that the courts tread lightly.[225]

225 *Martinez*, supra note 2, 60.