A CONTRACTUAL APPROACH TO INDIGENOUS SELF-DETERMINATION IN AOTEAROA/NEW ZEALAND

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I. INTRODUCTION

The contemporary realities of international law and politics are such that if Indigenous Peoples are to peacefully and effectively realise self-determination, they will most likely have to exercise it *within* existing State structures and orders. This requires (re)establishing and (re)orienting Indigenous-State relations away from policies of assimilation and integration, and towards a partnered process of "belated State-building."[1] To this aim, an international legal right of self-determination for Indigenous Peoples would provide a politico-legal mechanism that legitimately advances Indigenous self-determination at the international level.[2] Another significant step would be to establish, at

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1. The phrase "belated State-building" is adopted from Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1, 9 (1993). "With few exceptions, Indigenous Peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitution of the States in which they live, or to share, in any meaningful way, in national decision-making . . . . Whatever the reason, [by law, force, language, poverty, or prejudice,] Indigenous Peoples in most countries have never been, and are not now, full partners in the political process, and lack others' ability to use democratic means to defend their fundamental rights." *Id.* at 8-9. Accordingly, the concept and process of "belated State-building" seeks to right such historical injustices by imposing obligations on States to accommodate Indigenous Peoples through constitutional means in order to share power democratically. The approach of "belated State-building" (and that of contractualism) in this paper may be contrasted with more radical approaches to self-determination (e.g., secession and independence) that are disruptive to the existing "fabric" of the international order of States. *Id.* at 9. For useful overviews and analyses of more radical approaches to self-determination, see ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991) and JORRI DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD (1996).

2. The international legal right of self-determination for Indigenous Peoples, as articulated in Article 3 of the *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Mi-

the domestic level, a coherent framework that effectively implements the international legal right, and exercises and realises Indigenous self-determination within the existing structures and orders of the State. This article will examine a case study of one such coherent domestic framework for Indigenous self-determination: that of contractualism in Aotearoa/New Zealand.

It is through the process and product of contractualism that Indigenous Peoples may negotiate and establish power-sharing arrangements with their surrounding States as part of the process of belated State-building, and in the exercise and realisation of self-determination.[3] This contractual State-building provides a paradigmatic approach to peaceful and effective self-determination for Indigenous Peoples within the realities of international law and politics in the 21st century.

The second section examines the jurisprudential model of contractualism as the abstract framework for contractual State-building. It reveals how contractualism, as a process and product of ordering relations by negotiated agreement, can accommodate competing discourses on self-determination, sovereignty, and justice between Indigenous Peoples and States. Contractualism is then distinguished from a related model of ordering relations:

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norities, 46th Sess., U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56 (1994), adopted in 1994 after ten years of deliberation by Indigenous Peoples' representatives and the United Nations Working Group on Indigenous Populations, and currently before the United Nations Commission on Human Rights, provides that "Indigenous [P]eoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The language of Article 3, with the exception of the inclusion of the term "Indigenous," recites verbatim the classic statement of the right of self-determination contained in common Articles 1 of the International Human Rights Covenants. For an excellent discussion on the right of self-determination in international law, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995). For discussions on the connection between the right of self-determination and Indigenous Peoples, see Daes, *supra* note 1; MAIVAN CLECH LAM, AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION (2000); and, Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 GERMAN Y.B. OF INT'L L. 277 (1986).

3. Garth Nettheim identifies ten classes of claims for self-determination advanced by Indigenous Peoples nationally and internationally since the 1970's. *See* Garth Nettheim, *"Peoples" and "Populations" – Indigenous Peoples and the Rights of Peoples*, *in* THE RIGHTS OF PEOPLES 107, 116 (James Crawford ed., 1988). However, this article is premised on the proposition that Indigenous Peoples' claims for self-determination amount, in essence, to two basic demands for *sovereignty* (i.e., varying degrees of control over their own affairs) and *justice* (i.e., redress for past wrongs, redistribution for present equality and rearrangements for future security). For support for this proposition, see JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 4-5 (1995). However, Tully rightly warns of the dangers of redescription and adjudication of various claims into "a cacophony of heterogeneous claims so as to obscure and misidentify the nuances associated with context-specific claims" for sovereignty and justice by different Indigenous Peoples. *Id.* at 5. *See* discussion *infra* note 21 and accompanying text.

that of contractarianism. Finally, it is defended against arguments questioning the appropriateness and efficacy of contractualism as a model for establishing, ordering, and improving Indigenous-State relations.

The third section details a juridical method of contractual State-building through the case study of historical treaty-making and contemporary legislative agreement between Indigenous Maori and the Crown in Aotearoa/New Zealand. This case study provides one concrete example of contractualism and contractual State-building in action during belated State-building between Indigenous Peoples and States.[4] The section also addresses the limitations of both the case study and contractualism as a complete approach for Indigenous self-determination and belated State-building.

The summary section concludes that the model of contractualism and the method of contractual State-building provide a paradigmatic approach to achieving peaceful and effective Indigenous self-determination within existing State structures and orders. However, the process and product of contractual relations in Aotearoa/New Zealand does not itself provide *the* paradigmatic approach. Rather, the case study illuminates how the jurisprudential model of contractualism can be implemented as a juridical method of contractual State-building. It is the *process* of contractualism that is valuable in this case study. The *product* of contractualism will vary with each contractual process and depend upon domestic and international developments.

II. JURISPRUDENTIAL MODEL: CONTRACTUALISM

There are numerous instances of belated State-building in the 20th century, deriving primarily from Third World decolonisation, the fall of communism and the increasing indigenisation of public life in Western democracies. S. James Anaya, an international legal scholar, identifies the process required for belated State-building as one of "negotiation involving good faith dialogue toward achieving agreement that helps to build mutual understanding and trust."[5] Anaya outlines three

4. This selective case study is not in disregard of the important, and often parallel, approaches to Indigenous-State relations in North America and elsewhere. However, it serves to underscore the fact that it is in Aotearoa/New Zealand that a useful contractual approach has been actualised regarding Indigenous-State relations. *See infra* note 64.

5. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 130 (1996). This would need to be approved by the relevant constituencies through democratic procedures to invest the process with a substantial degree of legitimacy on the part of all concerned. *See id.* Anaya's approach relates closely to Daes' vision of belated State-building. *See* Daes, *supra* note 1. It is acknowledged that, from

domestic institutional mechanisms for implementing this process: executive action; legislative action and constitutional reform; and judicial procedures.[6]

For Anaya, negotiated agreement and institutional mechanisms make it possible to resolve the complex issues of redistribution of power and resources in belated State-building on a case-by-case basis.[7] In a similar vein, the United Nations Special Rapporteur, Miguel Alfonso Martinez, in his monumental study on treaties, agreements, and other constructive arrangements between States and Indigenous Peoples, is convinced that the process of negotiation and the "seeking [of] consent inherent in treaty-making" are the most appropriate way to resolve conflicts of Indigenous issues at all levels.[8] These theories strongly support contractualism as a jurisprudential model for Indigenous-State relations.[9]

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a narrow perspective, the apparently progressive notion of belated State-building parallels what Miguel Alfonso Martinez has described as the process of "domestication" of all issues relating to Indigenous Peoples (including Indigenous Peoples themselves) by their surrounding States. *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples*, U.N. Commission for Human Rights, 51st Sess., Agenda Item 7, ¶ 66, U.N. Doc. E/CN.4/Sub.2/1999/20 (1999) [hereinafter *Study on Treaties*]. However, the process of belated State-building is a far cry from, and in fact seeks the opposite of, the assimilative or integrationist processes that Indigenous Peoples are reacting against. The notion of belated State-building is instead a vision for realistic and necessary compromise between Indigenous Peoples and States in contemporary international law and politics which, if successful, can provide a peaceful and effective settlement of issues satisfactory to both parties, and to world order.

6. ANAYA, *supra* note 5, at 133-40.

7. *Id.* at 130-31.

8. *Study on Treaties*, *supra* note 5, ¶ 263.

9. The exclusion of judicial procedures in the following analysis is not to deny the efficacy of "judicial law-making" as a form of empowerment of Indigenous Peoples in terms of self-determination. For the efficacy of this approach, see, e.g., the recognition of Native American Indian sovereignty by the United States Supreme Court in Worcester v. Georgia, 31 U.S. 515 (1832), Cherokee Nation v. Georgia, 30 U.S. 1 (1831) and Johnson v. M'Intosh, 21 U.S. 543 (1823); native land title in Australia in Mabo v. State of Queensland [No. 2] (1992) 107 A.L.R. 1 (Austl.) and Milirrpum v. Nabalco Pty Ltd. (1971) 17 F.L.R. 141; Indigenous constitutional rights in Canada in Van der Peet v. The Queen [1996] 137 D.L.R.4th 289, Delgamuuku v. R [1991] 79 D.L.R.4th 185, R v. Sparrow [1990] 70 D.L.R.4th 385, Calder v. Attorney General of British Columbia [1973] 34 D.L.R.3d 145; and customary fishing rights and Treaty of Waitangi principles in New Zealand in New Zealand Maori Council v. Attorney General [1987] 1 N.Z.L.R. 641 [hereinafter the "1987 *Lands* case"] and Te Weehi v. Regional Fisheries Officer [1986] 1 N.Z.L.R. 680. Rather, the exclusion is founded on the fact that judicial procedures fall outside the scope of negotiated agreement between Indigenous Peoples and the State, and thus beyond the model of contractualism, serving instead, in this context, as post-facto institutional mechanisms to ensure the legitimacy and legality of the process and product of contractualism.

Contractualism is the process and product of ordering relations by negotiated agreement.[10] The language and practice of contractualism, once confined to the realms of liberal political theory, commercial law, and economic exchange, has recently been used to manage diverse problems in public administration, employment, schooling, ordering of private (marriage or marriage-type) relationships, women's rights, and minority rights.[11] Anna Yeatman, a political scientist, describes the key features of what she terms the "new contractualism":

- "Obligation is mediated by some form of individualised consent ('individualised' in this sense covers both empirical individuals and individual organisations of various kinds);
- [t]he consent elicited must be informed consent which is the result of some . . . dialogic explicitness about the tasks and processes being undertaken by both parties to the 'contract';
- [n]egotiation on the terms of the contract occurs by mutual adjustment; and
- [w]here the above conditions are satisfied, both parties to the contract are accountable for their actions."[12]

In light of these features, the phrase "*new* contractualism" is perhaps something of a misnomer. The key features outlined above draw directly from the characteristic language and practice of older traditions of contractualism.[13] However, the contractualism that has emerged in the late 20th century is *new* in the sense of its novel application to areas beyond the older traditions and

10. For an excellent collection of essays on contractualism, see generally THE NEW CONTRACTUALISM? (Glyn Davis et al., 1997).

11. Barbara Sullivan, *Mapping Contract*, *in* THE NEW CONTRACTUALISM?, *supra* note 10, at 1.

12. *Id.* at 6 (citing Anna Yeatman, *Interpreting Contemporary Contractualism*, *in* JONATHAN BOSTON, THE STATE UNDER CONTRACT (Jonathan Boston ed., 1995) and Anna Yeatman, *The New Contractualism: Management Reform or a New Approach to Governance?*, *in* NEW IDEAS, BETTER GOVERNMENT (Paul Weller & Glyn Davis eds., 1996)).

13. As mentioned, contractualism has its doctrinal origins in law, economic theory, and liberal political thought. In law, there is no generally recognised definitional theory of contract. The will paradigm and the reliance paradigm are two central theories of this sort. However, Patrick Atiyah's approach does hold wide support. *See* P. S. ATIYAH, ESSAYS ON CONTRACT 179 (1986). For Atiyah, a "contract" refers to an exchange of "consideration" to establish a legally enforceable obligation that flows from the free choice of the parties. In economic theory, "contract" is a derivative legal notion that supports complex market exchanges to promote mutually beneficial relations. *See* Sullivan, *supra* note 11, at 2. In political theory, there is no single tradition of the "social contract" or "contractarianism." *See* David Boucher & Paul Kelly, *The Social Contract and its Critics*, *in* THE SOCIAL CONTRACT FROM HOBBES TO RAWLS 1, 1 (David Boucher & Paul Kelly eds., 1994). Michael Lessnoff defines contractarianism, albeit narrowly, as "a theory in which a contract is used to justify and/or set limits to political authority, or in other words, in which political obligation is analysed as a contractual obligation." MICHAEL LESSNOFF, SOCIAL CONTRACT 2 (1986).

the resulting impact this has had on the structure of the body politic and the nature and agency of contracting individuals.[14]

Contractualism has been observed to radically disaggregate and individualise governance into a series of contractual relationships.[15] To operate effectively within such a contractual framework, contracting individuals must be able to make rational choices about their own interests, and be able to understand, negotiate and adhere to contracts. In other words, individuals need capacity in contractual relationships. "Contractual personhood" (i.e., the capacity to contract) is not a natural attribute of individuals but rather an outcome of "status-based processes" (i.e., the historically-formed character of parties to a relationship deriving from, e.g., child rearing and formal education). Accordingly, contractualism requires a distinctive non-contractual status component in the nature and agency of contracting individuals.[16]

For Indigenous Peoples, the changes wrought by a contractualist society potentially impact them in two ways. First, contractualism allows for contractualising the nature of their relationship with the State, thereby opening up opportunities to (re)establish and (re)orient Indigenous-State relations upon appropriate contractualist principles of choice, voice, participation and consent. Secondly, to ensure sound contractual relations and outcomes, contractualism requires that Indigenous Peoples, as contracting individuals and groups, possess leadership skills and be conversant in the language and practice of contractualism.[17]

Since Indigenous-State relations involve significant matters of public policy and law, an important aspect is that any process and product of contractualism between these parties would take place in two separate public realms: the political and the legal.[18] Contractualism as a process (i.e., the negotiation of relations) is a political fact with important political connotations, but it possesses only moral, not legal, authority.[19] Contractualism as a

14. For a full discussion of this, see Sullivan, *supra* note 11, at 6-7; Glyn Davis, *Implications, Consequences and Futures*, *in* THE NEW CONTRACTUALISM?, *supra* note 10, at 224, 232; and, generally, Anna Yeatman, *Contract, Status and Personhood*, *in* THE NEW CONTRACTUALISM?, *supra* note 10, at 39.

15. Sullivan, *supra* note 11, at 6 (citing Anna Yeatman, *The New Contractualism: Management Reform or a New Approach to Governance?*, *in* NEW IDEAS, BETTER GOVERNMENT (Paul Weller & Glyn Davis eds., 1996)).

16. *Id.* at 7.

17. In the Aotearoa/New Zealand context, the success of the Indigenous Maori tribes of Waikato-Tainui and Ngai Tahu in their contractual relations and settlements with the Crown owed much to the strength of their leadership, most noticeably Sir Robert Mahuta and Sir Tipene O'Regan.

18. This is not the case for other parties to contractualism who operate almost entirely in a private legal capacity only.

19. According to Glyn Davis, political contracts, in the sense of defining the relationship between government and society, are "relational or implicit contracts –

product (i.e., the agreement on relations) must acquire a legal form, such as a treaty, legislative agreement, or other formal contractual instrument, in order to possess legal authority and become enforceable through legal mechanisms and institutions.[20] Thus, in the context of Indigenous-State relations, there must be a conflation of the political and legal realms within contractual relations, as captured in the process and product of contractualism, so as to ensure the coherency, effectiveness, and enforceability of what is contracted.

Thus the jurisprudential model of contractualism purports to achieve the theoretical ordering of Indigenous-State relations through negotiated agreement premised upon just, practical, and mutually beneficial processes and outcomes. The practical aim is a coherent framework for incorporating the competing Indigenous and State discourses on self-determination in an agreement for coexistence as part of belated State-building.

A. CONTRACTUALISM AND SELF-DETERMINATION

Contractualism supplies a set of elements, values, and principles that can (re)establish and (re)orient Indigenous-State relations within a coherent framework regarding self-determination. The core elements of Indigenous Peoples' claims for self-determination are two distinct demands: the demand for sovereignty over their own affairs (i.e., varying degrees of self-government over political, social, economic, and cultural matters that affect them); and the demands for justice (i.e., reparative justice for past wrongs, distributive justice for present equality and prospective justice for future security).[21] Sovereignty and justice, and

'understandings which endure . . . because of the shared needs of the parties to go on doing business with each other.'" Davis, *supra* note 14, at 226 (citing J. Martin, *Contracting and Accountability*, *in* THE STATE UNDER CONTRACT, *supra* note 12, at 39). They concern a "deal" signed by only one side of the table, and enforceable only through the imprecise and blunt exactment of election. *Id.* at 225-26. Strictly speaking, for Davis, such arrangements are not contracts at all. However, this narrow analysis clearly ignores the scope for political agreements to define the nature of the relationship between government and society while still being contractual in the truest sense. Aotearoa/New Zealand provides an example of this in its Indigenous-State relations, culminating in political Deeds of Settlement and legislative agreements regarding Treaty of Waitangi issues that do indeed contractualise the nature of the relationship between the Crown, Maori and *Pakeha* (majority European-descendent New Zealanders) alike. *See infra* notes 101-12 and accompanying text.

20. Valid legal contracts are binding (i.e., enforceable in a court of law) and thus provide some guarantees regarding the "operation of reciprocity . . . and . . . accountability" in contractualism. *See* Davis, *supra* note 14, at 225.

21. *See supra* note 3.

their components, are viewed as essential for the self-determination of Indigenous Peoples.[22]

Contractualism procedurally and substantively reflects and engenders the sovereignty of Indigenous Peoples and States as contracting parties. Procedurally, the negotiation and agreement process presupposes each party to be sovereign in their own right and sovereign equals in relation to each other. Despite potential or real disparities in bargaining power, the parties come to the contractual process as assumed equals exercising their freedom of choice to contract, their right to participate, and their power to give or withhold consent. This procedural posture reflects the sovereign autonomous status of each party and their willingness and capacity to meet, talk, and agree to terms on matters of sovereignty.[23] Without these procedural sovereignty elements, there could in fact be no valid or just contract.[24] Substantively, the actual agreement that is the product of contractualism will identify and define these sovereign parties, specify the areas of their sovereignty, and spell out their sovereign rights and duties within the contractual relationship.

Contractualism also provides for justice procedurally and substantively. To ensure justice in contractual procedure, parties employ principles of choice, voice, participation, and consent during the contractualist process. As long as these procedural principles are upheld, the product of contractualism will be substantively just because it will represent what has been contracted for, participated in, negotiated upon and consented to by the parties. Thus, procedural justice is a prerequisite of, and comple-

22. See *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 2, which represents the aspirations of Indigenous Peoples worldwide and encodes many classes of claims that have been sought by Indigenous Peoples at the United Nations since 1982. The various provisions of the Draft Declaration contain most of the significant political powers that sovereign Indigenous governments would wish to exercise as a matter of justice for past and present grievances and for future security.

23. Contracting is an inherent sovereign operation in the sense that contractual power is not diminished by its own exercise. Tony Honore, *The Social Contract Interpreted*, *in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 139, 158 (Tony Honore ed., 1987). In allowing Indigenous Peoples and States to exercise their sovereignty by freely entering into contractual relations, freely negotiating terms, and freely reaching agreement on matters of sovereignty, the process of contractualism should thus be viewed as an exercise of sovereignty by both parties. P.G. McHugh, *Aboriginal Identity and Relations in North America and Australasia*, *in* LIVING RELATIONSHIPS: THE TREATY OF WAITANGI IN THE NEW MILLENNIUM 107 (Ken S. Coates & P.G. McHugh eds., 1998).

24. This conceptualisation of sovereignty in procedure may be applicable, by extension, to all types of contracts and contracting parties. At that point, however, the attributes of the parties are less "sovereign" and more "personal" in engaging, in a private capacity, in contractual relations concerning commercial or other non-sovereign interests.

mentary to, substantive justice in the process and product of contractualism. This is a major strength of contractualism, not only by virtue of its process and product, but also because it provides the grounds for agreement that can not reasonably or justly be rejected by any party to that agreement.[25] In addition, the guiding contractual principles of good faith bargaining, the honouring of promises, and the will of the parties to reach agreement are also important aspects of contractualism that, where upheld, ensure the negotiated agreement is justly adhered to and effectively implemented.

Also important for Indigenous-State relations is the capacity of contractualism to accommodate competing discourses on sovereignty and justice.[26] As Tim Rowse, a political scientist, puts it, contractualism is perceived not as if its attributes are "fixed and essential," but rather, as "a thing of historical, cross-cultural and strategic contingency" through the "explicit commitment [to contractualism] as discursive activity, and thus to the inevitability of polysemy, as the existence of many meanings."[27]

Within the context of Indigenous-State relations, State discourse on sovereignty and justice seeks to "silence[ ] the past[,]" settle the present, and "tam[e] the future" of Indigenous-State relations.[28] State discourse aims, above all, at achieving a definitive result and a fresh start. By contrast, Indigenous discourse on sovereignty and justice seeks to recognise the past, address the present, and secure the future of these relations. Indigenous discourse aims, above all, at (re)establishing and (re)orienting a relationship with States through this lens of continuity with the past, present, and future on just terms that provide for effective coexistence of Indigenous and State sovereignties.[29] Given this apparent disjuncture of discourse, one party might "attempt to force its own view on the other, making the agreement an instrument of domination, rather than of coexistence."[30] But the very process and product of contractualism denies domination by inherently accommodating competing discourses in the establishment of contractual relationships, terms, and agreements through

25. This point derives from T. M. Scanlon's negative formulation for his theory of contractarian justice: that a principle counts where it could not reasonably be rejected. T. M. Scanlon, *Contractualism and Utilitarianism*, *in* UTILITARIANISM AND BEYOND 103 (Amartya Sen & Bernard Williams eds., 1982).

26. See Paul McHugh, *Crown-Tribe Relations: Contractualism and Coexistence in an Intercultural Context*, *in* THE NEW CONTRACTUALISM?, *supra* note 10, at 198, for an excellent discussion on this aspect of contractualism.

27. Tim Rowse, *Reflections on Contractualism and Coexistence in an Intercultural Context*, *in* THE NEW CONTRACTUALISM?, *supra* note 10, at 217, 218.

28. McHugh, *supra* note 26, at 204.

29. *Id.*

30. Rowse, *supra* note 27, at 217.

the procedural principles of choice, voice, participation, and consent.[31]

Contractualism thus provides a theoretical way of structuring negotiations, channelling discourses, and facilitating agreement regarding matters of sovereignty and justice through a process that recognises and accommodates opposing viewpoints.[32] Were domination to arise outside the negotiated agreement, such as in the form of (non)implementation or (non)performance, the dominated party is able to avail itself of the benefits of the legal order within which the contractual relationship operates.[33] In effect, contractualism provides a peaceful and effective framework for Indigenous Peoples to participate in, and consent to, the nature and terms of coexistence with States in their quest for self-determination and in the process of belated State-building.

B. CONTRACTUALISM AND CONTRACTARIANISM

There is a natural correlation between contractualism as a jurisprudential model for Indigenous-State relations within the body politic, and contractarianism as a theoretical moral, civil, or constitutional model for political society.[34] Just as contractualism founds and/or organises the body politic through a real, negotiated contract, contractarianism sources the origin and/or organisation of political society in a hypothetical or quasi-histori-

31. Nonetheless, as stated above, even with the solid framework of contractualism in place, it should not be ignored that much depends on the strength of the contracting skills of Indigenous leadership to ensure sound contractual relations and outcomes with States. *See* discussion *supra* note 17 and accompanying text.

32. Davis, *supra* note 14, at 236; McHugh, *supra* note 26, at 202. For a practical application of this in the Aotearoa/New Zealand context, see discussion *infra* notes 98-132 and accompanying text.

33. Rowse, *supra* note 27, at 218 (discussing McHugh, *supra* note 26). *See* discussion *supra* notes 18-20 and accompanying text.

34. Moral contractarianism grounds moral principles in the creative self-interest of individuals who adopt constraints on their behaviour in order to maximise benefits. *See* Boucher & Kelly, *supra* note 13, at 3. Civil contractarianism concerns social compacts, whether historical or hypothetical, whose role is either to legitimise coercive political authority or to evaluate coercive constraints independently of the authority from which they derive. *Id.* at 4. Constitutional contractarianism, often invoked concurrently with civil contractarianism and reflected in modern constitutionalism, conceives of the relationship between the ruler and ruled to be contractual, explicitly or implicitly, and which specifies or implies the respective rights and duties of the contractees. *Id.* at 10. For excellent accounts of the traditions of contractarianism, see *id.*; SIR ERNEST BARKER, SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU (1947); J. W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT (2d ed., 1957); LESSNOFF, *supra* note 13; SOCIAL CONTRACT THEORY (Michael Lessnoff ed., 1990); PATRICK RILEY, WILL AND POLITICAL LEGITIMACY (1982); and Robert Sugden, *The Contractarian Enterprise*, *in* RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT: THEMES FROM *Morals by Agreement* (David Gauthier & Robert Sugden eds., 1993).

cal social contract.[35] Thus, both contractualism and contractarianism seek to justify the origins and/or organisation of the social and political realms of the State upon the consensual foundations of contractual agreement and the principles derived from contractual agreement. The basic aims (relationships of governance) and the basic principles (governance by consent) are the same. Beyond the general conceptual similarity, however, there are significant differences between contractualism and contractarianism. These differences give rise to several interrelated criticisms levelled at contractarianism which contractualism successfully avoids.[36]

First, contractarianism, as a quasi-historical agreement, is retrospectively justificatory.[37] It posits a past agreement that explains and justifies present social and political organisation without confronting that present in a critical way. Citizen obligations of obedience to rulers and co-operation amongst themselves are set within the limits of the social contract, the terms of which cannot be ascertained due to its hypothetical or fictional character.[38] By contrast, contractualism, as a critical activity, seeks to examine and adjust present relations within the State and society by referencing the past and anticipating the future.

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35. The primary classical works of contractarianism include the following: THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge Univ. Press 1991) (1797); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988); JEAN-JACQUES ROUSSEAU, *The Social Contract* and Other Later Political Writings (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1762); (1690). In the last fifty years, there have been a number of important contributions to contractarianism across the moral, civil, and constitutional traditions. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); BRIAN M. BARRY, THEORIES OF JUSTICE (1989); CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979); JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (1975); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 243-276 (1988); DAVID P. GAUTHIER, MORALS BY AGREEMENT (1986); GEOFFREY RUSSELL GRICE, THE GROUNDS OF MORAL JUDGEMENT (1967); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter *Theory of Justice*]; Honore, *supra* note 23; Scanlon, *supra* note 25.

36. The following is not to dismiss out of hand the value of contractarianism. On the contrary, contractarianism, as several traditions of thought experiment regarding social and political organisation, has been invaluable for centuries at the theoretical level. The discussion merely seeks to highlight the virtues of contractualism in that it takes much of what is valuable in contractarianism and applies it practically.

37. This point refers to the classical tradition of Hobbes and Locke that centres on the problems of allegiance.

38. Honore, *supra* note 23, at 141-42.

Secondly, contractarianism, as a hypothetical agreement, involves processes, agents, and outcomes that are abstract, assumptive, unrealistic, and impractical.[39] By contrast, contractualism is a concrete activity grounded in the reality of actual parties conducting actual negotiations in an effort to reach actual agreements. Therefore it avoids many of the contractarian assumptions about the "nature" of the parties, process, and agreement.

Thirdly, contractarianism, as either a hypothetical or quasi-historical agreement, ignores the most important aspects of contractualism: actual participation, genuine consent, and legal effect. This is a particularly significant difference as it demonstrates how contractarianism fails to match contractualism's clear parallels to international human rights and fundamental freedoms, including the right of political participation and the freedom of choice. To compensate for its absence of grounding, contractarianism relies on intuitive or speculative "universal" approaches to rationalism and justice that presupposes inherent moral or legal effect.[40] By contrast, the actuality of the contractualist process and product avoids such intuition or speculation, relying simply on general contractual principles of good faith bargaining, the honouring of promises and the will to establish legally binding contractual relations and outcomes through agreements.[41]

Fourthly, all forms of contractarianism have emerged in a historical context that is firmly committed to Western, liberal, and individualist discourses that leave little room for competing discourses.[42] By contrast, a very real virtue of contractualism is its flexibility to accommodate many forms of discourse. Instead

39. See Rawls' infamous "original position," "veil of ignorance," and "high-minded rational beings" arguments that make assumptions about human nature, the equality of bargaining power, and the level of knowledge of agents. *Theory of Justice*, *supra* note 35. Rawls' agents are not in a position to make a contract, for it is essential to a contract that parties are not ignorant of the crucial features of the situation about which they are contracting. Honore, *supra* note 23, at 153.

40. Honore, *supra* note 23, at 144. Kant's "categorical imperative" is the best classical example of this.

41. *Id.* at 154 (citing Ronald Dworkin, *The Original Position*, *in* READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE 16 (Norman Daniels ed., 1975) on the important moral difference between actual and hypothetical agreements).

42. The influences on, and assumptions made by, contractarians as a result of this historical pedigree have been heavily criticised from many camps: utilitarianism, communitarianism, and feminism, to name only a few. *See* ALASDAIR C. MACINTYRE, AFTER VIRTUE (1981); ALASDAIR C. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989); TULLY, *supra* note 3; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). For a response to these

of presupposing any world-views, value systems, or outcome structures, contractualism leaves such matters to the parties to voice, negotiate, and agree upon.[43]

Fifthly, contractarianism denies the fundamental importance of the freedom of contract. Contractarianism, as either a hypothetical or quasi-historical agreement, cannot rely on actual practice for agreement. Thus, it fixes the rules so that the parties are compelled to participate and reach agreement on the theorist's terms and principles in order to generate the universal or near-universal assent that is required for the agreement to have value.[44] This is not really contracting at all in denying the freedom not only to choose the terms to contract, but whether to contract at all. As Tony Honore, a legal philosopher, points out, the corollary freedom not to contract is, paradoxically, an essential element of contracting.[45] Contractualism, as a practical activity that may or may not be undertaken, involves actual participation and consent and provides precisely this freedom to contract and on what terms. Thus, in this light, contractualism is closer to the essence of contract principles than is contractarianism.

Finally, contractarianism assumes that the social and political organisations, which derive from the acceptance of a particular theory of justice, are the product of a "timeless" rationalism that ought to bind society indefinitely to what is, ultimately, no more than a theoretical truth.[46] However plausible the social and political arrangements might be, this contractarian assumption denies the freedom to make multiple contracts. By contrast, contractualism recognises and respects competing discourses and the ongoing nature of relations between the parties. Isolated agreements are thus contingent on these continuing discourses and relations, and are not settled and fixed indefinitely.[47] They are merely the foundation for, or the current stage of, a continuum of coexistence between the parties. Multiple and inconsistent contracts may well be parts of this process because one rational use of contractualism is the incorporation and ordering of diverse values into the various social and political relations of the State and society. Again, this perspective places contractual-

criticisms from within a liberal framework of minority rights, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

43. *See* discussion *supra* notes 26-33 and accompanying text.

44. Honore, *supra* note 23, at 156-57.

45. *Id.* at 157.

46. *Id.* at 157, 159.

47. For a practical example of this within the Aotearoa/New Zealand context, see discussion *infra* notes 126-27 and accompanying text.

ism closer to the heart of contract principles than does contractarianism.

As a consequence of these features, contractualism serves as a very useful jurisprudential model for Indigenous-State relations. Contractualism absorbs what is theoretically valuable from the contractarian tradition and grounds it in reality as a (continuing) source of social and political organisation, while avoiding many of the theoretical pitfalls inherent in contractarianism.[48]

C. Contractualism and Scepticism

At least three sceptical arguments question the appropriateness and efficacy of contractualism as a model for peacefully and effectively (re)establishing and (re)ordering Indigenous-State relations in terms of belated State-building and for Indigenous self-determination. First, there is a general scepticism that merely writing down how the world ought to operate will really make it so.[49] However, the refinement provided by the jurisprudential model of contractualism is that it is, above all else, premised upon real negotiations, genuine consensus and pragmatic solutions. Any failing in practice is a result of a party's change of will in terms of (non)implementation or (non)performance, not a failing of the process and product of contractualism itself.

Secondly, there is a specific scepticism that views contractualism as dependent upon "inadequate, overly economistic, masculinist and/or eurocentric notions of human relations."[50] As the argument runs, likely differences between the Indigenous and State parties' understandings of the process and product of contractualism preclude genuine agreement.[51] The textual manifestation of the contract may not reflect the Indigenous "way of knowing the world and ordering" social and political relations.[52] It has even been suggested that the dominant use of contract in Indigenous-State relations reflects the Euro-American State dominance of Indigenous Peoples.[53] As a consequence, Indigenous Peoples have suffered from contractualism through misunderstanding or a lack of understanding in, for example, historical treaty-making.[54]

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48. It should be noted that this discussion on contractualism captures elements, values, and principles that are pervasive in all contractual forms: legal, economic, and political.

49. Davis, *supra* note 14, at 238.

50. Sullivan, *supra* note 11, at 12.

51. Rowse, *supra* note 27, at 217 (discussing McHugh, *supra* note 26).

52. McHugh, *supra* note 26, at 200.

53. *Id.*

54. *Id.*

To be sure, the idea of contractualism, as generally perceived by States and their representatives, is "loaded with the values and epistemic properties of [Euro-American] society, [as] ways of knowing the world . . . that . . . evolved over time" and within a specific historical context.[55] The "new contractualism" itself, outlined above, has direct origins in the Euro-American discourse about the ordering of political relations from the mid-seventeenth century and social relations from the late-eighteenth century.[56] It is also certainly true that Indigenous Peoples have suffered through historical treaty-making with States. However, none of these circumstances significantly affect Indigenous Peoples' understanding of the process and product of contractualism. There are several reasons for this.

The systems of commerce and trade, and thus the relations of exchange that give rise to the process and product of contractualism, are not strictly modern or Euro-American inventions. They have been "part of the human condition for at least as long as *Homo sapiens* has been a species."[57] Indigenous Peoples, as with all other human communities and cultures, were and are well versed in these forms of communication and interaction. Evidence also suggests that even before the period of encounter and treaty-making with Euro-American States, Indigenous Peoples routinely contracted, albeit most often orally, amongst themselves and with others regarding a range of matters, including political and territorial matters.[58]

In terms of substance, there appears to be little support for the assertion that Indigenous Peoples did not understand the na-

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55. *Id.* at 198.

56. *See* discussion *supra* note 12 and accompanying text. This discourse was instrumental in the transformation of power from a verticalised sphere to a horizontalised sphere; in other words, this discourse served to bring about a shift in the bases of political and personal arrangements away from the historically formed character of relationships (status) and towards what the parties had explicitly agreed to (contract). McHugh, *supra* note 26, at 199-200. Contractualism, in Euro-American discourse, thus serves two organisational functions in Euro-American society: as an explanation for State sovereignty over its subjects (including Indigenous Peoples), and as a means by which autonomous units (including Indigenous Peoples) can regulate their own affairs.

57. MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION 200 (1997). For some, contractualism is the quintessential form for effective human interaction. *See* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 591 (1933); Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 19 (1969); Lon L. Fuller, *The Role of Contract in the Ordering Processes of Society Generally*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 169 (Kenneth I. Winston ed., 1981).

58. Generally, the concept and practice of entering into contractual agreements "was widespread among Indigenous Peoples in the Americas, Aotearoa/New Zealand and elsewhere before the arrival of the European coloniser and continues to be so." *Study on Treaties*, *supra* note 5, ¶ 57.

ture of the relationships they were entering into in writing at the time of contracting.[59] If anything, what they misunderstood were the frequently changing and contradictory intentions of the State parties, the trickery employed by these parties in the process and product of contractualism, and the underlying absence of good faith bargaining.[60] That was not something to be immediately gleaned from negotiations or the text of the agreement, but rather from the course of the subsequent history of relations.

In terms of process, while specific concepts regarding power, royal authority and other matters of political organisation may have differed between the parties, "they nevertheless rarely failed to find common ground as far as those principles [of treaty-making] were concerned."[61] Most important amongst these, from both a historical and principled perspective, is the fact that the "principle of reciprocity" appears to represent a "cross-cultural feature" of contractualism.[62]

Thirdly, there is a scepticism regarding the State's good faith in contractual relations. Considering how often Indigenous Peoples historically encountered the disingenuous face of the State through contractualism, they cannot now rely on contractual relations to achieve belated State-building and self-determination. As acknowledged, this is a fair criticism in the context of historical treaty-making. But as an argument against contractualism generally, it cannot be sustained. It is reasonable to assume that the disingenuous face of the State will reveal itself in Indigenous-State relations with or without contractualism. As with all relationships, a degree of good faith is required. Where that is absent, relations will become strained. Currently, a more favourable domestic and international climate towards address-

59. "[I]t would be . . . erroneous to assume that Indigenous Peoples have no proper understanding of the nature, formalities and implications of treaties and treaty-making." *Id.* ¶ 56.

60. Miguel Alfonso Martinez lists some examples such as the poor attempts at producing a written version of Indigenous oral understandings of the rights and obligations established, the "[failure] to adequately inform their [I]ndigenous counterparts of the cause and object of the compact," draftings only in the European languages with the use of fine print, and less than accurate oral transmissions of written agreements. *Id.* ¶ 56-58, 281. These factors often prevented the Indigenous parties from gaining a full understanding of the true nature and extent of the obligations that they had assumed, and were clearly not conducive to free, educated consent by the Indigenous parties. But such factors had nothing to do with the Indigenous' capacity to understand and consent, provided they had the proper information.

61. "Among [the] commonly-shared fundamental principles of treaty-making . . . [were] the need for mandated representatives to engage in negotiation, basic agreement on the subject matter of treaties and concepts relating to the need for ratification and the binding power of any type of formally negotiated compact." *Id.* ¶ 60-61.

62. *Id.* ¶ 63.

ing Indigenous-State relations should ensure greater fairness and honour in dealings between these parties.[63] Consequently, contractualism is increasingly being employed as a method for (re)orienting and (re)establishing such relations in the interests of belated State-building and Indigenous self-determination.

III. JURIDICAL METHOD: CONTRACTUAL STATE-BUILDING IN AOTEAROA/NEW ZEALAND

The history of Indigenous-State relations in Aotearoa/New Zealand provides a useful case study of the implementation of contractualism as a juridical method for contractual State-building.[64] Relations between the Indigenous Maori and the Crown have been formalised, in respect of all Maori, in a historical international treaty and, in respect of particular Maori tribes, in contemporary domestic legislative agreements.[65] There is an

63. For a brief overview of such climate changes in North America and Australasia, see discussion *infra* note 66-71 and accompanying text.

64. Aotearoa/New Zealand is chosen as the case study in this paper for three main reasons. First, the particular history of Indigenous-State relations in this country gives rise to paradigmatic instances of contractual State-building as a juridical method in *both* historical and contemporary forms. Secondly, the complexities of the Indigenous situation in Aotearoa/New Zealand, such as the degree of urbanisation of Maori and inter-marriage between Maori and *Pakeha*, make it a uniquely difficult place for negotiated settlement of Indigenous issues (including issues of identity and territoriality), and make its careful and nuanced achievements all the more remarkable. Thirdly, the history of Maori-Crown relations shares much in common with the history of Indigenous-State relations in North America and elsewhere, making it a useful test case by extension for other jurisdictions. *See* PETER SPILLER ET AL., A NEW ZEALAND LEGAL HISTORY 134 (1995); discussion *infra* note 66.

65. These forms of contractualism are the Pouakani Claims Settlement Act 2000 (N.Z.); Ngati Turangitukua Claims Settlement Act 1999 (N.Z.); Ngai Tahu Claims Settlement Act 1998 (N.Z.); Waikato Raupatu Claims Settlement Act 1995 (N.Z.); and the Treaty of Waitangi, Feb. 6, 1840, Gr. Brit.-N.Z., 89 Consol. T.S. 473, *available at* http://www.govt.nz/en/aboutnz/?id=A32f7d70e71e9632aad1016cb343f900. It is accepted that there are alternative quasi-contractual forms of Indigenous-State relations to the model and method discussed here: most obviously, the CAN. CONST. (Constitution Act, 1982), § 35, which recognises and affirms existing Aboriginal rights. However, in this instance, as with other attempts to incorporate the status and rights of Indigenous Peoples in revised and newly created constitutional documents, "no fundamental political self-determination rights were envisaged as inherent in the notion of Aboriginal rights." INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA, & NEW ZEALAND 405 (Paul Havemann ed., 1999). The status of Indigenous sovereignty has thus been left in the Canadian context for the domestic courts to interpret within the meaning of constitutional Aboriginal rights, and through other political mechanisms such as national referenda and formal negotiations, both without success for Indigenous Peoples' claims of sovereignty in Canada. Further, while justice for Indigenous Peoples is clearly a factor in such constitutional clauses, there exists no room within an interpretation of constitutional rights for significant reparative justice for past wrongs. Any deference to justice rests with the constitutional establishment of Indigenous rights in the present and for the future. In Canada, this is highlighted by the express reference to "existing"

interrelationship between treaty-making and legislative agreement in Aotearoa/New Zealand: contemporary legislative agreements are the product of specific Maori tribal grievances and claims against the Crown for the latter's breaches of the original founding treaty between all Maori and the Crown. Thus, to examine the contractualism of treaty-making and legislative agreement in this case study is to examine much of the history of Maori-Crown relations in Aotearoa/New Zealand.

As a first grounding, the history of Maori-Crown relations may be briefly summarised within the broader context of Indigenous-State relations in North America and Australasia.[66] It is beyond dispute that before the arrival of European powers, Indigenous Peoples were sovereign, self-determining peoples in their territories.[67] From the outset of encounter, European powers sought to found and ligitimise their colonial enterprise in the territories they "discovered," as against other colonial powers, through treaty-making with the Indigenous inhabitants as the appropriate juridical method between sovereign entities of the time. The subject matter of these treaty agreements concerned the locus of sovereignty over territory, resources and people (*imperium*), and/or title to, and appropriation of, land and related resources (*dominium*).[68]

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rights. Constitutional clauses can thus be seen to protect specific "existing Aboriginal" rights, but not Indigenous self-determination *per se*. Finally, constitutional clauses, although often the product of lengthy negotiations between Indigenous Peoples and States, are not themselves a product of contractualism in the sense of being in contractual form (such as a treaty or legislative agreement). In this light, constitutionalism, although important in itself in protecting specific Indigenous rights, serves merely as an example of State-sponsored legal pluralism rather than as a process and product of contractualism, and does not adequately provide for the important dimensions of Indigenous self-determination through recognising and affirming, in full, the twin elements of sovereignty and justice. Consequently, constitutionalism fails to be a paradigm juridical method of contractualism, and will not be addressed in this analysis.

66. For more detailed accounts of this history, see generally ANAYA, *supra* note 5; HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990); LAM, *supra* note 2; PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994); INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA, & NEW ZEALAND, *supra* note 65; Morris, *supra* note 2; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); Robert A. Williams Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

67. However, in Australia, for instance, it was not until the early 1990s that the Eurocentric and unjust official non-recognition of the Australian Aboriginal peoples as prior sovereign inhabitants and rights-holders in that country was largely put to an end. *See* Mabo v. State of Queensland [No. 2] (1992) 107 A.L.R. 1 (Austl.).

68. McHugh, *supra* note 26, at 198.

Initially, at least, States sought to conduct themselves in accordance with their treaty arrangements with Indigenous Peoples.[69] This may well have been simply because, at the time of contracting and for some time afterwards, Indigenous Peoples on the whole outnumbered, or at least challenged numerically, States' representatives and settler populations in the territories. But as a result of a rapid and growing influx of State bureaucrats and settlers into the territories, numerical parity was reached and then reversed. With a consequential increase in demands for the lands and resources of Indigenous Peoples, States began to renege on their contractual obligations to Indigenous Peoples. In fact, for most of the post-treaty-making history of Indigenous-State relations in North America and Australasia, State parties have failed to uphold their contractual obligations. The pressures on States to acquire control over land and resources brought about the denial of the status and relevance of treaty agreements with Indigenous Peoples, and, in their place, States pursued policies of subsumption of Indigenous Peoples and their territories under State sovereignty.

From the 1970s, however, in the wake of a changed international climate of human rights and anti-colonialism, Indigenous Peoples around the world sought a reinvigoration of their Indigenous identity and a renewal of their Indigenous self-determination.[70] Largely in tandem with these trends has been a renascence of the theory and practice of contractualism as a model and method of social and political organisation, including the (re)establishing and (re)orienting of Indigenous-State relations on contractualist terms.[71] The motivation behind this revived contractualism has been the growing State need to respond to Indigenous unrest concerning matters of sovereignty and justice that date back to the original treaty agreements between the parties. In this way, the juridical method of contractualism can be seen to have played an integral part in Indigenous-State rela-

69. In the early Aotearoa/New Zealand context, "the colonial government conducted land sales [with Maori] in a manner that acknowledged the equality of the participants. Under the direction of tribal leaders, the boundaries were walked by all concerned and a price agreed." Robert Mahuta, *Tainui, Kingitanga and Raupatu, in* JUSTICE AND IDENTITY: ANTIPODEAN PRACTICES 18, 22 (Margaret Wilson & Anna Yeatman eds., 1995).

70. *See* ANAYA, *supra* note 5, at 39-41, 43, 50, 55.

71. This contractual trend can be seen from the time of the early writings of Buchanan and Rawls in the 1970s. *See supra* note 35. See also the contemporaneous and subsequent legislative agreements reached between States and First Nations in North America, including the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629 (2002); Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716 (2002); Cree-Naskapi Act, ch. 18 (1984) (Que.); Sechelt Indian Band Self-Government Act, ch. 27 (1986) (Can.); and Nunavut Act, ch. 28 (1993) (Can.).

tions as the foundation for, and renewed source of, those relations.

A. HISTORICAL TREATY-MAKING: THE TREATY OF WAITANGI

Treaties, like all forms of contractualism, are negotiated agreements. Treaties may record agreements to halt the fighting between sovereign entities, or they may record agreements regarding a sale and purchase.[72] Treaty-making has been a fundamental aspect of, and formal basis for, Indigenous-State relations for over three centuries.[73] The significance of treaty-making is its historical capacity as a juridical method to recognise and accommodate the elements, values, and principles of contractualism,

72. I. H. Kawharu, Introduction to WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, at xi (I. H. Kawharu ed., 1989).

73. However, treaty-making itself has only been narrowly applied in State relations with some of the tribes of the First Nations of Canada and the United States, the Mapuche in Chile and the Maori in Aotearoa/New Zealand. *Study on Treaties*, *supra* note 5, ¶ 108-09. Treaty-making was not applied, to take a classic example, to State relations with the Aborigines of Australia. Incidentally, the Treaty of Waitangi, although purportedly a pan-Maori agreement with the Crown, was not in fact signed by all Maori tribes. For excellent accounts of treaty-making between States and Indigenous Peoples, see *Study on Treaties*, *supra* note 5; IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES: THE ROBB LECTURES 1991 (F. M. Brookfield ed., 1992); Ken S. Coates, *International Perspectives on Relations with Indigenous Peoples*, *in* LIVING RELATIONSHIPS: THE TREATY OF WAITANGI IN THE NEW MILLENNIUM, *supra* note 23, 19-103; Andrée Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights under International Law*, 23 VAND. J. TRANSNAT'L L. 703 (1990); and McHugh, *supra* note 23, at 107-79. In the North American context, see Kirke Kickingbird, *What's Past is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 ST. THOMAS L. REV. 603 (1995); Brad W. Morse, *A View from the North: Aboriginal and Treaty Issues in Canada*, 7 ST. THOMAS L. REV. 671 (1995); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000); and Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995). There is very little material on treaty-making in Latin America. *But see Study on Treaties*, *supra* note 5, ¶ 109. In the New Zealand context, since 1987, there has been a growing body of literature on the Treaty of Waitangi. *See* BROWNLIE, *supra*, 1-27, 77-100; PAUL MCHUGH, THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991); TREATY SETTLEMENTS: THE UNFINISHED BUSINESS (Geoff McLay ed., 1995); CLAUDIA ORANGE, THE TREATY OF WAITANGI (1987); ANDREW SHARP, JUSTICE AND THE MAORI: THE PHILOSOPHY AND PRACTICE OF MAORI CLAIMS IN NEW ZEALAND SINCE THE 1970's (2d ed., 1997); K. Upston-Hooper, *Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi*, 28 VICTORIA U. WELLINGTON L. REV. 683 (1998); Jennifer S. McGinty, *New Zealand's Forgotten Promises: The Treaty of Waitangi*, 25 VAND. J. TRANSNAT' L. 681 (1992); J. G. A. Pocock, *Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi*, 43 MCGILL L.J. 481 (1998); SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS (William Renwick ed., 1991) [hereinafter SOVEREIGNTY & INDIGENOUS RIGHTS]; WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72.

and the competing discourses of Indigenous Peoples and States on self-determination in the process of original contractual State-building.[74] This is no less true of the 1840 Treaty of Waitangi ("Treaty") between Maori and the Crown in Aotearoa/New Zealand.

The Treaty was a response to the Crown's need to justify imposing its will on Maori, to assume governance of Aotearoa/New Zealand and to rationalise land purchases in the wake of its recognition of Maori sovereignty in the Declaration of Independence 1835.[75] By 1839, the Crown had decided that a treaty was to be the juridical method of achieving these ends. The treaty instrument was to have three objectives: the protection of Maori interests, the promotion of settler interests and the securing of strategic advantage for the Crown.[76] However, haste, inadequate consultation, lack of participation by Maori, and linguistic and cultural misunderstandings were hallmarks of the original treaty-making and contractual State-building in Aotearoa/New Zealand.[77]

The Treaty is a relatively simple document consisting of a preamble and three articles.[78] Its specific purpose has been declared as "[securing] an exchange of sovereignty for protection of *rangatiratanga*."[79] The terms of the Treaty can be briefly stated.[80]

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74. Martinez presents a more skeptical view of treaty-making. For him, the States-based motivation behind treaty-making has had little to do with Indigenous Peoples themselves, but rather has been a means "to legitimise (via the acquiescence of the autochthonous sovereign of the territories in question) any "right" (real or intended) with which they could counter opposing claims advanced by other colonial powers vying for control of those lands." *Study on Treaties, supra* note 5, ¶ 111, 187. This "required that they seek the agreement of the legitimate holder of the original title, i.e., the Indigenous nation in question," so as to acquire derivative title through "the formal cession of their lands (or their sale, or a concession of acquisitive possession or any other type of valid transfer)." *Id.* ¶ 188. The transfer was then encased in a written document "that could be presented as proof before the colonizing power's equals in the 'concert of civilized nations.'" *Id.* ¶ 189.

75. M. H. DURIE, TE MANA KAWANATANGA: THE POLITICS OF MAORI SELF-DETERMINATION 176 (1998).

76. *Id.* (citing PETER ADAMS, FATAL NECESSITY: BRITISH INTERVENTION IN NEW ZEALAND 1830-1847, at 87-88 (1977)).

77. *Id.* at 176-77. This, however, should not be seen to undermine the process and product of contractualism more generally. Rather, it should be seen as merely highlighting the absence of employing guiding principles in this particular instance of contractualism.

78. It has also been suggested that there was a fourth oral article protecting the important laws and customs of Maori society to which all parties agreed prior to signing. McGinty, *supra* note 73, at 694. This may well have been the case at Waitangi itself, but there is nothing to show that such an oral article was carried about the country when the Treaty was presented for accession at other places. SPILLER ET AL., *supra* note 64, at 131.

79. Kawharu, *supra* note 72, at xvi (citing the New Zealand Maori Council in its 1983 *Kaupapa*) (emphasis added). "Rangatiratanga" is defined as control over lands, forests, fisheries, and *taonga* (treasures) of the Maori people. *See, e.g.*, M. P.

By Article 1, the Maori ceded to the British Crown their sovereignty over Aotearoa/New Zealand. In exchange for this cessation of power, under Article 2, the British Crown guaranteed "to protect the Maori people's material assets, culture, and social system—while preserving to itself a pre-emptive right of purchase [sic] of tribal land . . . ."[81] Finally, Article 3 provided that the British Crown conferred on the Maori people the same rights as other British subjects. Despite the apparent simplicity and straightforwardness of the terms of the Treaty, there remain marked differences between the Maori and the Crown interpretations, which are largely captured by the differences in the Maori and English language versions of the Treaty.[82]

The question of sovereignty under the Treaty of Waitangi, as with treaties generally between Indigenous Peoples and States, is the major point of contention.[83] For Maori, the Treaty represented concurrent sovereignty.[84] Contrastingly, for the Crown, the Treaty represented a transfer of sovereignty to create a rela-

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K. Sorrenson, *Towards a Radical Reinterpretation of New Zealand History: the Role of the Waitangi Tribunal, in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, 158. For a full explanation of "rangatiratanga," see *id.* at xix-xxii.

80. This restatement of the Treaty is derived from the English language version. *See* Kawharu, *supra* note 72, at xvii.

81. *Id.* But see Tipene O'Regan, *A Ngai Tahu Perspective on Some Treaty Questions, in* TREATY SETTLEMENTS, *supra* note 73, at 88, 88-89 for his own interpretation of the Treaty articles. For Tipene O'Regan, *tino rangtiratanga* in Article 2 of the Treaty is more than just property rights; it is both ownership and control. *Id.* at 92.

82. Bruce Biggs cogently argues that the Treaty is best thought of as two treaties: the English and Maori language versions. Bruce Biggs, *Humpty-Dumpty and the Treaty of Waitangi, in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, at 300, 310-11. This is because the canonical texts existing in English and Maori language versions are not translations of each other. SPILLER ET AL., *supra* note 64, at 130-31. For useful discussions on the competing interpretations of the terms of the Treaty, and the competing language concepts, see Kawharu, *supra* note 72, at xvii-xx, and McGinty, *supra* note 73, at 690-99.

83. Miguel Alfonso Martinez argues that Indigenous Peoples who have never entered into treaty relations with any State, and thus have not been formally recognised as nations, or who are third-party subjects of treaties between States, cannot be said to have relinquished their sovereign attributes. *Study on Treaties, supra* note 5, ¶ 284. This is based on the reasonable proposition that Indigenous Peoples who never formally entered into juridical relations, and who "wish to claim for themselves juridical status [as sovereign] nations . . . must be presumed until proven otherwise . . . [to] continue to enjoy such status." *Id.* ¶ 288. "Consequently, the burden to prove otherwise falls on the party challenging their status as [sovereign] nations." Thus, it is irrelevant to the status of Indigenous Peoples, as sovereign nations, that they may or may not have formalised relations with State powers. *See id.* ¶ 285-88. Treaties are merely a particular and identifiable instance of such a status, and, on this issue, the "intrinsic nature, form and content [of the instruments] make it clear that the . . . [parties] . . . mutually bestowed on each other (in either an explicit or implicit manner) the condition of sovereign entities." *Id.* ¶ 186.

84. Kawharu, *supra* note 72, at xvii.

tionship where the Crown is sovereign and Maori are subjects.[85] Certainly, the process of treaty-making served as an expression of the dual sovereignties of Maori and the Crown in the exercise of their external self-determination in accordance with the international law of the time.[86] Further, the product of the Treaty concerned some form and degree of exchange of political and legal sovereignty in terms of governance (*imperium*) and title over land and resources (*dominium*).[87] For Paul McHugh, a constitutional law scholar, the recognition of Maori *rangatiratanga* in the Treaty provides Maori self-determination in terms of sovereignty rights over their Treaty-defined material assets, culture, and social system.[88] In this way, it can be seen that the process and product of contractualism in the Treaty brought sovereignty to the agreement and included it within the terms. However, the practical value of this inclusion of sovereignty is marginalised by the fact that there remains no real consensus on the status, meaning, and implications of the Treaty, so that the question of where precisely sovereignty lies cannot be definitively answered.[89]

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85. *Id.*

86. For Indigenous Peoples generally, historical treaty-making provided recognition not only of their juridical capacity as subjects of international law, and thus sovereign entities, but also of their collective rights as peoples in international law in confirming their autonomy, self-government and self-determination. José R Martínez Cobo (UN Special Rapporteur), *Study on the Problem of Discrimination Against Indigenous Populations*, ¶ 110, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.1-8 (1987). This was in accordance with the contemporary non-Indigenous States-based international law whose ideal instrument for recognition or transfer of sovereignty was the treaty. "[T]he only entities with the juridical capacity to make treaties were (like today) . . . international subjects possessing sovereignty." *Study on Treaties*, *supra* note 5, ¶ 189. A reasonable conclusion is that at the time of treaty-making (i.e., during the era of the Law of Nations), there was widespread recognition by both parties, State and Indigenous, that each party was a sovereign entity juridically capable of concluding treaties. *Id.* at 55, 104, 110.

87. See McHugh's excellent conception of this as it applies to the Treaty and treaty agreements between Indigenous Peoples and States more generally. MCHUGH, *supra* note 73, at 19-62; P.G. McHugh, *Constitutional Theory and Maori Claims*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, at 25, 42-46 [hereinafter McHugh, *Constitutional Theory*]; McHugh, *supra* note 26.

88. McHugh, *Constitutional Theory*, *supra* note 87, at 42, 47.

89. Certainly, on this point, the New Zealand Courts have been far from decisive. In R v. Symonds [1847] N.Z.P.C.C. 387, 395, Martin CJ suggested that, in the context of the Crown's pre-emptive right to purchase land, British sovereignty predated, and thus was established independently from, the Treaty in Aotearoa/New Zealand. Prendergast CJ in Wi Parata v. the Bishop of Wellington [1877] 3 N.Z. Jur. 72, 78 claimed, in favour of exclusive Crown sovereignty in Aotearoa/New Zealand, that insofar as the Treaty "purported to cede sovereignty, it must be regarded as a simple nullity," as "no body politic existed . . . capable of making cession of sovereignty nor could the thing itself exist." However, the Treaty has been regarded by the Privy Council in Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] N.Z.L.R. 590 and Nireaha Tamaki v. Baker [1901] N.Z.P.C.C. 371 as a valid international treaty of cession, but as such it has no enforceable status in New Zea-

Nonetheless, and with the semantic and conceptual problems of the text aside, the Treaty may be viewed as a historical juridical method of contractualism. The Treaty accommodates sovereignty in its process and product as one of the core elements of Indigenous self-determination in the process of original contractual State-building in Aotearoa/New Zealand.

The other core element of self-determination, that of justice, also arises in the process and product of treaty-making in general and in the Treaty in particular. In terms of process, procedural justice in treaty-making between Indigenous Peoples and States may be questionable historically.[90] However, where procedural contractual principles—namely informed choice, voice, participation, and consent—are genuinely present, then what is agreed must be the outcome of just process, and cannot reasonably be viewed as substantively unjust.[91] In terms of product, and in practice, substantive justice is effected because both Indigenous Peoples and States, although perhaps lacking a full understand-

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land municipal law until recognised in statute, and this remains the orthodoxy at the present time. But see the obiter statements of Cooke P (as he then was) in the 1987 *Lands* case. New Zealand Maori Council v. Attorney General [1987] 1 N.Z.L.R. 680, 655-56. For additional statements by the courts on the status and role of the Treaty in New Zealand law, see PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 48-79 (2d ed., 2001). There is much academic commentary on the nature and standing of the Treaty. For the view that the Treaty is, in fact, an original social contract, see Kawharu, *supra* note 72, at x (stating that "while still binding on the original two parties, [the Treaty] continues 'to speak', and is, as ever, capable of setting parameters for a social contract"); Jindra Tichy & Graham Oddie, *Is the Treaty of Waitangi a Social Contract?*, *in* JUSTICE, ETHICS, AND NEW ZEALAND SOCIETY 73 (Graham Oddie & Roy W. Perrett eds., 1992); and MCHUGH, *supra* note 73, at 30-41. For the view that the Treaty is an international "treaty of cession," see Benedict Kingsbury, *The Treaty of Waitangi: Some International Law Aspects*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, at 121. This accords with the Crown's understanding of the Treaty. SPILLER ET AL., *supra* note 64, at 132 (citing ORANGE, *supra* note 73). By contrast, what the Maori who signed the Treaty supposed they were agreeing to is unclear. *Id.* at 132. For definite opinions from a Maori perspective, see Mahuta, *supra* note 69, at 19; O'Regan, *supra* note 81, at 89; and, generally, Joe Williams, *Not Ceded but Redistributed*, *in* SOVEREIGNTY & INDIGENOUS RIGHTS, *supra* note 73, at 190. For the view that the Treaty ceded Maori legal sovereignty to the Crown, but retained Maori political sovereignty in the protection of their *rangatiratanga*, which serves as a non-legal check on the Crown's exercise of its ceded legal sovereignty, see MCHUGH, *supra* note 73; McHugh, *Constitutional Theory*, *supra* note 86, at 47. For the view that the Treaty provided "some colour of right" by which the Crown assumed absolute sovereignty "by revolution" (i.e., by exceeding the terms of the Treaty and legitimising this through time and the effective assertion of power), see F. M. BROOKFIELD, WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND LEGITIMATION (1999); F. M. Brookfield, *The New Zealand Constitution: The Search for Legitimacy*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, at 1, 4-5; and F. M. Brookfield, *The Treaty, the 1840 Revolution and Responsible Government*, 5 CANTERBURY L. REV. 59 (1992).

90. *Study on Treaties*, *supra* note 5, ¶ 56-58. *See also supra* note 74.

91. *See* discussion *supra* note 25 and accompanying text.

ing of the other's actual position, have been very aware of their own position and the juridical method they adopted through which substantive justice could be ensured.[92] The Treaty can be seen as an example *par excellence* of substantive justice in its Maori and English language versions. The Treaty grievances of Maori are not with the process and product of the Treaty itself, for procedural and substantive justice is, in fact, achieved in the Maori version of the Treaty. Rather, grievances are with the subsequent history of the Crown's revealed or changed intentions, dubious interpretations, retrospective arguments, contradictory practice, and use of force to crush Maori dissent. It is in terms of this subsequent history that justice (re)enters the Treaty context in the implementation and/or breach of the Treaty.[93] In this light, the Treaty can be seen as a historical juridical method of contractualism that ensures justice (in the sense of procedural and substantive justice producing consensual agreement and securing reasonable terms on matters of sovereignty) is accommodated as one of the core elements of Indigenous self-determination in the process of original contractual State-building.

Treaty-making thus serves as a historical source of original contractual State-building on matters of sovereignty and justice between Indigenous Peoples and States. In addition, treaty-making, and, in particular, the Treaty itself through its recognition of *rangatiratanga*, may well be a contemporary juridical source for the self-determination of Indigenous Peoples. The general acceptance of the status and significance of treaty-making as one juridical method of contractual State-building could counteract the frequently negative role treaties have played for Indigenous Peoples and Indigenous rights during the colonial and post-colonial history of Indigenous-State relations.[94]

B. Contemporary Legislative Agreement: Waikato-Tainui and Ngai Tahu

According to I. H. Kawharu, a Treaty of Waitangi scholar, "[I]nherent in the simplicity of the Treaty is its lack of a concep-

92. *See* discussion *supra* notes 57-62 and accompanying text.

93. *See* discussion *infra* note 98 and accompanying text.

94. "On many occasions . . . [treaties were] used as tools to acquire 'legitimate title' to the [I]ndigenous lands by making the [I]ndigenous side formally 'extinguish'" Indigenous rights. *Study on Treaties, supra* note 5, ¶ 282. Also, on occasion, treaties were used to force Indigenous Peoples to bargain away their ancestral and treaty rights. Treaty agreements, once made, were often ignored, not complied with, or violated, by States. States undertook to unilaterally abrogate treaties, or parts thereof, by way of State law or other mechanisms. States even failed to ratify some treaties. State practice of this nature has not been limited to historical situations, but also arises with respect to more modern contractualist situations. *Id.* ¶ 125-26.

tual framework that could accommodate the two cultures, *Pakeha* and Maori, and an administrative infrastructure for devising coherent policies and programmes that balance obligations of sovereignty against those of *rangatiratanga*."[95] This failing of the Treaty, combined with its State-sponsored neglect, created the reality of a unitary and indivisible Crown sovereignty in Aotearoa/New Zealand, denying Indigenous self-determination in the form of contractual recognition of the *rangatiratanga* of Maori for much of the post-Treaty period of Maori-Crown relations.[96]

From the 1970s onwards, however, there was a shift in the focus of Maori-Crown relations back toward the content of the historical Treaty, and yet away from treaty-making as a juridical method of (re)establishing and (re)orienting those relations.[97] By the 1990s, in the place of international treaty-making, but still within the contractualist paradigm, Maori and the Crown began entering into domestic legislative agreements regarding long-standing Maori Treaty grievances and claims against the Crown.[98] This new juridical method of contractualism reintroduced Indigenous self-determination by way of *rangatiratanga* into Maori-Crown relations in Aotearoa/New Zealand. The two exemplars of this method are the Waikato Raupatu Claims Settlement Act 1995 ("Waikato Act") and the Ngai Tahu Claims Settlement Act 1998 ("Ngai Tahu Act").[99] Each legislative agreement has been tailored towards the settlement of grievances and claims by particular Maori tribes, in these cases Waikato-Tainui and Ngai Tahu.[100]

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95. Kawharu, *supra* note 72, at x (emphasis added).

96. Paul McHugh describes this absolute sovereignty of the Crown metaphorically as "Leviathan" following the political philosopher Thomas Hobbes' conception of the State. P.G. McHugh, *Constitutional Voices*, 26 VICTORIA U. WELLINGTON L. REV. 499, 502 (1996).

97. There was a similar trend in North America. For useful discussions on the North American situation, see Hamar Foster, Canada: *"Indian Administration" from the Royal Proclamation of 1763 to Constitutionally Entrenched Aboriginal Rights*, *in* INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA, & NEW ZEALAND, *supra* note 65, at 351; and McHugh, *supra* note 26, at 204-14. For a more general narrative, see also *supra* notes 6-71 and accompanying text.

98. *See, e.g.*, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (N.Z.). For a good discussion on Treaty grievances, see R. J. Walker, *The Treaty of Waitangi as the Focus of Maori Protest*, *in* WAITANGI: MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI, *supra* note 72, at 263, 263-79. Tipene O'Regan asserts the following: "Treaty settlements are an attempt to give expression to the Treaty promise. They are largely an exercise in recapture, of resumption. They do not involve the establishment of new rights but the resumption of old ones that have been denied." O'Regan, *supra* note 81, at 92.

99. For other recent examples, see sources cited *supra* note 65.

100. It should be noted that, although Ngai Tahu signed the Treaty in May and June of 1840, Tainui were not signatories to the Treaty, claiming the retention of

The recent history leading up to these agreements may be briefly summarized.[101] In 1989, as a result of the 1987 *Lands* case, the Crown undertook a deliberate strategy to return Treaty issues to the political arena and government control with the issuance by the Labour Government of its principles for Crown action on the Treaty, rather than continuing to rely on the piecemeal approach of the Waitangi Tribunal or the courts of law.[102] Within this strategy, direct negotiations began between the Crown and Maori at three levels: pan-Maori negotiations, tribal negotiations and leadership summits.[103] In December 1994, with only negligible Maori input, the National Government released details of its proposal to settle all Treaty claims within a ten-year period and with a cap of one billion New Zealand dollars.[104] This was to be achieved through durable, full and final settlements by direct negotiation with Maori tribes, and introduced through legislation that removed the claims from the jurisdiction of the Tribunal and the courts. Some Maori objected to these restrictions and held other concerns.[105] Nonetheless, within this framework,

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their sovereignty over their own land as signatories to the DECLARATION OF INDEPENDENCE (N.Z. 1835). *See* DORA ALVES, THE MAORI AND THE CROWN: AN INDIGENOUS PEOPLE'S STRUGGLE FOR SELF-DETERMINATION 124 (1999); John Dawson, *A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown*, *in* PROPERTY AND THE CONSTITUTION 210 (Janet McLean ed., 1999); Robert Te Kotahi Mahuta, *Tainui: A Case Study of Direct Negotiations*, *in* TREATY SETTLEMENTS, *supra* note 73, at 69. However, this is largely a moot point as the Crown asserts that the Treaty applies to all Maori tribes, signatories or not.

101. For a good overview, see DURIE, *supra* note 75, at 188-95.

102. *See* New Zealand Maori Council v. Attorney General [1987] 1 N.Z.L.R. 641. TREATY OF WAITANGI POLICY UNIT FOR THE CROWN TASK FORCE ON TREATY OF WAITANGI ISSUES, PRINCIPLES FOR CROWN ACTION ON THE TREATY OF WAITANGI (1989). The Principles are: Principle of Government (*Kawanatanga* Principle) - the nature and power given to the Crown in the Treaty by Article 1 was the right to govern and make laws, fettered by a requirement to accord Maori interests as an appropriate priority by Article 2; Principle of Self-Management (*Rangatiratanga* Principle) - the extent of Maori interests which the Crown promised to protect was the right to organise as *iwi* (sub-tribe) and control, under the law, the resources they own; Principle of Equality - all New Zealanders, Maori and Pakeha alike, are equal before the law; Principle of Reasonable Co-operation - all New Zealanders, including the government, are obliged to work together on major issues of common concern; and, Principle of Redress - the government is responsible for providing effective processes for the resolution of Treaty grievances in the expectation that reconciliation could occur. *Id.*

103. DURIE, *supra* note 75, at 189.

104. This became popularly known as the "fiscal envelope."

105. These objections included the exclusion of the conservation estate and the introduction of the billion dollar cap as non-negotiable; the principles of the Treaty, as outlined in the 1987 *Lands* case, not being included among the settlement principles; the settlement principles themselves being founded upon political expediency, economic affordability and popular support, rather than as principles of natural justice; Maori interests in natural resources being confined to use and value interests, excluding ownership; and implicit discounting of the Maori version of the Treaty. *See* DURIE, *supra* note 75, at 191-93.

four settlements have been successfully negotiated and legislated: Waikato-Tainui, Ngai Tahu, Ngati Turangitukua, and Pouakani; with Tuwharetoa ki Kawerau, Te Aupouri and Ngati Makino, among others, currently negotiating with the Crown.[106]

Waikato-Tainui was the first Maori tribe to settle Treaty claims through domestic legislative agreements with the Crown under this framework. It is perhaps the most significant land claim settlement ever reached in Aotearoa/New Zealand.[107] The Waikato Act was, in fact, the first piece of Aotearoa/New Zealand legislation to be signed by the Monarch personally.[108] The Waikato Act legislates the Deed of Settlement made between the Crown and Waikato-Tainui on 22 May 1995, and concerns the claim against the confiscation of 486,502 hectares of Tainui land in the Waikato region under the New Zealand Settlements Act 1863. The Waikato Act provides for the transfer of 15,439 hectares of available Crown land back to the tribe and a compensatory cash payment of N.Z.$170 million.

The Ngai Tahu settlement was constructed along different lines, and came about for different reasons, from the Waikato-Tainui settlement. There were no *rauputu* (confiscated) lands involved in the Ngai Tahu claim. Instead, the claim concerned the failure of the Crown to honour the conditions upon which Ngai Tahu land was purchased, the overexploitation and then expropriation of Ngai Tahu sea fisheries and the destruction of Ngai Tahu *mahinga kai* (traditional food gathering sources).[109] The claim involved almost the entire South Island (*Te Waipounamu*) of Aotearoa/New Zealand, and embraced almost every issue possible in Treaty negotiations and a great variety of environments and resources.[110] However, the primary concern for Ngai Tahu

106. See the information contained at the Office of Treaty Settlements, *available at* http://www.ots.govt.nz. Pre-requisites of the negotiation process were acceptance onto the National Government's Negotiations Work Programme, which presupposed prior agreement between the Crown and Maori that the claims were historically verifiable; that the claimant group had a mandate; that the Crown's position on the alleged breaches was accepted; and, that the claim was seen as having sufficient priority. The claimants also had to agree to negotiate a final settlement and to waive all other avenues of redress. DURIE, *supra* note 75, at 198.

107. *Id.* at 195.

108. In 1995, Queen Elizabeth II gave the Royal Assent personally in Wellington.

109. DAWSON, *supra* note 100, at 210.

110. ALVES, *supra* note 100, at 135. The claim was known in the Waitangi Tribunal as the "Nine Tall Trees of Ngai Tahu" involving the Crown purchase between 1844 and 1864, at artificially low prices, of the Otakou Block, the Kemp purchase of Canterbury and Otago, Banks Peninsula, Murihiku, North Canterbury, Kaikoura, Arahura and Rakiura, comprising a total of 34.6 million hectares, and the depletion and loss of *mahinga kai*. DURIE, *supra* note 75, at 200. *See* Ngai Tahu Claims Settlement Act 1998, preamble (N.Z.).

had been the failure of the Crown to keep its promise that three million hectares of purchased land would be reserved for the tribe.[111] The Ngai Tahu Act legislates the Deed of Settlement made between the Crown and Ngai Tahu on 21 November 1997, and involves the transfer of 1.38 million hectares of available Crown land back to the tribe and a compensatory cash payment of N.Z.$170 million. The significance of the Ngai Tahu settlement is that it provides certainty regarding the South Island.[112]

Both legislative agreements are detailed, lengthy and complex. In terms of their land and compensation provisions, the Tribe-Crown settlements are much like the legislative agreements between the Indigenous Peoples and States of North America of the last two decades.[113] However, what separates the Aotearoa/New Zealand settlements are the form and content of the legislation giving effect to the settlements. In terms of the self-determination of the tribes, and as an aspect of contractual State-building, the legislative agreements provide for both substantive and procedural justice and sovereignty.

Justice is accommodated substantively through the incorporation of the past, present and future of Tribe-Crown relations. For reparative justice of past wrongs, the Preambles set out, in considerable detail, the historical background of the settlements in both English and Maori. Section 6 of each Act contains a formal apology by the Crown to the tribe in both English and Maori that stands as part of the law of Aotearoa/New Zealand. Within the apology is contained an acknowledgement of the injustice of Crown action in breach of the Treaty, recognition of the "crippling impact" and "harmful effects" to "the welfare, economy and development" of the tribes of such action and a declaration "to begin the process of dealing and to enter a new age of co-operation" with the tribes. For their part, within section 6 of each Act, the tribes accept the apology and the settlement of their grievances and claims.[114] Further, section 6 of the Ngai Tahu Act provides an affirmation of the tribe as *Tangata Whenua* (Indigenous Peoples) of their lands. All of this, in effect, goes beyond the "normal positivist function[s]" of legislation in "per-

111. DURIE, *supra* note 75, at 201.

112. Despite the fact that Ngai Tahu had signed the Treaty, the South Island was deemed as belonging to the Crown by "discovery" in the Treaty.

113. *See* discussion *supra* note 71.

114. The settlement of claims is "final" in that all future progress on the claims is statute-barred and any associated litigation is discontinued. *See* Waikato Raupatu Claims Settlement Act 1995, § 9 (N.Z.); Ngai Tahu Claims Settlement Act 1998, § 461 (N.Z.). The Acts do not, however, block any claims outside the legislative agreement. *See* ALVES, *supra* note 100, at 127; DURIE, *supra* note 75, at 196.

form[ing] a memorialising task of inscribing the past into the laws of the country."[115]

For distributive justice for present equality and prospective justice for future security, the major Parts of each Act provide for the transfer and vesting of land, forests and other properties and assets to tribal ownership and control. This was intended to enhance the *mana* (power; authority; prestige) of the tribes and permit the restoration of the tribal community by providing the necessary resources and cultural properties for that restoration. There is thus symbolic and material property exchange in the legislation.[116] Substantive justice has thereby occurred with the pain of *raupatu*, or loss of resources, having been assuaged, and the beginnings of a sound financial future ensured. Procedural justice is met by the fact that these are legislative agreements arising from the choice, voice, participation and consent of the tribes and the Crown in the political and legal realms through the Deeds of Settlement and the Acts. The agreements are enforceable as part of the law of Aotearoa/New Zealand.

The Acts also provide in their Parts for measures of sovereignty in the significant redistribution of resources and authority, in relation to resource management, to the tribes.[117] The legislated return of *rangatiratanga*, in terms of ownership and control over their own resources, provides the tribes with the opportunity to be self-determining in directing their own tribal destiny through this economic base. The establishment of tribal corporate bodies under the Waikato Act and the Te Runanga O Ngai Tahu Act 1996 provide the tribes with representative bodies to restore the tribes' legal personalities and to receive and manage settlement assets.[118] In this way, the tribes will have a degree of sovereign authority over the application and management of the significant public assets under their ownership and control.

In particular, with regard to the Ngai Tahu Act, there is a redistribution of sovereignty for the tribe in reverse of the Treaty exchange. Part 9 of the Ngai Tahu Act provides the tribe with a permanent right of refusal of relevant Crown properties that are to be put on the market. Such a pre-emptive right is regarded as an aspect of the Crown's sovereignty under the Treaty and in common law.[119] Further, section 1 of the Ngai Tahu Act provides

115. McHugh, *supra* note 26, at 201.

116. Dawson, *supra* note 100, at 215.

117. *Id.*

118. This was a Waitangi Tribunal recommendation. ALVES, *supra* note 100, at 137.

119. *See* Article 2 of the Treaty of Waitangi, Feb. 6, 1840, Gr. Brit.-N.Z., 89 Consol. T.S. 473, *available at* http://www.govt.nz/en/aboutnz/?id=A32f7d70e71e9632aad1016cb343f900.

that the legislative agreement was to be brought into force upon recommendation of the Prime Minister whom "must not recommend the making" of that commencement order unless "advised by Te Runanga o Ngai Tahu in writing that this Act is acceptable."[120] In effect, the legislation was brought into force only when enacted by Parliament and agreed to by Ngai Tahu. Additionally, throughout the Act, the emphasis is on joint participation in the resource management domain, extending Ngai Tahu relations beyond that of the Crown to cover all resource managers who have the capacity to affect the tribe's interests.[121] As John Dawson, a constitutional law scholar, points out, this equates, at the constitutional level, to joint decision-making procedures in the resource management domain, and a shift towards shared governance of cultural and public resources of particular significance to the tribe.[122] In other words, it is a powerful example of renewed contractual State-building in Aotearoa/New Zealand through a redistribution of measures of sovereignty to Ngai Tahu.

The Waikato-Tainui and Ngai Tahu settlements reflect the jurisprudential model of contractualism and the juridical method of contractual State-building through Tribe-Crown negotiations, Deeds of Settlement and legislation.[123] They can also be said to have involved most New Zealanders through the democratic process.[124] The Deeds of Settlement were the culmination of the process and product of contractualism at the political level between the tribes and the Executive Government of the Crown. The New Zealand Parliament played no role in the settlements as political Deeds. But through the passage of the settlements into ordinary legislation enacted by the representative legislature, Parliament has had the opportunity to vote on them. In this way, the represented majority has had a say on the settlements and are committed now, and in the future, to their arrangements at the legal level. The contemporary legislative agreements may thus be said to honour both majority preferences and Indigenous concerns.[125]

The major advantage of contemporary legislative agreements in the process of belated State-building has been their ca-

120. Ngai Tahu Claims Settlement Act 1998, § 1 (N.Z.).

121. The relevant statutory agencies are directly fixed with the legal obligation to consider Ngai Tahu associations with their environment, and the precise nature of those associations is specified in relation to scores of natural features of the land. Dawson, *supra* note 100, at 218-19.

122. *Id.* at 222.

123. This is also true of the 1992 fisheries legislation at the pan-Maori level. *See supra* note 98; O'Regan, *supra* note 81, at 91.

124. Dawson, *supra* note 100, at 222-23.

125. *Id.* at 223.

pacity to address matters of self-determination for Indigenous Peoples in far greater detail and specificity than by way of treaty-making, constitutional clauses and the piecemeal contribution of judicial review. Legislative agreements can specifically accommodate the claims for self-determination of Indigenous Peoples by meeting, in detail, the demands of sovereignty and justice within the domestic context of that State as part of the process of contractual State-building. In the case of Aotearoa/New Zealand, this has meant the giving of effect to the (economic) self-determination of certain Maori tribes by bringing within the domestic politico-legal system the previously unrecognised conceptions, identities, powers and rights of those tribes. This has been achieved peacefully and effectively through the elements, values and principles of the process and product of contractualism in providing fair, negotiated and consensual agreement between tribal Maori and the Crown.

On the flip side, a concern may arise as to the actual product of contemporary legislative agreement. As ordinary legislation, legislative agreements are susceptible to amendment or repeal at some time in the future. However, the likelihood of this occurring without consultation with Indigenous Peoples may not be great, as it would offend the principles inherent in their contractual relations with States. More to the point, an international legal right of self-determination for Indigenous Peoples, which may provide the impetus for agreement in the first place, may also provide the requisite political and legal pressure at the international level to ensure that any unilateral amendments and repeals to legislative agreements do not occur domestically.[126] Additionally, within the Aotearoa/New Zealand context, at least, although such legislative agreements purport to be full, final, and lasting settlements, there is a strong perception of them as generational only.[127] The settlements will take several generations to complete and times will change. It should not be forgotten that Maori and the Crown, as with relations between Indigenous Peoples and States more generally, will continue to coexist, and their relationship, and any negotiations and agreements that emerge from it, should reflect this continuity.[128]

126. *See supra* note 2.

127. Mahuta, *supra* note 100, at 82.

128. This is especially important in light of the fact that the Waikato-Tainui and Ngai Tahu settlements were not free from controversy. In the Waikato-Tainui's case, this involved concerns over the mandate of the Tainui Trust Board to negotiate on behalf of all Tainui *hapu* (families). DURIE, *supra* note 75, at 197. In Ngai Tahu's case, there were counter-claims by the ancient Waitaha tribe regarding settlement assets in the lower South Island and a "turf war" with various Nelson and Marlborough tribes in the upper South Island. *See* Te Runanga o Ngai Tahu v. Waitangi Tribunal [2001] 3 N.Z.L.R. 87; Ngati Apa ki te Waipounamu Trust v. The Queen

A further concern may arise as to the process of contemporary legislative agreement in terms of the actual inequality of bargaining power between Indigenous Peoples and States. Regardless of the assumptions of equality in bargaining power in contractual relations, State-promoted extinguishment of Indigenous status and rights as a result of contractualism, is but one situation that may emerge, which could potentially impose duress on the Indigenous party in contractual relations. What must be assessed in each instance is proof of free and informed choice, voice, participation and consent by all parties as befits the nature and principles of contractual relations.[129] In Aotearoa/New Zealand, this has been a major sticking point in certain Maori-Crown negotiations.[130]

The process and product of contractualism will vary on a case-by-case basis depending on the nature of the relations, situations, and issues involved.[131] In the Aotearoa/New Zealand setting, Tribe-Crown contractual relations provide merely one possibility of contractualism as a process and product. Maori tribes have had certain grievances and claims recognised and addressed that have seen them achieve measured success in their quest to be self-determining within the domestic context of the Aotearoa/New Zealand State. But more successful products may yet emerge there and elsewhere, especially in the wake, and under colour, of an international legal right of self-determination for Indigenous Peoples.

[2000] 2 N.Z.L.R. 659; Waitaha Taiwhenua o Waitaki Trust v. Te Runanga o Ngai Tahu, CP 41/98 (H.C., Christchurch, June 17, 1998); Leah Haines, *Ngai Tahu Seeks Privy Council Ruling on Turf War*, THE DOMINION (Wellington), Nov. 27, 2001, at 15.

129. This is a crucial point in the Aotearoa/New Zealand context because the current settlements occur within the domestic framework of the State with little or no recourse to international mechanisms for justice, such as an international legal right of self-determination. For discussion on a proposed permanent international forum for Indigenous Peoples, see *Report of the Open-Ended Inter-Sessional ad hoc Working Group on a Permanent Forum for Indigenous People*, U.N. Commission on Human Rights, 56th Sess., Agenda Item 15, U.N. Doc. E/CN.4/2000/86 (2000).

130. For example, the fisheries settlement between all Maori and the Crown, *supra* note 98 attempts at reaching settlement between the Whakatohea tribe and the Crown. *See* Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (N.Z.). However, the so-called "full and final settlement" of fisheries has yet to occur. Nonetheless, the "fiscal envelope" is being successfully pushed in various areas. In Canada, the practice of so-called "comprehensive land claims settlements" and "modern treaties" are examples of such successful extinguishment. *Study on Treaties*, *supra* note 5, ¶ 146.

131. This includes undertakings in accordance with the most appropriate level of organisation as perceived by the Indigenous Peoples themselves. O'Regan, *supra* note 81, at 98. This is a matter of considerable importance and dispute for Maori, in particular.

In essence, the contemporary legislative agreements in Aotearoa/New Zealand are an important step forward in (re)establishing and (re)orienting Maori-Crown relations on terms of greater equality by providing administrative and property law solutions to constitutional problems that arose from the signing of the Treaty and its subsequent history.[132] In this sense, the legislative agreements serve, to some extent, to remedy the deficiency of the Treaty, identified by I. H. Kawharu above, by putting in place appropriate infrastructures regarding resources of particular significance to the tribes within their regions as part of the process of contractual State-building.[133]

Despite the significance of this achievement, it is important to emphasise the fact that the peaceful and effective self-determination of Indigenous Peoples does not rest solely on negotiated agreements.[134] Contractualism merely provides a basis for (re)establishing and (re)orienting Indigenous-State relations in terms of the past, present, and future relations. As with an international legal right of self-determination for Indigenous Peoples, contractualism provides a positive mechanism for achieving Indigenous self-determination and belated State-building. But what is additionally required is political will from the parties to give committed and ongoing effect to any contractual settlement reached. For Indigenous Peoples, this means the internal ability to effectively decolonise and commit themselves to a pro-active strategy for the future.[135] For the State, this means the honouring of agreements and receptivity towards the continuity of relational coexistence. Where such political will is present, contractualism and contractual State-building, backed up by legal sanction, can provide the foundation for the peaceful and effective exercise, as well as the realisation, of Indigenous self-determination as part of the process of belated State-building in the 21st century.

IV. SUMMARY

Indigenous Peoples share "an almost unanimous opinion . . . that existing State mechanisms . . . [cannot] satisfy their aspirations and hopes for [self-determination]."[136] This is not to suggest that State mechanisms are incapable of doing so in the

132. Dawson, *supra* note 100, at 210.

133. *Id.*

134. The subsequent history of the Treaty bears testimony to this notion. For Miguel Alfonso Martinez, "the main lesson to be drawn from history concerns the problems of . . . enforcement and implementation" of negotiated agreements between Indigenous Peoples and States. *Study on Treaties, supra* note 5, ¶ 299.

135. Mahuta, *supra* note 100, at 87.

136. *Study on Treaties, supra* note 5, ¶ 261.

future. On the contrary, Indigenous Peoples commonly desire a solid, new, and different kind of relationship with States that meets their claims and demands alongside the interests of States—that is, a partnership in belated State-building within the existing domestic politico-legal framework.[137] Such a relationship is achievable through the full and ongoing implementation of the process and product of contractualism regarding matters of sovereignty and justice.

Aotearoa/New Zealand has been an important testing ground for implementing the model and method of contractualism in Indigenous-State relations. Through historical treaty-making and contemporary legislative agreement, different peoples with different frames of reference have been able to find agreement on coexistence and shared governance within a single domestic politico-legal system. This original and renewed State-building is one of contractual State-building. These contractual relations have granted measured recognition of, and respect to, Indigenous self-determination in Aotearoa/New Zealand. However, Aotearoa/New Zealand is only one example of contractualism in action. Its importance as a case study lies with process rather than product. The outcome of Maori-Crown contractual relations has been noteworthy for certain Maori tribes, but it remains short of full self-determination and complete, partnered State-building for all Maori.

Wherever Indigenous Peoples and States undertake contractual State-building, the contractual process must be exercised and assessed on a case-by-case basis depending on the nature of the relations, situations and issues involved. Whatever recognition is accorded, or powers are established, in contractual State-building, this "will neither automatically end States' aspirations to exert eventually the fullest authority possible (including integrating and assimilating [Indigneous Peoples] nor nullify whatever inalienable rights [and claims for such rights] these people may have. . .."[138] This is the reality of power struggles—even on such morally justified grounds as cultural survival, self-determination, and the honouring of agreements—that arise from the continuing coexistence of Indigenous Peoples and States. Yet, it is the potential that contractualism offers as a model and method for Indigenous self-determination and belated State-building, as demonstrated in the case study of Maori-Crown relations in Aotearoa/New Zealand, that makes the contractualist approach significant.

137. Daes, *supra* note 1, at 9-10.

138. *Id.* ¶ 135 (regarding the context of autonomy).

At the international level, a right of self-determination for Indigenous Peoples would provide greater impetus for Indigenous Peoples and States to come together to negotiate and reach agreement through contractualism. Such a right would also provide political pressure and legal recourse at the international level to ensure that contractual principles are adhered to in both the process and product of contractualism. At the domestic level, contractualist approach would provide a coherent framework, with domestic political and legal effect, for recognising and addressing matters of sovereignty and justice. In combination, contractual State-building under colour of a right of self-determination would then be likely to initiate procedures and outcomes that more closely approximate Indigenous Peoples' aspirations and hopes as self-determining peoples. From this foundation, it would be a matter of political will and legal sanction to ensure the path to Indigenous self-determination and belated State-building is a peaceful and effective one.

The contractualist vision of peaceful and effective Indigenous self-determination and belated State-building is perhaps best captured by Cooke P (as he then was) in the 1987 *Lands* case when His Honour described the Treaty of Waitangi as a "living instrument."[139] This is how contractualism ought to be envisioned between Indigenous Peoples and States—as a matter of continuing coexistence through consensus.[140] This vision is already shared by, and taking shape within, the Indigenous-State relations of Aotearoa/New Zealand and Canada. It can be achieved elsewhere.

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139. *See* New Zealand Maori Council v. Attorney General [1987] 1 N.Z.L.R. 641, 656.

140. Importantly, this is paralleled, in essence, by the international legal right of self-determination which encapsulates the democratic concept that government should rule with the consent of the governed.