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A Comparative Analysis: Legal and Historical Analysis of Protecting Indigenous Cultural Rights Involving Land Disputes in Japan, New Zealand, and Hawai'i

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A COMPARATIVE ANALYSIS: LEGAL AND HISTORICAL ANALYSIS OF PROTECTING INDIGENOUS CULTURAL RIGHTS INVOLVING LAND DISPUTES IN JAPAN, NEW ZEALAND, AND HAWAI'I

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Abstract: This article explores how courts in developed market economies address the tension between recognizing the rights of indigenous groups and addressing questions of land development that supposedly benefit the majority populations. Using a comparative approach, the article identifies three jurisdictions in the Pacific Rim with indigenous populations: (1) the State of Hawai'i in the United States, (2) Japan, and (3) New Zealand and analyzes how land use courts and administrative bodies have addressed the thorny question pursuing development while fulfilling their obligations to indigenous populations. While the State of Hawai'i has explicit state constitutional protections, Japan and New Zealand each demonstrate that international treaties like the ICCPR may provide another important source of legal protection. However, the article concludes that explicit constitutional protections of indigenous groups provide the greatest level of support when combined with other constitutional protections like administrative due process.

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I. INTRODUCTION

A major issue emerging in the twenty-first century is how to recognize and protect the rights of indigenous peoples and their unique cultures, histories, and values. The dilemma is especially daunting for developed democracies with indigenous minorities whose land was conquered, confiscated, or claimed many years ago. To many indigenous peoples, land access is critical to the protection of their identity, culture, and history. Denying recognition or protection conflicts with the democratic ideas of justice and equality that democracies purport to represent. However, in addition to indigenous rights, courts must consider modern property regimes,

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the rights of owners, and the contemporary development needs of society. Therefore, land use questions involving the protection of indigenous rights are particularly thorny for courts.

The examples of Japan, New Zealand, and the State of Hawai‘i (Hawai‘i) provide three different models for how courts may analyze and answer questions of land rights when indigenous minorities bring suits challenging proposed land developments. Japan, which has historically defined itself as an ethnically and culturally homogenous nation, has struggled to recognize the rights of its indigenous peoples and define the scope of indigenous rights protections.[1] Nevertheless, Japan has made strides in at least recognizing the rights of the Ainu, an indigenous minority with origins in the northern island of Hokkaido.[2] In contrast, New Zealand and Hawaiian courts have both succeeded and failed at recognizing the land rights of the Māori and Native Hawaiians.[3] This recognition has coincided with the adoption of a Western property regime and changes in sovereignty.[4] In Hawai‘i, the adoption of a written Constitution has provided additional protection. The scarcity of land and high demand for property development has pushed those courts to resolve the tension between indigenous rights and the need for development.[5] Accordingly, New Zealand and Hawai‘i provide an interesting comparison with the Japanese courts.

This Comment will first explain the legal systems of Japan, New Zealand, and Hawai‘i and the fundamental differences between them. Second, it will examine the relationship between the Ainu people and the *wajin* majority[6] throughout history, and the legal relationship between the Ainu and

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[1] CULTURAL SURVIVAL, OBSERVATIONS ON THE STATE OF INDIGENOUS HUMAN RIGHTS IN JAPAN 1–2 (2017), https://www.culturalsurvival.org/sites/default/files/JapanUPRR2017_0.pdf.

[2] May-Ying Lam, *‘Land of the Human Begins’: The World of the Ainu, Little-Known Indigenous People of Japan*, WASH. POST, (July 27, 2017), https://www.washingtonpost.com/news/in-sight/wp/2017/07/28/land-of-the-human-beings-the-world-of-the-ainu-little-known-indigenous-people-of-japan/.

[3] *See* Kalipi v. Hawaiian Trust Co., Ltd, 656 P.2d 745, 752 (Haw. 1982) (holding that Native Hawaiians may enter undeveloped, privately-owned lands to practice Native Hawaiian customs and traditions when no harm occurs to the property owner).

[4] Lee S. Motteler & J. Patricia Morgan Swenson, *Hawaii*, ENCYCLOPEDIA BRITANNICA (May 24, 2018), https://www.britannica.com/place/Hawaii-state/Government-and-society.

[5] *See generally* Samuel J. Panarella, *Not in My Backyard: The Clash between Native Hawaiian Gathering Rights and Western Concepts of Property in Hawaii*, 28 ENVTL. L. 467 (1998).

[6] "*Wajin*" is a term used in Japan mainstream ethno-racial majority. It originated to distinguish the settlers of mainland Japan from other ethnic groups, including the Ainu in Hokkaido, the Ryukyu people in Okinawa, and Taiwanese and Korean ethnic minorities as the Japanese Empire expanded. *See* Mark Levin,

the Japanese State. This section will examine the Japanese court's decision in the landmark Nibutani Dam case. Third, this Comment will discuss the relationship between the Māori and the New Zealand Crown with a focus on the creation of specialized courts for Māori land disputes. Fourth, it will explore the Hawai'i Supreme Court's recent jurisprudence to cases raised by Native Hawaiian plaintiffs to halt development projects. Here, the role of Hawaiian sovereignty remains a thorny and complicated issue as the Kingdom of Hawai'i, which predated the U.S. annexation, was autonomous and conducted its own foreign policy with other foreign nations. While Hawai'i's State Constitution aims to protect Native Hawaiian rights and Hawai'i's Congressional delegation has pushed for federal recognition of Native Hawaiians providing the same government-to-government status as tribes on the continental United States,[7] this has not eliminated demands for even greater autonomy or outright independence in Hawai'i. As a result, this Comment will compare the ideas and legal framework used by each system. Finally, this Comment will conclude with lessons for each corresponding jurisdiction.

II. BACKGROUND: THREE DIFFERENT LEGAL SYSTEMS

Most nations belong to one of the following two dominant legal systems—a civil law system or a common law system. Japan adopted the former approach and America and New Zealand retained the latter one.[8] Japan has continually sought to modernize its legal system.[9] In Japan, the modern civil law system emerged from the reformist Meiji government.[10] After years of isolation, Japan looked outward from 1868 to become a modern,

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Hihanteki jinshu riron to Nihon-hō wajin no jinshu-teki tokken ni tsuite (批判的人種理論と日本法—和人の人種的特権について) [*The Wajin's Whiteness: Law and Race Privilege in Japan*], 80 HŌRITSU JIHŌ 80 (2008).

[7] In 2010, the U.S. House of Representatives passed the Native Hawaiian Government Reorganization Act, which provided federal recognition of Native Hawaiians and allowed for the creation of a governing entity organized by Native Hawaiians. The bill failed to pass the Senate. *See* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY (3d ed. 2015).

[8] Piyali Sam, *Major Differences Between the Japanese and American Legal Systems*, @WASHULAW BLOG, (Nov. 20, 2013), https://onlinelaw.wustl.edu/blog/major-differences-between-the-japanese-and-american-legal-systems.

[9] Michael Auslin, *Japan's Endless Search for Modernity*, ATLANTIC, (Jan. 3, 2018), https://www.theatlantic.com/international/archive/2018/01/japan-abe-meiji-restoration-china/549536/.

[10] *See* R. Daniel Keleman & Eric C. Sibbit, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L L. 269, 292 (2002).

international power.[11] Legal reform was considered essential to Japan's development, and the Japanese sought to model their legal system after France and Germany, which were then considered the two most advanced legal systems.[12] As a result, Japan became a civil law country.[13] The Civil Code took effect in 1898.[14] It remains in place today, having survived two World Wars and the adoption of the 1946 Constitution.[15]

The primary difference between a civil law and common law system is that codified statutes predominate in the former.[16] Although common law also makes use of statutes, judicial cases are considered an important source of law systems.[17] This provides judges with an important role in lawmaking. For the sake of consistency, common law systems form rules based on precedent from higher courts, whereas in civil law systems, codes and statutes are expected to cover all eventualities and circumstances.[18] Past judgments by courts are mere guides when interpreting statutes. As a result, judges in civil law systems play the role of investigators and trial procedure is much more bureaucratic and focused on fact-finding.[19] The signature feature of the common law legal system is the trial—a duel between opponents, involving oral testimony from live witnesses and the submission of exhibits with a judge acting as a referee.[20] Trial is an adversarial process, which is a major difference from the Japanese system.

New Zealand is a common law nation whose Western legal traditions were adopted from the British legal system.[21] One key difference between

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[11] *The Meiji Restoration and Modernization*, COLUMBIA UNIVERSITY: ASIA FOR EDUCATORS (2009), http://afe.easia.columbia.edu/special/japan_1750_meiji.htm.

[12] *Legal Research Guide: Japan*, THE LAW LIBRARY OF CONGRESS (June 9, 2015), https://www.loc.gov/law/help/legal-research-guide/japan.php.

[13] *Id*.

[14] Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 LAW & CONTEMP. PROBS. 129, 148–49 (1989).

[15] Harald Baum, *Comparison of Law, Transfer of Legal Concepts, and Creation of a Legal Design: The Case of Japan*, *in* LEGAL INNOVATIONS IN ASIA: JUDICIAL LAWMAKING AND THE INFLUENCE OF COMPARATIVE LAW 61, 68–73 (John O. Haley & Toshio Takenaka eds., 2014).

[16] *The Common Law and Civil Law Traditions*, THE ROBBINS COLLECTION: U.C. BERKELEY SCHOOL OF LAW (2010), https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html.

[17] *Id*.

[18] *Id*.

[19] S.B., *What is the difference between common and civil law?*, ECONOMIST (July 17, 2013), http://www.economist.com/blogs/economist-explains/2013/07/economist-explains-10.

[20] Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998).

[21] Margaret Greville, *Access to New Zealand Law*, GLOBALEX (Nov./Dec. 2014), http://www.nyulawglobal.org/globalex/New_Zealand1.html.

New Zealand and both Japan and the United States (or the State of Hawai‘i) is that New Zealand does not have a written constitution.[22] The absence of a written constitution has led to criticism in the international community that the nation could more adequately protect Māori rights with written constitutional guarantees. [23] Instead, New Zealand's constitutional arrangements are a patchwork of various documents which that include the Constitution Act 1986, the New Zealand Bill Of Rights Act 1990, the Electoral Act 1993, and the Treaty of Waitangi, as well as broader traditions and norms.[24]

The common law system in Hawai‘i predates its annexation by the United States. Hawai‘i adopted a common law system in the 1840s after the arrival of American missionaries.[25]

III. THE AINU IN JAPAN

A. Historical Background

The Ainu people developed their distinct culture and settlements in Hokkaido, the northern part of Honshu, the southern part of Sakhalin, and the Kuril Islands.[26] The Ainu were subjects of the Yuan Dynasty of China from 1308 to the sixteenth century.[27] The first documented encounter between the Ainu and *wajin* occurred in 1356.[28] *Suwa Daimyojin Ekotoba* describes the Ainu as the image of *Oni* (devil), a term used to discriminate against foreign people.[29] During this period, *wajin* began settling in the southern parts of

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[22] NEW ZEALAND MINISTRY OF JUSTICE, THE NEW ZEALAND LEGAL SYSTEM: A GUIDE TO THE CONSTITUTION, GOVERNMENT, AND LEGISLATURE OF NEW ZEALAND 4–5, http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN013991.pdf (last visited Nov. 18, 2018). [hereinafter NEW ZEALAND LEGAL SYSTEM].

[23] UPR Recommendations New Zealand received, UPR INFO: DATABASE OF RECOMMENDATIONS, https://www.upr-info.org/database/index.php (select "New Zealand" under the "State under Review" filter) (last visited Nov. 18, 2018).

[24] NEW ZEALAND LEGAL SYSTEM *supra* note 22, at 4–5.

[25] Jane L. Silverman, *Imposition of a Western Judicial System in the Hawaiian Monarchy*, 16 HAWAIIAN J. HIST. 48, 57 (1982).

[26] Mitsuharu Vincent Okada, *The Plight of Ainu, Indigenous People of Japan*, 1 J. INDIGENOUS SOC. DEV. 1, 2 (2012).

[27] BRETT L. WALKER, THE CONQUEST OF AINU LANDS: ECOLOGY AND CULTURE IN JAPANESE EXPANSION, 1590-1800 132–33 (University of California Press 2006).

[28] Okada, *supra* note 26, at 3.

[29] *Id*.

Hokkaido.[30] The Ainu and *wajin* traded with each other—yet many of these arrangements favored *wajin*.[31] A general pattern of unequal trade, conflict, and colonialism occurred.[32]

By the 1860s, Japan claimed Hokkaido as its sovereign territory.[33] The Meiji government established a plan to develop the island in 1869.[34] The acceleration of *wajin* migration coincided with the forced assimilation of the Ainu.[35] Traditional Ainu ways of living, culture, and language were prohibited.[36] From then on, the Ainu were forced to give up their traditional hunter-gatherer lifestyle and become farmers.[37] The Census Registration Act of 1871 forced the Ainu to adopt Japanese last names.[38] Meanwhile, under the Property Law, the Meiji government confiscated traditional Ainu land that *wajin* considered underdeveloped.[39] While *wajin* individuals and businesses received incentives to move to Hokkaido, the Ainu were excluded from the policies that were intended to develop Hokkaido.[40] The results of these policies were devastating for the Ainu.

After a century of policies enforcing assimilation and discrimination, Ainu people struggle to maintain and preserve their traditional methods of living, culture, identity, beliefs, land, and education. It is not uncommon for Ainu to hide their identity to avoid discrimination.[41] In 1993, there were less than ten remaining speakers of the Ainu language.[42] This fact is especially

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[30] Norimitsu Onishi, *Despite Free Land, No Cry of Northward Ho in Japan*, N.Y. TIMES (June 3, 2010), https://www.nytimes.com/2008/06/03/world/asia/03iht-03shibetsu.13410595.html.

[31] Richard M. Siddle, *The Ainu: Indigenous People of Japan*, *in* JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY 25–26 (Michael Weiner ed., 2008).

[32] *Id*.

[33] *Id*.

[34] Okada, *supra* note 26, at 3.

[35] Hiroshi Maruyama, Note, *Japan's Post-War Ainu Policy. Why the Japanese Government Has Not Recognized Ainu Indigenous Rights?*, 49 POLAR RECORD 204, 204–07 (2013).

[36] *A Shameful Statement on the Ainu*, JAPAN TIMES (Nov. 17, 2014), https://www.japantimes.co.jp/opinion/2014/11/17/editorials/a-shameful-statement-on-ainu/#.WsEov2aZPq0.

[37] John B. Cornell, *Ainu Assimilation and Cultural Extinction: Acculturation Policy in Hokkaido*, 3 ETHNOLOGY 287, 287–88 (1964).

[38] Okada, *supra* note 26, at 5.

[39] *Id*.

[40] Alexander Bukh, *Ainu Identity and Japan's Identity: The Struggle for Subjectivity*, 28 COPENHAGEN J. ASIAN STUD. 35, 36–38 (2010).

[41] Okada, *supra* note 26, at 11.

[42] David McGrogan, *A Shift in Japan's Stance on Indigenous Rights and its Implications*, 17 INT'L J. MINORITY & GROUP RTS. 355, 356 (2010), http://www.academia.edu/3299428/

devastating for the preservation of Ainu culture because the Ainu did not develop a written language.[43] Furthermore, Ainu are disproportionately poor and undereducated; in Hokkaido, roughly 56% of Ainu are employed in low-wage industries,[44] and only 17% of Ainu have college degrees, compared to the national average of 54%.[45] More Ainu receive government-supported welfare than the national average.[46]

In light of the different history, culture, and socioeconomic status of the Ainu, the Japanese government has historically pursued a policy of denying those differences even exist.[47] At the time, the government's official position was that there were no ethnic minorities in Japan.[48] The Ainu were "former aborigines" totally subsumed into the Japanese homogenous state. In reports to the treaty monitoring bodies of the United Nations (U.N.), the Ainu were referred to with euphemisms such as "the group" and described as living "lives that differ little from those other constituents of the society."[49] Nevertheless, beginning in the 1980s, Ainu activists began organizing with greater energy.[50] The Ainu Association of Hokkaido (AAH) lobbied the Japanese government for greater educational, political, cultural, and fishing rights.[51] The AAH's main goal was recognition of the existence of the Ainu people both domestically and internationally.[52] By 1987, an Ainu delegation was sent to the U.N. Working Group on Indigenous Populations.[53]

A_Shift_in_Japans_Stance_on_Indigenous_Rights_and_its_Implications_International_Journal_of_Minority_and_Group_Rights_2010.

[43] Sherley Wetherhold, *The Disappearing Languages of Asia*, THE ATLANTIC (July 9, 2012), https://www.theatlantic.com/international/archive/2012/07/the-disappearing-languages-of-asia/259530/.

[44] Okada, *supra* note 26, at 9–10.

[45] *Id*.

[46] *Id*.

[47] Bukh, *supra* note 40, at 38.

[48] McGrogan, *supra* note 42, at 357.

[49] *Id*.

[50] Ann-Elise Lewallen, *Ainu Women and Indigenous Modernity in Settler Colonial Japan*, 15 ASIA PAC. J. 1, 3 (2017).

[51] Simon Cotterill, *Ainu Success: The Political and Cultural Achievements of Japan's Indigenous Minority*, 9 ASIA-PAC. J. 1, 5 (2011), http://apjjf.org/-Simon-Cotterill/3500/article.pdf.

[52] *What is the Ainu Association of Hokkaido?*, AINU ASSOCIATION OF HOKKAIDO, https://www.ainu-assn.or.jp/english/outline.html (translating in English) (last visited Apr. 3, 2018).

[53] *Ainu Historical Events*, AINU ASSOCIATION OF HOKKAIDO, https://www.ainu-assn.or.jp/english/history.html (translating in English) (last visited Apr. 3, 2018).

B. The Nibutani Dam Decision

The *Nibutani Dam Decision* was a landmark case in Japanese law, representing the first time that a Japanese court recognized the right of an ethnic minority to enjoy his or her culture based on Article 13[54] of the Japanese Constitution and the International Covenant on Civil & Political Rights (ICCPR).[55] The Sapporo District Court held that a public dam project was illegal because the government failed to adequately consider the project's effect on Ainu culture.[56] In doing so, the court reached three important conclusions. First, the court held that the Ainu are a distinct minority culture in Japan deserving of protection.[57] Second, Japan has a public policy interest in protecting Ainu cultural rights resulting from the legacy of discrimination and forced assimilation that weakened Ainu culture.[58] Finally, the court found that the dam construction project itself threatened to damage Ainu cultural interests.[59]

C. Facts and Background

The *Nibutani Dam Decision* resulted from the construction of the Nibutani and Shiratori dams in Hokkaido's Saru River. The project's first stage began with planning in 1973 by the Hokkaido Regional Development Bureau (the Bureau). The Bureau initially intended for the dam to supply water to a nearby industrial park.[60] However, the Bureau later added hydroelectricity, flood control, and other goals for the project.[61] The project's critics argued that it threatened the livelihood of the Ainu in three ways. First, the dam would alter salmon migration—a source of sustenance that Ainu

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[54] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 13 (Japan) ("All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.").

[55] Sapporo Chihō Saibansho [Sapporo Dist. Ct.] Mar. 27, 1997, Hei 9 (gyō u) No. 9, 1598 HANREI JIHŌ [HANJI] 33, 938 HANREI TAIMUZU [HANTA] 75 (Japan), *in* THE JAPANESE LEGAL SYSTEM: CASES, CODES, & COMMENTARY 296 (Curtis J. Milhaupt, J. Mark Ramseyer, Mark D. West 2d eds., 2012) (Kayano v. Hokkaidō Expropriation Committee) [hereinafter Nibutani Dam Decision].

[56] *Id*.

[57] *Id*. at 302.

[58] *Id*. at 303.

[59] *Id*. at 304.

[60] Kenichi Matsui, *Nibutani Dam on Ainu Homeland*, ENVIRONMENTAL JUSTICE ATLAS (June 19, 2015), https://ejatlas.org/conflict/dam-on-ainu-homeland.

[61] *Id*.

fishermen relied on.[62] Second, the dam would destroy traditional burial grounds as well as historical and sacred sites.[63] Finally, the dam would inundate land that Ainu property owners retained for farming since the Former Aboriginal Protection Act of 1899.[64]

In 1987, the Hokkaido Expropriation Committee (Expropriation Committee) entered negotiations with landowners of the proposed dam site.[65] When some Ainu owners refused to sell their land—both unsatisfied with the price and demanding greater compensation for the Ainu that inhabited the area—the Expropriation Committee condemned the land using the Land Expropriation Law.[66] Two private plaintiffs appealed the administrative ruling to the Minister of Construction in 1989.[67] Because the Minister of Construction failed to review the matter, the plaintiffs sued the Expropriation Committee in Sapporo District Court on October 26, 1993.[68] The court did not publish its decision until March 27, 1997.[69] Nevertheless, dam construction commenced despite the plaintiffs' administrative appeals and lawsuit in Sapporo District Court.[70]

D. The Sapporo District Court's Ruling

The Sapporo District Court considered the dispute between the private landowners and the Expropriation Committee in light of Japan's Land Expropriation Law.[71] Article 20(3) requires a balancing test between the planned project's public benefits and the resulting harm to both public and private interests.[72] The balancing test should be comprehensive according to the following factors:

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[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id.*
[67] Nibutani Dam Decision, *supra* note 55, at 296.
[68] Andrew Kaisuke Stewart, *Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil and Political rights, an Alternative Paradigm for Okinawan Demilitarization*, 4 ASIAN-PACIFIC L. & POL'Y J. 387, 387 (2003).
[69] Nibutani Dam Decision, *supra* note 55, at 296.
[70] Jude Isabella, *How Japan's Bear-Worshipping Indigenous Group Fought Its Way to Cultural Relevance*, HAKAI MAGAZINE (Oct. 18, 2017), https://www.smithsonianmag.com/science-nature/how-bear-worshipping-group-in-japan-fought-for-cultural-relevance-180965281/.
[71] Nibutani Dam Decision, *supra* note 55, at 296.
[72] *Id*.

> [T]he background of the Project Plan enactment process, the details of the Project Plan that are raised in the Project Authorization, the public benefit that should occur from carrying out the Project Plan, the losing interests and accompanying costs that may arise out of the execution of the project, and the considerations that were made in response to the various losses arising from the instant project.[73]

To condemn private property, the government must show that the public benefits outweigh the cumulative harm inflicted on public and private interests.[74] In its analysis, the court acknowledged the public benefits gained by constructing the dam, including improving flood control, maintaining the Saru River's flow, and increased water supply and electrical power generation.[75] The court concluded there was little difference between the Nibutani dam and other projects that had been approved and this supported the project's approval.[76] However, the court observed that the private-public interest balancing test implicates the cultural rights of the Ainu, a minority group.[77]

The Expropriation Committee argued that, even if a minority's right to enjoy their culture existed, the Land Expropriation Law did not confer the Ainu special protections subject to the public and private balancing test.[78] In response, the court considered the scope and quality of legal interests held by Japan's ethnic minorities. The court used a two-prong analysis, where it considered both Japan's obligations under the ICCPR and the Japanese Constitution.[79] After concluding that ethnic minorities possess the right to culture, the court explored whether the Ainu met the definition of an indigenous minority.[80] Finally, the court analyzed the Nibutani dam project in light of both the public benefits and the harm inflicted on Ainu cultural rights.

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[73] Stewart, *supra* note 68, at 388 (quoting the Nibutani Dam Decision).
[74] Nibutani Dam Decision, *supra* note 55, at 296.
[75] *Id*. at 297.
[76] *Id*. at 297.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 299–302.
[80] *Id*. at 300.

The court concluded that Japan's international legal obligations required the recognition of ethnic minorities.[81] According to the court, the ICCPR was binding because the Diet ratified the treaty in 1979 and Article 98(2) of the Constitution provided that treaties have legal force.[82] The court observed that the preamble established the dignity and equal rights of all persons, including the "inherent dignity of the individual."[83] Article 2(1)[84] and Article 26[85] of the ICCPR prevent distinctions based on race, language, sex, and religion, among other statuses, and provide for equal protection.[86] In light of the ICCPR preamble and the aforementioned articles, the court applied the text of Article 27, which read in relevant part:

> [I]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[87]

The court noted that, based on the Government of Japan's own reports to the U.N. Human Rights Committee, it was undisputed that the Ainu are a minority protected by Article 27 of the ICCPR.[88] In addition to the ICCPR preamble and the protections of Article 2(1) and Article 26, Article 27 protects the rights of individuals belonging to a minority to practice their unique culture, language, and religion.[89] Accordingly, the government was obligated to "exercise due care" to prevent the passage of policies that harm minority culture.[90] Although the scope of minority protections may be balanced against other public needs as defined in Articles 12 and 13, the court concluded that individuals may seek to enforce minority rights under the ICCPR.[91]

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[81] *Id*. at 298–99.
[82] *Id*. at 298.
[83] *Id*. at 297.
[84] G.A. Res. 2200A (XXI), art. 2(1), International Covenant on Civil and Political Rights (Mar. 23, 1976).
[85] *Id*. art. 26.
[86] *Id.*
[87] *Id.* art. 27.
[88] Nibutani Dam Decision, *supra* note 55, at 298.
[89] *Id.*
[90] *Id.*
[91] *Id*.

The court analyzed Article 13 of the Japanese Constitution in a manner similar to the ICCPR.[92] The court wrote that Article 13 "demands the highest regard for the individual" in relation to the state.[93] Regarding diversity, Article 13 "demands meaningful, not superficial" respect for individuals and differences among people.[94] In the context of majority and minority relations, the court concluded that a minority's distinct culture is an "essential commodity" for self-survival.[95]

The constitutional guarantee of minority rights, therefore, fulfills basic tenets of democracy,[96] and Article 13 protects the rights of minorities to enjoy their culture.[97] Even if minority rights are subject to the public welfare clause, the court wrote that limitations on minority rights "must be kept to the narrowest degree necessary."[98] Accordingly, the protection of minority rights is afforded special consideration under the Constitution.[99]

The court concluded that the Ainu meet the definition of "indigenous people" required to receive protection under ICCPR Article 27. Interestingly, the court provided its own definition of indigenous people, defining minority populations as a social group that historically "existed outside of a state's rule" until their subjugation by the state.[100] In addition, the indigenous people must have had a culture and identity different from the majority and have "not since lost the unique culture and identity."[101] This definition is problematic because it implies that groups totally subsumed within the Japanese state would have no protections or redress, even if the loss of culture or identity resulted from majority domination. Given the government's once-held position that there are no minorities in Japan, the court's definition of indigenous peoples leaves open the possibility that a court could ignore minority claims if they conclude that a minority sufficiently lost its unique identity.

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92 *Id.; see also,* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] art. 13 (Japan).
93 Nibutani Dam Decision, *supra* note 55, at 298.
94 *Id.*
95 *Id.* at 299.
96 *Id.*
97 *Id.*
98 Nibutani Dam Decision, *supra* note 55, at 298.
99 *Id.*
100 *Id.* at 299–300.
101 *Id.* at 300.

Nevertheless, the court acknowledged that the Ainu inhabited Hokkaido before it was incorporated into the Japanese state.[102] The court then engaged in a historical analysis that was honest and reflective regarding the relationship between the *wajin*, the Japanese government, and the Ainu. The court concluded that the assimilationist policies imposed by the Meiji government caused the Ainu to lose their "ethnic culture, lifestyle, [as well as] traditional customs."[103] Prohibitions on Ainu fishing were especially devastating, and the court conceded that attempts to "stabilize" the lifestyle of Ainu failed.[104] As a result, the Ainu are an indigenous minority that are deserving of protections under the ICCPR and Japanese Constitution.[105]

Finally, the court considered the obligations of the government with respect to the Nibutani dam project. The court placed special importance upon Ainu religious ceremonies and customs held in the Nibutani area.[106] For example, the Nibutani area was home to burial grounds, worship places, and other sacred sites, and these were important to understanding the history and culture of Ainu people.[107] The court observed that the "essence" of Ainu culture depends on its close connection to nature.[108] Thus, the project's threat to Ainu interests was especially high.[109] Therefore, public officials must give "the greatest degree of consideration" to Ainu minority rights in applying the Land Expropriation Law.[110]

The court concluded that the Ministry of Construction failed to adequately consider the cultural interests of the Ainu during the project approval process.[111] The court noted that authorities knew that the planned development area would disproportionately impact the Ainu since most of the condemned land belonged to Ainu.[112] Nevertheless, the planning authorities did nothing to investigate the project's impact on Ainu culture. At the very least, the court stated that the planning authorities should have conducted the

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[102] *Id.* at 300–01.
[103] *Id.* at 302.
[104] *Id.* at 303.
[105] *Id.* at 305.
[106] *Id.* at 304–06.
[107] *Id*. at 305.
[108] *Id.*
[109] *Id*. at 306.
[110] *Id.*
[111] *Id.* at 307.
[112] *Id.* at 304.

"equivalent of a preliminary environmental assessment."[113] The court concluded that when the Ministry of Construction approved the project, it should have given the "highest regard" to balancing the public benefits of the project with the Ainu's cultural interests.[114] The authorization of the project—before any study investigating the Ainu's interests—therefore, was illegal under the Land Expropriation Law Article 20(3).[115]

However, even if the project was illegal, the court refused to reverse the expropriation order.[116] The court concluded that public policy concerns required rejecting the plaintiffs' complaints.[117] The court based its conclusion on the fact that the dam construction project was already near completion and that most of the cultural sites had already been destroyed.[118] In light of these facts and remedial measures by the Hokkaido government, the removal of the dam would cause even greater damage. In spite of this result, the court expressed hope that "from this time forward" there would be sufficient consideration to Ainu culture by the national and local governments.[119]

E. The Nibutani Dam Decision—Unmet Expectations?

The decision of the Sapporo District in the *Nibutani Dam Decision* is important because it marked the first time that a Japanese court recognized the rights of indigenous minorities based on the ICCPR and Article 13 of the Constitution. In addition, it was important that the court addressed the historical relationship between the Ainu and *wajin*—acknowledging *wajin* responsibility for the cultural and socio-economic deterioration of the Ainu. In doing so, the court repudiated the typical narrative that Japan is a homogenous nation with a single cultural, linguistic, and ethnic heritage. Taken to its logical extreme, the *Nibutani Dam Decision* has the potential to redefine the relationship between the Ainu, *wajin*, and the Japanese government.

Yet, for many Ainu, the value of the *Nibutani Dam Decision* has proved to be more symbolic than substantive. The decision by the Sapporo District

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[113] *Id.*
[114] *Id.* at 307.
[115] *Id.*
[116] *Id.* at 307–08.
[117] *Id.* at 307.
[118] *Id.*
[119] *Id.*

Court remains the only one of its kind. The predicted rush of Ainu-rights related cases never materialized. In fact, litigation filed by Ainu activists in the Sapporo District Court was rejected in 1999.[120] It is unclear whether the *Nibutani Dam Decision* played any role in the Diet's decision to officially recognize the Ainu. The resolution was passed in 2008, fifteen years after the *Nibutani Dam Decision*.[121] Critics also noted that the resolution's passage was timed with Japan's hosting of an international conference of indigenous peoples in Hokkaido.[122] Most importantly, most of the major socio-economic disparities between the Ainu and the general population remain.[123] The idea that Japan's judiciary—a notoriously conservative institution [124] —will continue to create legal pressure for change seems slim. Nevertheless, the door is open for change and greater recognition of minority Ainu rights. As the population of Japan's *wajin* continues to decline, those voices may become louder.

IV. MĀORI IN NEW ZEALAND

A. Historical Background

The Māori discovered New Zealand and named it *Aotearoa*, which translates into "long white cloud."[125] Like the Native Hawaiians, the Māori descended from Polynesian explorers who ventured from Central Polynesia across the Pacific Ocean.[126] According to Māori legend, a demigod named Māui discovered Aotearoa's north island after catching it with a magic fishing hook.[127] The first explorer to arrive in Aotearoa was named Kupe.[128] Kupe

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[120] McGrogan, *supra* note 42, at 359.

[121] Norimitsu Onishi, *Recognition for a People Who Faded as Japan Grew*, N.Y. TIMES (July 3, 2008), http://www.nytimes.com/2008/07/03/world/asia/03ainu.html.

[122] *Id.*

[123] *Id.*

[124] Koji Tonami, *Judicial Review in Japan and Its Problems*, 33 WASEDA BULL. COMP. L. 1, 3–4 (2012).

[125] James O. Oakely Wilson, *Aotearoa*, ENCYCLOPEDIA OF NEW ZEALAND (A.H. McClintock ed. 1966), https://teara.govt.nz/en/1966/aotearoa.

[126] Rebecca Lenihan, *Māori Arrival and Settlement*, OXFORD DICTIONARY PLUS HISTORY (2016) http://www.oxfordreference.com/view/10.1093/acref/9780191823497.001.0001/acref-9780191823497-e-110.

[127] *See* W.D. WESTERVELT, LEGENDS OF MAUI, A DEMI-GOD OF POLYNESIA (1910), *republished in* SACRED-TEXTS.COM (Nov. 1999), http://www.sacred-texts.com/pac/maui/maui05.htm (Interestingly, Māui is a cultural hero and demigod in Native Hawaiian mythology and his magic fish-hook is credited for creating the Hawaiian islands.).

[128] *The Arrival of Māori*, 100% PURE NEW ZEALAND, https://www.newzealand.com/us/feature/early-settlement/ (last visited Oct. 27, 2018).

used the stars to navigate across the Pacific on his *waka hourua* (voyaging canoe). Kupe arrived at Hokianga Harbor in Northland, around one thousand years ago. Western historians still debate when the Māori arrived in New Zealand but scientific and archaeological evidence suggest that first permanent settlement was established around 1300 A.D.[129]

The Māori developed into organized, autonomous communities that were connected through political alliances and kinship.[130] The largest unit in Māori society was the *iwi*, which derived from common ancestry and did not include a permanent leader.[131] Instead, decisions resulted from negotiations among chiefs and family leaders.[132] Disputes were resolved through custom according to *tikanga Māori*,[133] which loosely translates into the correct or ethical way of doing things according to Māori culture.[134]

The first Europeans "discovered" New Zealand in 1642 during Dutch explorer Abel Tasman's expedition.[135] However, Tasman departed before landing after his men engaged in a skirmish with the Māori.[136] James Cook was the next European explorer to interact with the Māori in 1769.[137] European contact accelerated as the whaling and sealing trade grew and required port settlements.[138] By the 1830s, the British coveted a colony to protect their trade interests and preempt French interest in Aotearoa.[139]

The British obtained sovereignty over New Zealand following the signing of a treaty with Māori chiefs. In 1840, Great Britain and 500 Māori chiefs signed the Treaty of Waitangi, which purported to make a political

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[129] Geoff Irwin & Carl Walrond, *When Was New Zealand First Settled?*, TE ARA - THE ENCYCLOPEDIA OF NEW ZEALAND (May 20, 2006), http://www.TeAra.govt.nz/en/when-was-new-zealand-first-settled/.

[130] *Traditional Māori Society*, RUAPEKAPEKA, http://www.ruapekapeka.co.nz/read/traditional-māori-society (last visited Oct. 27, 2018)

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *A Brief History*, NEW ZEALAND NOW (Aug. 30, 2016), https://www.newzealandnow.govt.nz/living-in-nz/history-government/a-brief-history.

[136] Merata Kawharu, *Cook, Tupaia and Māori*, BBC HISTORY (Feb. 17, 2011), http://www.bbc.co.uk/history/british/empire_seapower/cook_tupaia_Māori_01.shtml.

[137] *Id*.

[138] *A Brief History*, *supra* note 135.

[139] *Id.*

compact between the British and the Māori.[140] However, significant controversy remains over differences between the English and Māori text. Different interpretations of the Māori and English translations resulted in the belief that the Māori did not intentionally cede their sovereignty to the Crown. The English version declared that the Māori ceded sovereignty but retained "full exclusive and undisturbed possession" of their land, estates, property, forests, and fisheries.[141] However, the Māori version translated the word "sovereignty" as *kawatanga*, which means governance.[142] This led the Māori signatories to believe that the Crown would have authority over British settlers alone and the Māori chiefs would retain *tino rangatiratanga* (sovereignty) over their *taonga* (treasures), including control over property and people.[143]

Disputes over interpretations of the Treaty of Waitangi resulted in conflict between Māori and Europeans as more Europeans arrived and sought Māori land. In 1859, a minor chief agreed to sell land to the Crown in Taraniki, a mountainous region on the north island.[144] When a higher ranked chief disputed the sale, war broke out between the British settlers and Māori.[145] Although the Māori achieved some military success, they were outnumbered by British soldiers 18,000 to 4,000.[146] Conflict persisted until 1872 when the last Māori chiefs surrendered.[147] The Land Wars resulted in a new phase of land redistribution that was arguably as destructive as the wars themselves.[148] The British targeted the land of Māori that had fought and lost. After passage of the New Zealand Settlements Acts 1863, the Crown confiscated around one million hectares.[149]

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[140] *Treaty of Waitangi*, 100% PURE NEW ZEALAND, https://www.newzealand.com/us/feature/treaty-of-waitangi/ (last visited Oct. 27, 2018).

[141] *The Treaty in Brief*, NEW ZEALAND HISTORY (May 23, 2018), https://nzhistory.govt.nz/politics/treaty/treaty-faqs#WhatistheTreatyofWaitangi.

[142] *Id.*

[143] *Id.*

[144] *War in Taranaki 1860-63*, NEW ZEALAND HISTORY (Aug. 5, 2014) https://nzhistory.govt.nz/war/taranaki-wars.

[145] *Id.*

[146] Tom O'Connor, *The Land Wars Were a Civil War*, WAIKATO TIMES (Aug. 27, 2016), https://www.stuff.co.nz/waikato-times/opinion/83629039/the-land-wars-were-a-civil-war.

[147] Danny Keenan, *New Zealand Wars*, TE ARA - THE ENCYCLOPEDIA OF NEW ZEALAND (Feb. 8, 2017), http://www.TeAra.govt.nz/en/new-zealand-wars/page-11.

[148] *Id.*

[149] *Id.*

The Native Land Court, the predecessor to the Māori Land Court, was established in 1865.[150] The Court allowed Māori customary land to be re-classified as freehold land—the most common form of land ownership in New Zealand. The reclassification made it easier to transfer land from Māori to European settlers because encumbrances on the land were removed and the government could control the price and size of parcels sold.[151] Even at the time, the Native Land Court's role in land redistribution was criticized. In 1890, an Auckland lawyer named William Rees led an investigation into the validity of Māori land sales. The findings concluded that the Native Land Court was responsible for "the difficulties, the frauds, and the suffering of Māori landowners." [152] Although several other investigations and commissions, including one headed by a Supreme Court justice resulted in the Crown paying annual reparation payments to Māori landowners, other statutes were used to justify the transfer of Māori land. In particular, public works acts dating as far back as the 1880s provided the Crown with the power to confiscate land in the name of public infrastructure projects and Māori land was often disproportionally targeted.[153]

The Waitangi Tribunal set up a clear institution for Māori claims for breach of the Treaty. The Waitangi Tribunal is a standing quasi-judicial institution that possesses exclusive jurisdiction to interpret the "meaning and effect of the Treaty of Waitangi."[154] The Tribunal's authority extends to identifying and responding to Treaty-related issues, including the power to review acts or omissions by the Crown for compliance with the Treaty's principles.[155] However, the Tribunal's enforcement powers are limited. In most cases, the Tribunal can only give recommendations. The notable

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[150] Christopher C. Hilliard, *The Native Land Court: Making Property in Nineteenth-Century New Zealand*, *in* NATIVE CLAIMS: INDIGENOUS LAW AGAINST EMPIRE, 1500–1920 (Oxford Univ. Press 2011), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199794850.001.0001/acprof-9780199794850-chapter-9.

[151] Alice Eager, Enough is Enough: Achieving the Protection of Māori Freehold Land from Public Works Acquisition 6–8 (Oct. 2015) (unpublished L.L.B. thesis, University of Otago) (on file with University of Otago), https://www.otago.ac.nz/law/research/journals/otago451208.pdf.

[152] Mark Derby, *Ngā Take Māori – Government Policy and Māori*, TE ARA - THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), http://www.TeAra.govt.nz/en/nga-take-Māori-government-policy-and-Māori/page-3).

[153] Eager, *supra* note 151, at 8–9.

[154] Treaty of Waitangi Act 1975, sec. 5, Oct. 10, 1975 (N.Z).

[155] Edward Willis, *Legal Recognition of Rights Derived from the Treaty of Waitangi*, 8 N.Z. J. PUB. & INT'L L. 217, 221–22 (2010).

exception relates to Māori land. The Tribunal can direct State Enterprise and Crown Forest lands to be returned to the Māori.[156]

Māori custom is also an important source of law in New Zealand. Along with the passage of the Treaty of Waitangi Act, Māori customs have played an increasingly important role in New Zealand's legal development. Known as *tikanga Māori*, the individual Māori tribes had firmly established rules of governance, social structures, and accepted norms and customs relating to trade and land rights, protecting the environment, and conflict resolution.[157] New Zealand's courts now recognize that applying Treaty principles requires consideration of *tikanga Māori*.[158] The former chief judge of the Māori Land Use Court cites the Treaty for the proposition that New Zealand law has "its source in two streams"—both English law and *tikanga Māori*.[159] Under New Zealand common law, Māori custom is also applicable in cases where there is no controlling treaty or statutory authority in cases involving aboriginal rights and aboriginal title. Under these doctrines, customary laws or practices that are continuous must be protected by courts if they have not been extinguished by statute. This has included fishing, hunting, and gathering rights.[160] New Zealand courts hold that "customs and practices which include spiritual elements are cognizable in a Court of law provided they are properly established[.]"[161]

The Māori Land Court is an important institution adjudicating disputes related to Māori land and title rights. The court hears matters relating to the status, ownership, management, and use of Māori land.[162] The Māori Land Court holds a register of all Māori land and has the power to accept applications to transfer Māori land ownership, establish Māori land trusts or incorporations, or recommend the establishment of a Māori reservation.[163]

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[156] C. J. J V Williams, Reparations and the Waitangi Tribunal to "Moving Forward Conference", Speech at Australian Human Rights Commission Moving Forward Conference (Aug. 15–16, 2001), https://www.humanrights.gov.au/reparations-and-waitangi-tribunal.

[157] Kelly Buchanan, *Legal Research Guide: Māori Customary Law*, THE LAW LIBRARY OF CONGRESS (July 2012), https://www.loc.gov/law/help/Māori-customary-law.php.

[158] *Id.*

[159] *Id.*

[160] *Multiculturalism Policies in Contemporary Democracies: New Zealand*, QUEEN'S UNIVERSITY, http://www.queensu.ca/mcp/indigenous-peoples/evidence/new-zealand (last visited Nov. 18, 2018).

[161] *Id.*

[162] *See Māori Land and the Land Court*, CITIZENS ADVICE BUREAU (Aug. 23, 2017), http://www.cab.org.nz/vat/hle/ml/Pages/MāoriLandCourt.aspx.

[163] *Id.*

Although the Māori Land Court performs an important function, it has been severely criticized. In the late 1800s and early 1900s, the court played an important role in the loss of Māori control of land by registering and alienating Māori land. However, today the Māori Land Court aims to promote reconciliation and the protection Māori land claims.[164] The court is mandated by statute to "promote and assist in retention of Māori land . . . in the hands of the owners; and the effective use, management, and development . . . of Māori land or General land owned by Māori."[165]

Today, Māori, make up almost fifteen percent of the national population.[166] They are younger and more urban. Eighty-seven percent live on the northern island with a quarter in the Auckland metropolitan area.[167] The median age of Māori is twenty-two years old—compared to the national population median of thirty-three. [168] Māori are more likely to be underemployed than the general population.[169] Māori land makes up less than six percent of New Zealand's land area. Māori land is also mostly concentrated on the northern island (where most *iwi* resided before European contact).[170] Nevertheless, a large portion of Māori land is regarded as poorer quality because the most fertile land was confiscated by British settlers. Māori land is also less likely to have productive potential because significant areas are in forests, coasts, or areas bordering rivers or lakes with more local land controls.[171]

B. Grace v. New Zealand Transport Agency

The Māori Land Court decided *Grace v. New Zealand Transport Agency* in March 2014, affirming the conversion of Māori freehold land into a reservation and imposed stricter limitations on the Crown's ability to acquire

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[164] Daniel J. Pannett, *The Māori Land Court: A Preference for Deference?,* 2 N. Z. L. STUDENTS J. 191, 191 (2009).

[165] Te Ture Whenua Māori Act 1993, sec. 17(1)(a)-(b) (N.Z.).

[166] Tanira Kingi, *Māori Landownership and Land Management in New Zealand, in Reconciling Customary Ownership and Development, in* MAKING LAND WORK, VOLUME 2: CASE STUDIES ON CUSTOMARY LAND AND DEVELOPMENT IN THE PACIFIC 139, 132 (2008).

[167] *Id*.

[168] *Id*.

[169] *Id*.

[170] *Id*.

[171] *Id*.

land to advance public works.[172] In doing so, the court restricted the Crown's ability to convert land under the Public Works Act. While the decision alone cannot redress long-standing inequities, *Grace* represents an important step for the Māori Land Court in restricting one of the remaining ways that the Crown could acquire Māori land. Moreover, because the case involved a great deal of publicity, it has the potential to change the national conversation in a way beyond its strict legal application.

Patricia Grace is an acclaimed Māori author whose book, *Potiki*, won a national literary award in 1987.[173] In the book, the Māori protagonist and her husband oppose the development of a resort along an unspoiled coastline.[174] In a strange twist of fate, real life mirrored Grace's fictional work. Grace and her case captured national headlines with another tale of a small Māori community seeking to prevent development. In 2010, the New Zealand Transport Agency (NZTA) began construction of an expressway from Wellington's northern suburbs to Peka Peka, a small seaside town along the Kapiti coast north of the capital.[175] The original plan proposed acquiring land that had belonged to Grace's ancestors along the Kapiti coast. As a result, Grace and the local community protested to prevent the NZTA's acquisition of Māori land.

Grace commenced her litigation in 2013 by petitioning the Māori Land Court to set aside Māori freehold land as a reservation.[176] Grace was the sole owner of the land and direct descendant of the original owner.[177] Grace argued that the land was also one of the last undeveloped blocks on the Kapiti Coast and she had spent years seeking its preservation.[178] Soon thereafter, a second case was filed in New Zealand's Environmental Court.[179] As a result, the controversy proceeded in two stages: (1) the Māori Land Court ruled on the

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[172] *Māori Reservations Cannot Be Acquired for Public Works*, SIMPSON GRIERSON (May 19, 2014), https://www.simpsongrierson.com/articles/2014/māori-reservations-cannot-be-acquired-for-public-works.

[173] Eager, *supra* note 151, at 1–2.

[174] Patricia Grace, POTIKI (Penguin Books 1986).

[175] *Mackays to Peka Peka*, NEW ZEALAND TRANSPORT AGENCY (2018), http://www.nzta.govt.nz/projects/wellington-northern-corridor/mackays-to-peka-peka/.

[176] Eager, *supra* note 151, at 25.

[177] *Id.*

[178] *Id.*

[179] Anna Brenstrum, *Not Giving Ground: Patricia Grace's Successful Opposition to Compulsory Acquisition of Her Ancestral Land*, MĀORI L. REV. (Feb. 2015), http://maorilawreview.co.nz/2015/02/sir-edward-taihakurei-durie-student-essay-competition-2014-not-giving-ground-patricia-graces-successful-opposition-to-compulsory-acquisition-of-her-ancestral-land/.

parcel's status as a Māori reservation and (2) the Environmental Court determined whether the Public Works Act allowed the NZTA to acquire the land.[180] In both instances, the courts sided with Grace against the NZTA.

In order to designate Grace's land as a Māori reservation, the Māori Land court was required to consider whether her application fulfilled the statutory requirements of the Māori Land Act 1993.[181] The statute requires the proponent of reservation status to show that the parcel meets one of two conditions. The parcel can be a place of special "cultural, historic, or scenic interest" or *wahi tapau*, which means "a place of special significance according to *tikanga Māori*." [182] The court was persuaded by Grace's arguments on both issues, noting three important factors. First, the absence of Māori land in the Kapiti area favored designating Grace's land a reservation because it heightened the need to protect Māori interests.[183] Second, because Grace's ancestors were the original owners, the court considered the likelihood that there had been burials on the land.[184] Grace testified that she believed there were burials and her testimony was strengthened by the discovery of burials nearby.[185] Finally, the court considered the association of the land with key historical and cultural events. Here, the court took a broad view of the meaning and importance of historical and cultural events.

The NZTA had argued that before land could be designated a reservation for historical reasons, there should be tangible physical evidence including archaeological remains to prove its historical importance.[186] The court rejected this argument, holding that cultural and historical importance includes evidence of spiritual connections with the land.[187] The court concluded that to do otherwise would ignore Māori culture and customs.[188] As a result, the court found Grace's testimony to be persuasive regarding both

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[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Grace v. New Zealand Transport Agency* (2014) 317 Aotea MB 268 at 296 (N.Z.).
[184] *Id.* at 295–96.
[185] *Id.* at 275–76.
[186] *Id.* at 296.
[187] *Id.*
[188] *Id.*

her ancestral connection with the land and her desire to protect it in a culturally appropriate way.[189]

The court's broad approach to designating land with Māori reservation status may have important consequences. Once a parcel is designated a reservation, the Court held that it cannot be alienated, including by the Crown.[190] As a result, the designation of Māori land as a reservation has the potential to be a powerful restriction on future uses and transfers. Moreover, the potentially broad list of criteria means that more parcels could be designated as reservations in the future.

The Environmental Court affirmed the ruling of Māori Land Court by holding that land designated as a Māori reservation could not be alienated or sold to the Crown.[191] The Environmental Court also contemplated the acquisition of the Māori land based on the Public Works Act. The Court held that acquisition of land under the Act must be "fair, sound, and reasonably necessary" to achieve the government's objectives.[192] The Court held that the NZTA failed to meet this standard in proposing the expressway. Instead, the Court wrote that Section 24(7)(b) required adequate consideration of alternative sites, routes, or methods.[193] The Court concluded that the NZTA failed to adequately consider alternatives to building the expressway on Grace's land.[194] In light of the evidence favoring the land's historical and cultural significance, the Court held that it was not fair or reasonably necessary to compel the acquisition of land where alternative routes were available.[195] As a result, the Court found that the Crown's attempted acquisition was unnecessary and should not proceed further.[196] The Court's ruling was a victory for Māori land rights, particularly given the public attention that the case received. Nevertheless, the case highlights the need for reforming the Public Works Act with legislation providing for stronger Māori

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[189] *Id.* at 297.

[190] *Id*. at 294

[191] Jacinta Ruru, *Public Works – Proposed Taking Not Fair, Sound, or Reasonably Necessary*, MĀORI L. REV. (Sept. 2017), http://Māorilawreview.co.nz/2014/09/public-works-proposed-taking-not-fair-sound-or-reasonably-necessary-grace/.

[192] *Grace v. Minister for Land Information* [2014] NZEnvC 82 (N.Z.).

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

protections since the Court's opinion suggested that had the NZTA given more adequate consideration of alternative routes, it may have been legal.

V. NATIVE HAWAIIANS IN THE STATE OF HAWAIʻI

A. Historical Background

Native Hawaiians are the indigenous people of Hawaiʻi, who settled the Hawaiian islands, founded the Hawaiian nation, and exercised sovereignty over the islands.[197] The earliest Hawaiian colonies were established in 300 A.D. by Polynesian explorers.[198] Over centuries of isolation, the Native Hawaiians developed their own language, culture, system of governance, religion, and social system.[199] Even today, the landscape of Hawaiʻi bears the imprint of a sophisticated social system ordered around the cultivation of the land and ocean. As a result, the land, or *ʻĀina* in Hawaiian, plays a significant role in Hawaiian religious, cultural, and ceremonial activities.[200]

The Kingdom of Hawaiʻi originated in 1795 after the unification of the Hawaiian Islands under King Kamehameha I.[201] The Kingdom exercised sovereignty over the islands and conducted foreign policy with other nation states. The United States was the first foreign power that the Kingdom entered into a treaty with in 1826.[202] The original treaty benefited American whalers and traders while providing some assurances that the Kingdom could remain neutral in the event that the United States and Britain—then one of the Kingdom's closest diplomatic partners—went to war.[203] Moreover, it also provided Americans with standing to sue Hawaiian subjects and

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[197] Laurie D. McCubbin & Anthony Marsella, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 374, 374–87 (2009).

[198] DAVIANNA PŌMAIKAʻI MCGREGOR & MELODY KAPILIALOHA MACKENZIE, HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAIʻI 21–22 (2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/Mo%CA%BBolelo%20Ea%20O%20N%C4%81%20Hawai%CA%BBi(8-23-15).pdf (prepared for Office of Hawaiian Affairs).

[199] Chad Blair, *Ancient Hawaii Was a Cradle of Civilization, Says New Book*, HUFFINGTON POST, (Dec. 16, 2013), https://www.huffingtonpost.com/2013/12/16/ancient-hawaiian-state-book_n_4455960.html.

[200] Stephen T. Boggs, The Meaning of ʻAina in Hawaiian Tradition (June 1977) (unpublished scholarly paper, University of Hawaii) (on file with ScholarSpace, University of Hawaii), https://scholarspace.manoa.hawaii.edu/handle/10125/34232.

[201] *Kamehameha Unites the Hawaiian Islands*, HAWAIIANHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=272 (last visited Oct. 27, 2018).

[202] Robert H. Stauffer, *The Hawai'i-United States Treaty of 1826*, 17 HAWAIIAN J. HIST. 40, 57(1983).

[203] *Id*.

foreshadowed future demands for the extraterritorial application of U.S. law.[204] Nevertheless, the United States federal government had not dealt with the Kingdom in the same government-to-government fashion compared to North American tribes based in Alaska and the continental states.[205]

American missionaries from New England began arriving in the 1820s.[206] Their arrival contributed to a gradual deterioration of Native Hawaiian traditions, culture, and land rights. Much like the Ainu, traditional dress, dance, and other symbols were either banned or discouraged at the behest of the missionaries.[207] Small pox and measles reduced the Native Hawaiian population by seventy-five percent from the time James Cook arrived in 1778 to 1853.[208] As descendants of the American missionaries became wealthy from the sugar trade, their political influence became the dominating force in Hawaiian politics.[209] In 1848, Western advisors to King Kamehameha III persuaded him to adopt land reform known as the Great Mahele, transitioning the Kingdom to a Western-style fee simple system with no restrictions on foreign ownership.[210] The policy helped entrench the power and wealth of non-Native interests. After the reform, non-Native Hawaiians owned over sixty percent of fee simple lands.[211]

By 1893, conditions were ripe to overthrow the constitutional monarchy of Hawai‘i.[212] With Marines landing in Honolulu, Queen Lili‘uokalani yielded her authority to a provisional government established by descendants of the original American missionaries.[213] Hawai‘i was formally

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[204] *Id*.

[205] Anderson, *supra* note 7, at 875.

[206] Joy Schulz, Empire of the Young: Missionary Children in Hawai'i and the Birth of U.S. Colonialism in the Pacific, 1820–1898 (May 2011) (unpublished Ph.D. dissertation, University of Nebraska) (on file with History Department DigitalCommons, University of Nebraska), http://digitalcommons.unl.edu/historydiss/35.

[207] Paul F. Nahoa Lucas, *E Ola Mau Kakou I Ka 'Olelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAWAIIAN J. HIS. 1, 8–9 (2000), https://evols.library.manoa.hawaii.edu/bitstream/10524/431/2/JL34007.pdf.

[208] Malia Boyd, *The Other Side of Paradise: 'Lost Kingdom,' a History of Hawaii,* N.Y. TIMES (Mar. 9, 2012), http://www.nytimes.com/2012/03/11/books/review/lost-kingdom-a-history-of-hawaii.html.

[209] John McDermott, *Big Five Had DeepRroots in Hawaii Business and Politics*, PAC. BUS. NEWS (July 31, 2008), https://www.bizjournals.com/pacific/stories/2008/08/04/story15.html.

[210] Anderson, *supra* note 7, at 866.

[211] *Id.*

[212] Boyd, *supra* note 208.

[213] *Id*.

annexed five years later and was admitted into the United States in 1959.[214] In 1978, Hawai'i adopted its State Constitution. During the seventies, Hawai'i experienced a wave of activism supporting greater Native Hawaiian rights and protections.[215] The Constitution included protections of Native Hawaiian culture and land rights.[216] Moreover, the Office of Hawaiian Affairs (OHA) was established.[217] OHA was a semi-autonomous department to manage lands once owned by the Hawaiian Kingdom.[218]

In 1993, President Clinton signed a joint-resolution apologizing to the Native Hawaiian people for the United States' role in the overthrow and recognizing them as "indigenous people."[219] However, the resolution stopped short at granting Native Hawaiians the same federal recognition as Native Americans and Alaskans.[220] By 2000, Native Hawaiians made up twenty percent of Hawai'i's population.[221] The socio-economic statistics indicate disparity between Native Hawaiians and Hawai'i's Chinese, Japanese, and Caucasian populations.[222] Native Hawaiians are disproportionately represented in the criminal justice system and suffer higher rates of homelessness.[223]

Hawai'i's attempts at reconciliation have at times been frustrated by U.S. federal courts. For example, in *Rice v. Cayetano*, the U.S. Supreme Court held that Hawai'i's Constitutional provision that restricts voting in OHA elections to persons of Native Hawaiian descent violated the Fifteenth Amendment.[224] The challenge was brought by a resident of European descent and the Court accepted his argument that it was an unconstitutional race-based

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[214] *See* The Learning Network, *Jan. 17, 1893 – Hawaiian Monarchy Overthrown by America-Backed Businessmen*, N.Y. TIMES BLOG (Jan. 17, 2017 4:01AM); *see also* David Stebenne, *The Political Dealmaking That Finally Brought Hawaii Statehood*, SMITHSONIAN.COM (June 15, 2017), https://www.smithsonianmag.com/history/what-puerto-rico-learn-hawaii-180963690/.

[215] Ruby Fa'agau, *Hawaiian Cultural Rejuvenation*, 7 HOHONU 34, 35 (2009).

[216] D. Kapua'ala Sproat, *Avoiding Trouble in Paradise: Understanding Hawaii's Law and Indigenous Culture*, BUS. L. TODAY (Nov./Dec. 2008), https://apps.americanbar.org/buslaw/blt/2008-11-12/sproat.shtml.

[217] Fa'agau, *supra* note 215, at 36.

[218] *Id.*

[219] McGregor & MacKenzie, *supra* note 198, at 56.

[220] The Associated Press, *Movement for Sovereignty Is Growing in Hawaii*, N.Y. TIMES (June 5, 1994), https://www.nytimes.com/1994/06/05/us/movement-for-sovereignty-is-growing-in-hawaii.html.

[221] McGregor & MacKenzie, *supra* note 198, at 10.

[222] *Id.* at 11–12.

[223] *Id.*

[224] Rice v. Cayetano, 528 U.S. 495 (2000).

voting classification.[225] Nevertheless, while the State of Hawai‘i’s attempts at redressing historical injustices have been challenged in federal courts, the United States’ federalist system protects the State’s broad power to protect Native Hawaiian rights in areas that do not conflict with federal law and the State Constitution has played an important role in institutionalizing Native Hawaiian rights.

B. Background: Mauna Kea and the Thirty Meter Telescope

In recent years, the conflict over the fate of Mauna Kea has defined the struggle between the State’s balancing of Native Hawaiian land rights and other private and public interests. The Hawai‘i Supreme Court unanimously vacated the permit for the construction of the Thirty Meter Telescope (TMT) planned atop Mauna Kea in 2015.[226] The Court’s decision reflects Hawai‘i's unique State Constitution, a greater respect for procedural due process rights than Japan, and—as a result—an administrative process that is more responsive to the indigenous rights of Native Hawaiians to practice their culture.

Located on the east side of the island of Hawai‘i, Mauna Kea rises to 13,796 feet above sea level and is one of the tallest mountains in the world measured from the seafloor.[227] Astronomers regard the mountain’s summit as one of the best places in the world for observing distant solar systems and one of the few places in the world that is dark, dry, and calm enough for a billion dollar telescope.[228] There are already thirteen telescopes on Mauna Kea, involving NASA and international partners such as Japan.[229] Nevertheless, the TMT project is the biggest, most powerful telescope in the world—stronger than the Hubble Telescope—at a cost of $1.4 billion.[230] The telescope is thirty meters in diameter with attached instruments to record data and an enclosed dome.[231] The TMT project involves building an astronomy observatory and

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[225] *Id.*

[226] Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 63 P.3d 224 (Haw. 2015).

[227] Remy Melina, *Which Mountain is the Tallest in the World*, LIVE SCI. (May 17, 2010), http://www.livescience.com/32594-which-mountain-is-the-tallest-in-the-world.html.

[228] Dennis Overbye, *Under Hawaii’s Starriest Skies, A Fight Over Sacred Ground*, N.Y. TIMES, (Oct. 3, 2016), https://www.nytimes.com/2016/10/04/science/hawaii-thirty-meter-telescope-mauna-kea.html.

[229] *Id.*

[230] *Id.*

[231] *Mauna Kea*, 63 P.3d at 229.

construction of ancillary facilities for the astronomers and access roads on five-acres of Mauna Kea's upper slopes.[232]

The land on Mauna Kea once belonged to the Kingdom of Hawai'i and is classified as "ceded lands."[233] The State of Hawai'i administers them for the benefit of Native Hawaiians. As a site of ancient Hawaiian burials and a place of worship, Native Hawaiians regard the mountain as sacred. The upper slopes are also classified by the State as a "conservation district"—requiring special approval from the State including permits for construction.[234]

C. The Hawai'i Supreme Court's TMT Decision

In *Mauna Kea Anaina Hou v. Board of Land and Natural Resources* (hereinafter referred to as "the *TMT Decision*"), the plaintiffs challenged the State's issuance of a construction permit before the occurrence of public hearings, which would have allowed Native Hawaiian viewpoints to be heard.

The University of Hawai'i at Hilo (UHH) submitted an application to the Board of Land and Natural Resources (BLNR) for construction of the TMT telescope.[235] The BNLR held a series of public hearings.[236] Native Hawaiian opponents of the construction stated that the proposed site was on sacred land and that construction would be a desecration of Native Hawaiian culture.[237] The hearings drew high attendance and speakers were only allowed to speak for five minutes each.[238] At a meeting in February 2011, Native Hawaiian opponents requested a contested case hearing before the BLNR reached its final decision.[239]

Under Hawai'i law, a contested case hearing is "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined."[240] The benefits of a contested case include the fact that parties may be represented by counsel and that they have the right to present

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[232] Overbye, *supra* note 228.
[233] *Id*.
[234] *Mauna Kea*, 63 P.3d at 229.
[235] *Id*.
[236] *Id*. at 229–30.
[237] *Id*. at 228.
[238] *Id*. at 229–30.
[239] *Id*. at 230–31.
[240] HAW. REV. STAT. § 91-1(5) (approved 2004).

evidence, including calling witnesses sworn under oath and cross-examining opposing witnesses.[241] Contested case hearings are mandatory if the party seeking a contested hearing has a property interest as defined in the State Constitution.[242]

In that same February 2011 meeting, BLNR granted the opponent's request for a contested hearing *and* approved the permit requested by TMT.[243] The BLNR held the hearing in August 2011.[244] At the hearing, opponents raised the argument that their due process rights were violated by its prior approval of the construction permit.[245] After the hearing, the officer approved the BLNR's decision to grant the permit. The plaintiffs appealed to the State circuit court, which affirmed BLNR's decision to grant the TMT permit before the contested case hearing.[246] The circuit court reasoned that the BLNR's grant was "preliminary" and depended on a "final grant after a contested case hearing."[247] On appeal, the plaintiffs requested and received a transfer to the Hawai'i Supreme Court.[248]

The Hawai'i Supreme Court held that the Native Hawaiian opponents of TMT were entitled to a contested case hearing before the BLNR issued the construction permit.[249] The BLNR violated the due process rights of the plaintiffs by issuing the permit before the hearings.[250] As a result, the permit approved by the BLNR was ruled to be invalid.[251]

The Hawai'i Supreme Court found that the Native Hawaiian plaintiffs were entitled to a contested case hearing as a matter of constitutional due process.[252] The Native Hawaiians were entitled to exercise their rights and

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[241] Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 63 P.3d 224 (Haw. 2015).
[242] *Id.* at 238–39.
[243] *Id.* at 231.
[244] *Id.* at 233.
[245] *Id.* at 234.
[246] *Id.* at 236.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 239.
[250] *Id.*
[251] *Id.* at 247.
[252] *Id.* at 239.

practice their culture.[253] The Hawai‘i Supreme Court noted the explicit protections of Article XII, Section 7 of the Hawai‘i Constitution, which states:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a[254] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[255]

Throughout the dispute over TMT, the Native Hawaiian plaintiffs alleged that TMT's construction would have significant negative effects on Native Hawaiian cultural practices on Mauna Kea.[256] As a result of the Hawai‘i Constitution, the Hawai‘i Supreme Court concluded that Native Hawaiian interests in the dispute were "substantial" and a contested case hearing was "required by law" in light of the risk to Native Hawaiian cultural rights.[257] The Hawai‘i Supreme Court then considered the sequencing of the contested case hearing and the BLNR's approval of the construction permit.

The Hawai‘i Supreme Court concluded that contested case hearings must occur before any approval for the construction permits.[258] Article I, Section 5 of the Hawai‘i Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law."[259] The court reasoned that the basic elements of due process include "the opportunity to be heard at a meaningful time and in a meaningful manner."[260] The court concluded that due process rights extend to administrative hearings and that giving plaintiffs "a day in court" alone did not guarantee that a process is fair.[261] Due process requires unbiased hearings and forbids decision-makers

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[253] *Id.* at 238.

[254] Ahupua‘a refers to the traditional Hawaiian land unit, which runs from the mountainous uplands to the sea. *See* Dieter Mueller-Dombois, *The Hawaiian Ahupua‘a Land Use System: Its Biological Resource Zones and the Challenge for Silvicultural Restoration*, 3 BISHOP MUSEUM BULL. CULTURAL & ENVTL. STUD. 23 (2007).

[255] HAW. REV. STAT. ANN. § 7 (West, 2018).

[256] *Mauna Kea*, 63 P.3d at 228.

[257] *Id.* at 238.

[258] *Id.* at 239.

[259] HAW. REV. STAT. ANN. § 5 (West, 2018).

[260] *Mauna Kea*, 63 P.3d at 237.

[261] *Id.*

from "prejudging matters and the appearance of prejudging matters."[262]

Applying these rules to the TMT dispute, the Hawai'i Supreme Court found that the BLNR improperly awarded the TMT permit before the actual contested hearing.[263] The Hawai'i Supreme Court wrote that the entire purpose of the contested case hearing is to ensure that the factual record is fully developed and subject to adversarial testing before decisions are made.[264] The Supreme Court rejected the argument that the permit was "preliminary" and dependent on final approval based on the contested case hearing.[265] After the February 2011 hearing, the Hawai'i Supreme Court noted that the BLNR sent numerous letters to UHH describing the TMT project as "approved" and referred to the permit as "the permit" rather than as "a preliminary permit."[266] Furthermore, the beginning of construction was not "conditioned" on the contested hearing but on pre-construction requirements and mitigation measures.[267] As a result, the original permit was a decision on the merits of TMT's application and supported the Native Hawaiian appellant's argument that the BLNR had pre-judged the outcome before the contested case hearing.[268]

The Hawai'i Supreme Court unanimously found that the TMT permit was invalid based on the right of Native Hawaiians to raise claims asserting a cultural and property interest in Mauna Kea. This framework—with an emphasis on procedural due process rights—leaves open the possibility that the permit could be subsequently approved. As a result, although TMT and UHH were halted from construction related to the project, the Hawai'i Supreme Court could likely hear the case again if the BLNR approves the permit after a contested case hearing.[269]

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[262] *Id.*
[263] *Id.* at 239.
[264] *Id.* at 228, 239.
[265] *Id.* at 239–41.
[266] *Id.*
[267] *Id.* at 240.
[268] *Id.* at 241.
[269] This article was written before the Hawaii Supreme Court's most recent decision on the matter on August 8, 2018. *See* Flores v. Board of Land and Natural Resources, 424 P.3d 469 (Haw. 2018). However, the final status of the TMT project remains unresolved. In 2017, the BLNR approved a construction permit allowing construction. The BLNR's decision was appealed to the Supreme Court on grounds that another contested case hearing was required before the BLNR could consent to sublease portions of State land to allow for construction of TMT. *Id.* at 471. The Court held that a contested case hearing was not required before the BLNR could approve the sub-lease and that the specific appellant had participated in numerous

Nevertheless, the concurrence of Associate Justice Pollack—which was also signed by Associate Justice Wilson—suggests that Hawai‘i courts could go even further in future disputes and reject the permit outright. According to Justice Pollack, Article XII, Section 7 of the State Constitution creates an affirmative obligation on the government to engage in "heightened inquiry" when Native Hawaiian individuals assert that traditional customs will be adversely impacted by a project requiring BLNR approval.[270] In addition, Justice Pollack argued that Hawai‘i's public-trust doctrine applies based on Hawai‘i common law and Article XI, Section 1 of the State Constitution.[271] According to Justice Pollack, Hawai‘i case law establishes that one purpose of the public-trust doctrine is to protect Native Hawaiian culture.[272] Thus, since the land in question was public land, the BLNR had a duty to ensure that the proposed use by TMT satisfied all requirement of the public trust doctrine, including the protection of Native Hawaiian culture.[273] Accordingly, if the BLNR could not reconcile the project's aims with protecting Native Hawaiian culture, Justice Pollack seems to be hinting that the courts could reject the permits based on the merits as well as procedural grounds.

VI. COMPARISON

The *Nibutani Dam Decision*, *Grace* cases, and the *TMT Decision* each reflect different constitutional designs and legal systems. In addition, the decisions produced different results for the Ainu and Native Hawaiian plaintiffs. Both the Sapporo District Court and the Hawai‘i Supreme Court agreed to the general principle that indigenous minorities were entitled to a right to practice their own culture. However, the Hawai‘i Supreme Court resolved this question relatively quickly and easily because Article VII, Section 7 of the Hawai‘i Constitution explicitly requires the protection of Native Hawaiian culture. Meanwhile, the Sapporo District Court was required to infer Ainu cultural rights from Japan's international legal obligations under the ICCPR and Article 13 of the Constitution of Japan—neither of which explicitly referred to the Ainu. Furthermore, New Zealand's specialized courts involved a somewhat more complicated process between the Māori Land Court and the Environmental Court. Nevertheless, these specialized courts

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public hearings regarding the project. *Id.* at 483. Nevertheless, an appeal of the construction permit itself remains pending at the Supreme Court.

[270] *Mauna Kea*, 63 P.3d at 250 (Pollack, J., concurring).

[271] *Id*. at 251.

[272] *Id*. at 252.

[273] *Id*. at 255.

could refer to protections for Māori reaffirmed by the Waitangi Tribunal and Māori Lands Act.

The importance of the explicit protection of indigenous rights cannot be understated. Because it was easy for a court to find that indigenous rights are constitutionally protected, the Hawai‘i Supreme Court was able to dispose of the matter quicker and address the real question of whether Native Hawaiians were deprived of their due process rights by the BLNR's permit. After finding a due process violation, the project was halted until the BLNR held the hearings that the State Constitution required. Similar to Hawai‘i courts, New Zealand's creation of land courts with special jurisdiction served to facilitate the disposition of Grace's claims. Although the Māori Land Court's history is undoubtedly complicated by the legacy of its predecessor—the Native Lands Court—it has proved to be an effective mechanism for reconciling historical grievances and disputes since the late seventies.

In contrast to the plaintiffs in Hawai‘i and New Zealand, the Ainu plaintiffs raised their initial complaint in 1989, brought suit in the Sapporo court in 1993, and received a decision in 1997. In the meantime, dam construction proceeded and destroyed many of the sites the plaintiffs sought to protect. If Japanese courts had understood the dispute as a rights-based question from the beginning, it is conceivable that the case would have been decided more quickly and that construction would have been halted until the plaintiff's claims were adjudicated.

The different outcomes in *Nibutani*, the *Grace* cases, and *TMT* also raise important comparisons with regard to each legal system's commitment to procedural due process. Requiring contested case hearings before the BLNR issued a permit for TMT allowed the plaintiffs the right to be heard with the full benefit of an adversarial process, demonstrated a commitment to public transparency, and—most importantly—prevented the actual construction before it was deemed illegal. Although the Ainu plaintiffs were allowed an administrative appeal in 1989, a Hawai‘i court would likely have found that Ainu plaintiffs' rights to procedural due process were violated because the construction actually occurred without an adequate opportunity for the plaintiffs' claims to be heard. Similarly, the New Zealand Transport Agency was unable to proceed with construction of the Mackays to Peka Peka Expressway until Grace's claims were adjudicated by both the Māori Land Court and the Environmental Court. Moreover, once Māori reservation status was established, the Public Works statute placed the burden on the NZTA to

establish that its proposal was reasonably necessary compared to alternative routes.

Although Article 31 of the Japan Constitution has been interpreted to require due process, the plaintiffs in *Nibutani* never raised a due process claim and the Sapporo court never seemed to have considered due process within its analysis. This suggests that the Japanese conceive of due process differently than in the United States and in New Zealand, especially when a plaintiff's claims are rooted in administrative claims.

Differences in the long-term meaning of *Nibutani* and *TMT* also speak to Japan's civil law traditions compared to New Zealand and Hawai'i's common law systems. Ironically, the Sapporo District Court decision itself resembles a common law decision because—in breaking from the traditional narrative that Japan is composed of one culture and heritage—a judge played an active role in fashioning a new rule recognizing the cultural rights of the Ainu. Nevertheless, at least part of the limited impact of the *Nibutani* can be explained by its status as a civil legal system.

Since precedent in Japan is a mere guide, courts have not been pressured to follow *Nibutani* in similar cases or with similar plaintiffs. Hence, even the Sapporo District Court ruled against Ainu plaintiffs several years later.[274] Furthermore, Japan's civil law system explains one reason why *Nibutani* will not be applied to other indigenous groups with similar complaints to the Ainu, like the Ryukyu people of Okinawa. Hawai'i and New Zealand, by contrast, are common law jurisdictions and the *TMT Decision* and *Grace* cases will add another layer to the developed body of case law on Native Hawaiian and Māori rights that will bind future courts. By virtue of being set in a common law system, therefore, the importance of the *TMT Decision* is enhanced for future Native Hawaiian plaintiffs and the same can be said about the *Grace* cases for Māori plaintiffs seeking to designate land as Māori reservation land.

Finally, the differences in *Nibutani* and *TMT* also speak to the role of the judiciary itself, judicial review, and culture. Although Japan has judicial review, Japanese courts are notoriously conservative and rarely strike down laws or rulings of the government. Hawai'i courts, like their counterparts in most U.S. jurisdictions, are much more willing to strike down government

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[274] McGrogan, *supra* note 42, at 360.

laws, rulings, and policies. Indeed, Associate Justice Pollack's concurrence suggests that the Hawai'i Supreme Court could have been more aggressive and ruled on the merits. In New Zealand, the creation of specialized courts serves to demonstrate another possible mechanism to adjudicate indigenous land claims. Nevertheless, the role of the Māori Land Court is complicated by its legacy aiding European confiscation of Māori land. Although the Land Court is now statutorily required to protect Māori interests in Māori land and the *Grace* cases demonstrate its contemporary commitment to doing so, the court's history suggests that specialized adjudicatory bodies are not inherently better for indigenous people. Instead, the legal, political, and cultural forces that shape jurisprudence are critical to outcomes.

VII. CONCLUSION

The experiences of the Ainu in Japan, the Native Hawaiians in the State of Hawai'i, and the Māori of New Zealand reveal similar dilemmas that courts face between recognizing the rights of indigenous groups and addressing questions of land development that supposedly benefit the majority population. The *Nibutani Dam Decision* reveals that explicit constitutional recognition of indigenous rights is not always necessary for courts to recognize indigenous protections. Courts can infer that indigenous rights should be protected through other constitutional guarantees and a nation's treaty commitments. Nevertheless, explicit constitutional recognition of indigenous rights puts developers and government agencies on notice and leads to quicker recognition by courts of indigenous rights. Ultimately, this gives litigants the benefit of knowing that courts must acknowledge their rights and leads to rulings that halt construction before it begins. In addition, the importance of explicit constitutional recognition is also preferable to the patchwork of rights and restrictions on government power found in New Zealand's unwritten constitution.

Because the *Nibutani Dam Decision* is the only court decision of its kind, it is difficult to assess whether it will force Japan's government agencies to acknowledge indigenous rights and halt development projects when plaintiffs raise claims of violations of indigenous rights. Therefore, Ainu activists might consider seeking a constitutional amendment that explicitly protects indigenous rights. However, constitutional amendments are controversial in Japan and the strongest political block, the conservative Liberal Democratic Party, is unlikely to support indigenous rights or any further recognition of the Ainu beyond the 2008 resolution.

A more realistic path to stronger protections of indigenous rights in land development cases may include focusing on the reform of the administrative hearing process and pushing courts towards greater recognition of procedural due process. Since the Japanese Constitution recognizes due process, this battle will be less uphill than amending the Constitution to grant indigenous rights. The Ainu should push for procedural mechanisms like Hawai‘i’s contested case hearings. Even if Japan’s version of case hearings becomes less adversarial, hearings that fully develop the factual record and occur before construction have a better chance of ensuring that projects do not commence until indigenous rights are fully considered. In the alternative, prefectures like Hokkaido with a disproportionate amount of Ainu could follow New Zealand’s example and consider the establishment of specialized land courts to hear Ainu claims. In the language of the Hawai‘i Supreme Court, the *Nibutani Dam Decision* suggests that the Ainu have the “right to be heard in a meaningful manner.” With any luck, Japanese courts will adequately protect the “right to be heard in a meaningful time.”