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The Status and Effect in New Zealand Law of the Declaration on the Rights of Indigenous Peoples

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Introductory

My first association with the Draft Declaration on the Rights of Indigenous Peoples was as Deputy Secretary for Justice in 1995 – 2000. In that role I was responsible for providing advice to the Minister of Justice and other Ministers on the position New Zealand should take in relation to the Draft Declaration. This involved liaising with other “CANZUS” governments – Canada, Australia, New Zealand and the United States.

I won’t comment on the position New Zealand ended up taking in relation to the Declaration in 2007. But I was pleased that, during my tenure at Justice, New Zealand did not oppose the Draft Declaration. Incidentally I still find it difficult not to call it the DRAFT Declaration as it was that for a lot longer than it has, yet, been a Declaration.

In addition, I will say, as a lawyer, that I have been dismayed by the legalistic thinking behind some CANZUS countries’ positions. Lawyers are trained to identify problems. If you give them a text that reflects aspirations and compromise, they will identify problems! But the perspective the Court of Appeal said was called for with respect to the Treaty of Waitangi was, “above all a generosity of spirit”. ¹ If you approach the words of the Declaration from that perspective, then you are more likely to recognise the value to the human spirit of expressing rights. That is particularly so for indigenous peoples in other places, some of whom are so alienated, dispossessed, and oppressed that they lack the capacity that Maori have to seek justice.

* Thorndon Chambers. This is an edited version of the presentation at the Symposium. Comments are welcome to Matthew.Palmer@aya.yale.edu.

I also know that Maori were a huge force behind the successful outcome of the formulation of the Declaration. I acknowledge those efforts today, especially those of Moana Jackson who was always, irritatingly, exceedingly polite while being entirely unbending.

The next association I had with the Declaration was over 10 years later. In the Fall semester of 2007 I was teaching a course in Comparative Indigenous Peoples Rights at Yale Law School. There, I had the privilege of travelling with the class down to New York on 13 September 2007 to watch the United Nations General Assembly turn the Draft Declaration on the Rights of Indigenous Peoples into the Declaration on the Rights of Indigenous Peoples.

And I had the disappointment of seeing my own nation’s government stand out from the crowd against the Declaration by succumbing to legalistically generated fear rather than embracing optimistic hope.

So I am a supporter of the Declaration. And I recognise that it is a signal event in the struggle of indigenous peoples internationally.

But my topic today is more prosaic: I want to explore the status and effect of the Declaration at New Zealand domestic law. I do this from the perspective of a constitutional realist – who seeks to probe beneath the impressively swirling robes of justice to see with clear eyes the hard reality of what lies beneath.

**Conventional Legal Status**

My starting point is that the Declaration does not, itself, have binding legal force in New Zealand’s legal system. It would not have such force even if it were a Treaty, given New Zealand’s dualist approach to international law. As a declaration it certainly does not have legal force.

It has not been incorporated into domestic law in New Zealand, as it has been in Bolivia.

It is soft law, not hard law. And I say that with respect and admiration for the norm shifting dynamic force of soft international law.

**Indirect Legal Effect**

Are there other, less direct, means of the Declaration being reflected in law?
In searching for these means I note Melissa Water’s label of “creeping monism”. She said there is a cross-national trend of courts finding indirect ways to give legal leverage to international obligations, even where they are not incorporated into domestic law.\(^2\)

And I’m conscious of the example of exactly this by the Supreme Court of Belize in 2007 in *Aurelio Cal* which gave force to a provision of the Declaration because it “embodied general principles of international law”.\(^3\) But, as I noted below, I expect the New Zealand courts would be more conservative.

I identify four ways by which New Zealand courts could give legal leverage to the Declaration. I treat them in turn.

1. **Administrative law**

A court could determine that the Declaration constitutes a mandatory relevant consideration that the Crown or other public law decision-maker must consider in making a decision.

Given the right set of facts, I think this is entirely plausible.

But I’d have to say that I expect that, in practice before doing this, a New Zealand court would be more likely to find that the Treaty of Waitangi is a mandatory relevant consideration. The Treaty is directly reflected in a range of legislation. It is simply more salient in the New Zealand legal and constitutional landscape.

But use of the Declaration in this way would be likely to support that use of the Treaty.

2. **Statutory interpretation**

Statutory interpretation tends to shade into administrative law in some ways. But statutory interpretation is more ubiquitous, and more routine, as a judicial task.

NZ courts are used to thinking of international obligations as relevant to statutory interpretation.\(^4\)

But my observation is that they are not inclined to do so unless it supports an interpretation they wish to reach anyway. And, of course, the same point applies about the Treaty as applies to administrative law: courts will turn to the Treaty first.

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\(^3\) *Aurelio Cal and the Maya Village of Santa Cruz v Attorney-General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney-General of Belize* (Consolidated) Claim Nos 171 & 172, 2007, Supreme Court of Belize (18 October 2007).

3 Customary International law

In theory customary international law is part of common law in New Zealand’s legal system. And there is an argument that the Declaration is declaratory, or at least evidence, of the current state of customary international law; though I am aware that opinions on this are divided in the literature. So an argument might be mounted that executive action that is contrary to the Declaration is contrary to customary international law and therefore contrary to the common law of New Zealand. And it might have legs, depending on the context.

But in practice I would expect that the justice of the particular complaint would be crucial in convincing a New Zealand court to take such a step.

4 Principle of Legality

The principle of legality is the European principle of statutory interpretation, adopted in United Kingdom. It maintains that Parliament could not possibly have intended to override fundamental human rights without saying so very very clearly.

The NZ Supreme Court has effectively adopted the principle of legality in Cropp in 2008. Though it adopted the principle without, it seems deliberately, adopting the label.

Again, this could be useful in giving legal leverage to the Declaration. But in practice, I would expect such an argument in relation to the Declaration to have most effect in reinforcing other arguments, perhaps based on the Treaty of Waitangi.

Relationship with the Treaty

I have mentioned the Treaty several times in traversing these indirect means of giving legal bite to the Declaration.

That is because I think the ToW is a more powerful instrument in NZ domestic law, in the sense that the Courts are more accustomed to have regard to it having legal effect. Of course the Treaty is not fully part of New Zealand law for all purposes. I have described

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the Treaty elsewhere as half in and half out of the legal system.\textsuperscript{7} It follows that I see the Declaration as living, in New Zealand domestic law, in the half shadow of the Treaty.

**But an Advantage in Specificity**

This is not to say the Declaration is unimportant. There is one particular advantage the Declaration has over the Treaty - one respect in which the Declaration may well prove to amplify the Treaty’s effect, and fill in the gaps left in its content. That is: the Declaration is more precisely and more specifically worded.

Unlike the Treaty, the Declaration, deliberately, is specifically worded as a formal legal instrument. For a lawyer looking for support for a legal argument, often under time pressure, such precision is very helpful, if it is apposite. Instead of fossicking amongst Treaty principles to identify a vibe you can cite a specific article with a reassuringly (to judges) numerical identity.

In this regard I note a certain irony in the New Zealand government’s positions on the Declaration. New Zealand initially opposed the Declaration in the General Assembly on 13 September 2007. New Zealand rejected the argument that the Declaration was merely aspirational, “intended to inspire rather than to have legal effect”. New Zealand said it did “not accept that a State could responsibly take such a stance towards a document that purported to declare on the contents of the rights of indigenous peoples”. Once New Zealand belatedly endorsed the Declaration in April 2010, that might suggest it is rather difficult for the Crown to argue the Declaration is simply aspirational. But Prime Minister Key did so in Parliament on 20 April 2010. As did the official New Zealand Statement though, interestingly, in relation to specific articles.

Indeed, I have found that the legal specificity of the drafting of the Declaration is useful in argument in the High Court. On behalf of the Maori Council I have invoked articles 4 and 39 of the Declaration, to support an argument before the High Court about the importance in trust law of facilitating tribal groups’ own procedures with respect to their internal affairs, rather than interfering with them.\textsuperscript{8} My colleague in Thorndon Chambers Matt Smith has done the same on behalf of the Maori Council, relying on expert evidence from Dr Claire Charters, in a claim to the Waitangi Tribunal. That claim was a challenge to the Crown’s consultation over proposals to reform the legislation establishing the Council. It relied on articles 18 and 19.

Nevertheless I still think, for the foreseeable future, that the Treaty will be the more important source of legal rights for Maori in New Zealand.


\textsuperscript{8} *New Zealand Maori Council v Foulkes* (judgment pending).
The Courts So far

What of the practice of the NZ Courts to date?

First, I note that the Waitangi Tribunal has, naturally, considered the Declaration on several occasions. It did so particularly in the 2011 *Ko Aotearoa Tenei* (Wai 262) report, which described the Declaration as “groundbreaking” and “a milestone”, and referred to its potential to become customary international law.

The Tribunal also invoked the Declaration in the 2011 Petroleum report, the 2012 Water and Geothermal Report, and the 2013 Kohanga Reo report.

With more legal effect, there are also examples of the Courts citing the Declaration. Indeed, in *Barton-Prescott* in 1997 the High Court cited the Draft Declaration.

The most extensive consideration of the Declaration by the New Zealand courts is by the Court of Appeal in *Takamore* in 2011. There Glazebrook J, on behalf of a majority of the Court of Appeal, made some downright adventurous comments about the Declaration. These have been somewhat lost sight of given that the case then went on to the Supreme Court (as did Glazebrook J herself). Specifically, the Court noted that the Declaration “recognises the need to safeguard both the individual and the collective rights of indigenous peoples” in rebutting the notion that there is “one law for all”. The Court quotes one international commentator’s view that simply the Declaration “restates, in one systematic text, human rights contained in previously adopted international instruments and confirmed through the case law of international bodies.” The Court also cites the Declaration as support for the need to develop the common law consistently with the importance of recognising the collective nature of the culture of indigenous peoples and the value of their diversity.

The most authoritative treatment by a Court to date was by the Supreme Court in its *Water* judgment in 2013. That judgment is more subtle and more affirmative of previous Treaty jurisprudence than first appears in relation to the Treaty of Waitangi. The Supreme Court’s unanimous judgment mentioned the Declaration and its affirmation by New Zealand in 2010 The Court quoted article 28(1). It doubted that the Declaration “adds significantly to the principles of the Treaty statutorily recognised”. But the Court also accepted:

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9 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).
11 At [251]-[254].
12 At [253] per Professor Elsa Stamatopoulou.
13 At [254].
... that the Declaration provides some support for the view that those principles should be construed broadly. In particular, it supports the claim for commercial redress as part of the right to development there recognised.

Conclusion

So, in conclusion:

• There are legal avenues by which the Declaration could be given indirect legal effect.

• But I doubt the Declaration will be an effective lever for legal action in its own right in the short to medium term.

• I expect that the New Zealand courts are likely to mention the Declaration to bolster findings the courts would be prepared to make anyway.

• At least in terms of legal force and effect it is, and will remain, overshadowed by the Treaty of Waitangi which, itself, is struggling for coherent recognition in New Zealand law.

• This suggests that, at least for now, the Declaration on the Rights on Indigenous Peoples is likely to play a supporting role in New Zealand law.

• It is probably more important politically and morally, in easing New Zealand into recognition of indigenous rights on the international stage and opening up international law avenues of pressure on the Crown.

• And in the longer term, perhaps the Declaration will come to influence the development of the law in New Zealand.