

NIN, AND A CRITIQUE OF THE SUPREME COURT'S APPROACH IN TAKAMORE

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I. Introduction

I can't remember the first time I heard about Nin Tomas. It was probably as an undergraduate law student taking a course on Māori Land Law or the Treaty of Waitangi. However, I do remember that her reputation preceded her. As a first-year lecturer at Victoria University, in 2002, I recall feeling rather anxious when Kerensa Johnston called me to say Nin would be in touch to "discuss" the Hunga Roia Māori moot problem I had set for that year. The moot problem was based on a hypothetical fact pattern and involved what might have potentially been discriminatory, against women, tikanga. When she called, it was the first time I spoke to Nin. The first thing I remember her saying is "whose tikanga are you talking about?" I stumbled around trying to come up with a convincing answer: something about it being hypothetical and that I was open to different roopu applying their own tikanga in their understanding of the problem. The overall impression of Nin that the incident left me with, and one that remains with me, is how to the point, academically challenging and committed to tikanga she was.

All my other exchanges with Nin were inspiring, cheeky, opinionated, no-nonsense, fun and, overwhelmingly, supportive and loving. I first got to know Nin a little better when we, a few years later, together with Andrew Erueti and Khylee Quince, were at a conference at the University of Hawaii, staying in Oahu, Hawaii. One of my favourite facebook photos is one with us all and an Australian colleague enjoying cocktails with the caption "scholars being scholarly".

When I applied for a position at Auckland University Law School in 2012 and wrote to let Nin and Khylee know (as well as letting them know about the arrival of my baby boy, Max), this is how she responded:

Fabulous Claire,
Congratulations on your beautiful baby Max [...]. Pic of my moko and boy attached. I love being a nana.

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You have my 100% total support for the position. I would love to have you as a colleague. A warning though - you'll need to strengthen your reo and knowledge of custom law to keep ahead of the students and develop their minds beyond what they already know. The two minute mihi is no longer good enough! We (ie. Māori academics – Khylee and I) are being pushed by our students to up the anti and exhibit our "Māori" in all aspects of our teaching.

On my sending a photo of Max, blond like her eldest moko, in return, she wrote, “[t]hese are the new generation of blond haired, blue eyed Māori who will be fluent speakers of te reo and comfortable with tikanga.”

To me, this exchange encapsulates the way in which Nin’s and my relationship developed over the 8 months from my arriving at the Law School and her passing.

We talked about my children and her mokos, of similar age, first and foremost. She advised me on daycare, on the importance of being there for them and of the importance of their learning te reo. She also talked lovingly about her primary role in life as a Nana with many more photos to prove it.

Nin’s support was indeed the 100% she had promised. I often dropped in to visit, to ask advice or just waved as I taught my classes across the hall from her office. She told me, frankly and clearly, about her hopes for the Law School in terms of Māori and the issues we face and her desire to establish a customary law course. She spoke bluntly of her “succession plan” and my role in it, including her request that I edit the next editions of this journal.

At the time, I had little appreciation of how sick Nin was and was not fully aware that her passing might have been on keenly on her mind. Hosting the Tai Haruru meeting in my room in late 2013, I only got an inclining of the extent of Nin’s illness when she asked that we host the next meeting in her office so she need not climb the steps to my floor. In any event, those Te Tai Haruru meetings were a highlight of my first months at the Law School, involving, as they did, some mentions of her being a taniwha, numerous karakia, a blessing of my new office and, more than once, tears. Some meetings she would say she planned to retire soon. Other days, she said that she planned to retire some stage in years to come. Either way, she always expressed the same ultimate plan: to spend more time with her mokos.

When I planned a meeting of the United Nations Expert Mechanism on the Rights of Indigenous Peoples at the Law School, inviting Indigenous peoples and academics the world over, held in February 2014, her support was overwhelming (although, while agreeing to chair a session, she also told me in no uncertain terms that she wanted no involvement in the administration or the, and I quote, “razamatazz”). On the 6th February 2014, she wrote to say she was going to enjoy her role chairing a session. On the 11th of February, she wrote to say she had to pull out and apologized for doing so. I arrived at the first session of the meeting, at Waipapa marae, on 17 February 2014, to the news that she had passed the day before. She arrived herself to Waipapa the next morning and I felt at the time not only deep sadness but a degree of bemusement that she had indeed made it to the seminar to introduce herself to the international Indigenous peoples’ representatives, albeit with a little more of the razamatazz she had said she was trying to avoid.

The final theme of that initial email to me in 2012 was one of the need for me to engage more in tikanga and to learn te reo, both of which have become firm goals now that I am back in Aotearoa. It is also with that in mind that I reproduce a slightly amended version of my critical analysis of the *Takamore v Clarke* (*Takamore*) here,² part of a larger paper I wrote on the Supreme Court and Māori cases in 2014 and published as a chapter in *The New Zealand Supreme Court: The First Ten Years*.³ It is one of the few times I have engaged in an analysis of tikanga-related questions.

What struck me most on presenting the paper at the University of Auckland Faculty of Law’s conference on the Supreme Court 10 Years On was that the audience was largely older, male, not Māori and included most members of the New Zealand Supreme Court (NZSC). I felt unusually nervous presenting the paper in that context aggravated by the fact that I was one of the first speakers of the day to be decidedly critical (as well as positive) of the Supreme Court’s decisions and mostly with respect to the way it dealt with tikanga Māori. Nonetheless, I gained some confidence from the sense that Nin was there, behind me, supporting me in illuminating the inherent difficulties that exist in seeking greater respect and application of tikanga Māori under the colonial system that operates here, in the very same lands and territories from which tikanga Māori springs.

² *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

³ Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015). Readers, if citing, please refer to the longer paper.

Nin, your work, your ethos, your commitment, your tenacity and your vision live on as an inspiration to us all. Thank you, for everything. Arohanui.

II. Takamore

When Mr Takamore, from Tūhoe, died suddenly, his whānau, against the executor Ms Clarke's wishes, who was also Mr Takamore's spouse, buried him in the whānau urupa in Kutarere in accordance with Tūhoe tikanga. Tikanga had been breached when Ms Clarke and children left Mr Takamore's body overnight after a dispute with Kutarere whānau. Mr Takamore had left Kutarere some 20 years previously to live in Christchurch with Ms Clarke and their children. There was no conclusive evidence about Mr Takamore's wishes as to his preferred burial location.

Clarke successfully claimed in the High Court and the Court of Appeal that, as executor, she was entitled to determine where Mr Takamore would be buried. The Takamore whānau, appealing to the New Zealand Supreme Court, argued that as there is no New Zealand law recognizing the exclusive right of the executor to dispose of the body and the common law should recognize and give effect to tikanga.

The NZSC majority in *Takamore* found, relying on English, Australian and Canadian precedent, that the personal representative has the overriding right and the duty to determine the manner and give effect to the disposal of a deceased's body. However, the personal representative:⁴

should take account of the views of those close to the deceased, which are known or conveyed to him or her. These will include views that arise from customary, cultural and religious practices, which a member of the deceased's family or whānau considers should be observed. Any views expressed by the deceased on what should be done are an important consideration. There is no requirement, however, for the personal representative to engage in consultation. That may not be practical in circumstances of urgency. [...] The personal representative is also entitled to have regard to practicalities of achieving burial or cremation without undue delay.

Further, the majority state that he or she must refer to "any tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of

⁴ *Takamore v Clarke*, above n 2, at [156].

the case as matters that must form part of the evaluation.”⁵ However, “a personal representative, particularly one who is a member of the deceased’s family, who has a personal view of what is appropriate is not precluded from acting in accordance with that view, provided consideration has been given to all relevant factors and viewpoints.”⁶

If a person is aggrieved with the decision of the personal representative, he or she may challenge it in the High Court. The Court is not confined to reviewing the decision on the grounds that the discretion was “exercised improperly, capriciously or wholly unreasonably.”⁷ Rather, the Court “must also respect and permit the recognition of different cultural and other practices, as well as different family and other personal interests within the rubric of the common law decision-making process.”⁸

The majority found that Ms Clarke’s determination had priority. The circumstances considered included, “first, the fact that Mr Takamore made his life in Christchurch with his partner and their children, living there with them for over 20 years until his death in 2007”, referring to the lack of relationship between Mr Takamore’s children and Kutarere. “Secondly, Kutarere is the place of central importance to Mr Takamore’s Māori family and their custom.” Thirdly, different views were expressed as to Mr Takamore’s own wishes. Fourth, Mrs Clarke and children wanted him buried in Christchurch and finally, although of little weight, that Mr Takamore is buried in Kutarere.

In contrast, Elias CJ disagreed with the majority’s interpretation of precedent and concluded that there is no established common law rule recognizing a duty and right of personal representatives to determine how and where a body should be disposed of. The difference between Elias CJ’s judgment and that of the majority, then, is that she finds that, where there is a dispute as to burial, parties have standing to bring the case to the High Court to resolve in law under its inherent jurisdiction. In exercising that jurisdiction, the Court is required to take into account tikanga where relevant. On the facts, Elias CJ found that Ms Clarke and her children should be left to decide where Mr Takamore is buried.

⁵ At [164].

⁶ At [158].

⁷ At [161].

⁸ At [162].

III. Taking a Critical Approach

A critical Indigenous perspective draws on legal realism, critical legal studies, post-modernism, Marxism, radical feminism, critical race theory and tikanga Māori. It seeks to understand and expose the often invisible biases against Indigenous peoples underlying and inherent in law, including judge-made law. It is also somewhat anti-liberal in that it maintains that liberalism is biased towards cultural preferences that prioritise the individual and is overly focused on formal rather than substantive equality. For example, a critical Indigenous theorist may argue that aggressive affirmative action is required to systemically level the playing field between Indigenous peoples and dominant groups given the invisible structural biases towards the dominant groups. Moreover, critical race theorists are often sceptical about the impetus behind advancements in legal recognition of racial minorities' interests, maintaining that it can often only be explained, and is limited, by "interest convergence" with the interests of the dominant groups.⁹

Ani Mikaere, Moana Jackson and Nin Tomas are arguably some of the most well-known critical Indigenous scholars in New Zealand.¹⁰ Mikaere, for example, refutes the accepted legal position that sovereignty has legally or legitimately transferred from iwi to the Crown. She analyses the 1835 Declaration of Independence and the Treaty to Waitangi, and surrounding circumstances, to argue that they:¹¹

reveal a clear Māori intention to create a space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatiratanga. This reaffirmation of Māori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapū for a thousand years would retain its status as first law of Aotearoa: the development of Pākehā law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Māori.

⁹ Derrick Bell "Brown v. Board of Education and the Interest-Convergence Dilemma" (1980) 93 Harv L Rev 518.

¹⁰ See, for example, Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia and Te Wananga o Raukawa, Wellington, 2011); Mike Smith "Interview with Moana Jackson on constitutional change" (27 September 2007): < www.youtube.com>; and Nin Tomas "Ownership of Tupapaku" (2008) 6 NZLJ 233 at 233-236.

¹¹ Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 334.

Mikaere critically explains the failure to recognize tikanga under New Zealand law as a product of colonisation based on the “apparently unshakable Pākehā belief in the inherent superiority of British law” and the “blind assumption of the Crown’s right to sovereignty.”¹² She also explains we rarely, and conveniently for the colonial endeavor, ask whether sovereignty was acquired or how it was acquired, for which answers are difficult as a matter of law. As explained below, the NZSC exhibits a similar reluctance to address the legality of the transfer to sovereignty in *Takamore*.

Evidence of critical approaches can, to varying degrees, be seen in courts’ decisions, including *Takamore* and especially in Elias CJ’s opinion. A recent United States Supreme Court example of a critical race approach to analysis can be found in Sotomayer J’s dissenting decision in a case affirming Michigan legislation banning affirmative action in admissions to state universities. Sotomayor J wrote:¹³

The way to stop discrimination on the basis of racism is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.

By way of contrast, Kennedy J wrote:¹⁴

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this court’s precedents for the judiciary to set aside Michigan laws that commit this policy determination to the voters.

I critically examine *Takamore* in three ways. First, I seek to highlight passages or aspects of the decisions that might indicate hidden biases against Māori or tikanga in such a way as to suggest some partiality against outcomes in favour of tikanga or Māori rights. This realist approach is empirically contestable without an assessment of the personal, professional, social, economic and political factors behind judicial decision making, which are almost impossible to discern, possibly even for the judges themselves or those close to them. Thus, my conclusions here can only be tentative. Further, I do not suggest that NZSC judges are not conscious of this potential bias –

¹² At 340.

¹³ *Schuette v Coalition to Defend Affirmative Action* 134 US 1623 (2014) at 1676.

¹⁴ At 1638.

they function within a system where precedent constrains their approaches to some extent – or that there are malevolent forces such as explicitly racist beliefs at work. Instead, I suspect the bias against Māori or tikanga might come from a degree of ignorance of tikanga and/or an unconscious preference for the cultural-legal concepts learned in the “mainstream” anglicised legal system within which they operate.

Second, drawing on Professor Robert A Williams Jr’s analysis of US Supreme Court Indian rights decisions from a critical tribal perspective,¹⁵ and consistently with Sotomayer J’s concern with the effects of the law, I consider the outcome in *Takamore*. As will be discussed, Kutarere whānau who brought the case did not succeed in result although some success can be found in legal principle.¹⁶

Third, I analyse *Takamore* with a view to ascertaining the extent to which the NZSC has utilised precedent potentially biased against Māori and tikanga Māori. Williams writes:¹⁷

Stare decisis, by its very nature, represents a persistent danger for the protection of minority rights in our legal system, threatening to expand the original principles of racial discrimination justified by a particular legal precedent to new purposes and applications. Even without possessing a hostile intent toward any particular minority group, a judge who feels bound to enforce prior precedents because of the doctrine of stare decisis can perpetuate, in the most subtle of fashions, a system of racial inequality.

IV. A Critical Assessment of *Takamore*

A. *The Court Does Not Question the Authority of the Colonial Government*

The NZSC did not question the colonial government’s authority to govern or Parliament’s assumption of sovereignty and therefore supremacy. The majority in *Takamore* rejected the submission that the common law only applies to the extent it is not inconsistent with tikanga. Elias CJ notes that, “[a]s in all cases where custom or

¹⁵ Robert A Williams Jr *Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America* (University of Minnesota Press, Minneapolis, 2005).

¹⁶ David V Williams “Customary Rights and Crown Claims: *Calder* and Aboriginal Title in Aotearoa New Zealand” in Hamar Foster, Heather Raven & Jeremy Webber (eds) *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, Vancouver, 2007) at 155-176.

¹⁷ Williams, above n 15, at 23.

values are invoked, the law cannot give effect to custom or values which are contrary to statute or fundamental principles and policies of the law.”¹⁸ Tikanga is only influential as a factor to consider in the development of the common law and, in *Takamore*, to be balanced alongside other factors. This contrasts, of course, with views expressed by Ani Mikaere, Moana Jackson and Nin Tomas, outlined above, to the effect that tikanga remains as our first law and sovereignty was not *legally* transferred from Māori to the Crown.

B. Courts Determining Tikanga

In *Takamore* the courts assume authority to determine disputes involving tikanga and common law principles. In *Takamore* the courts have the ultimate authority, and under Elias CJ’s approach the primary authority, to determine disputes as to the place of burial of all persons, including where tikanga is applicable. From a critical perspective, tikanga-consistent institutions should have the authority to determine the outcome in such cases as the bodies with the exclusive and specialist expertise with respect to tikanga. Indeed, it is arguably tikanga-inconsistent to have a non-tikanga institution determine tikanga. However, we do see considerable evidence of a sensitivity to this issue in Elias CJ’s decision.

C. Tikanga Does Not Prevail Despite Favourable Facts

In *Takamore*, it is difficult to imagine many cases where there facts might more strongly support tikanga prevailing, suggesting that tikanga is unlikely to prevail in subsequent analogous cases.¹⁹

However, there remains some hope for the future. Elias CJ indicates her decision was finely balanced in her statement that “[h]ad the family connections with Kutarere been maintained, even slightly, the claim based on whakapapa, identity and hapū may well have prevailed.”²⁰ And:²¹

¹⁸ *Takamore v Clarke*, above n 2, at [95].

¹⁹ Although, note that there are good examples in the Māori Land Court where the judges will always strive to apply hapu specific tikanga even when a will is very clear. See cases where Māori Land Court applies tikanga: *Pomare-Peter Here Pomare* (2015) 103 Taitokerau MB 95 (103 TTK 95) at [56]-[57]; *Owhetu Block Charitable Trust- Lot 1 Deposited Plan 427145* (2015) 98 Taitokerau MB 242 (98 TTK 242) at [54]; *Paora-Te Tii Waitangi (Waitangi Marae)* (2015) 94 Taitokerau MB 134 (94 TTK 134) at [73].

²⁰ *Takamore v Clarke*, above n 2, at [105].

²¹ At [101].

It would however be paying lip service to the importance of culture recognised by the New Zealand Bill of Rights Act and in particular the importance of Māori society and culture in New Zealand (derived from the Treaty of Waitangi and recognised in modern New Zealand legislation) to conclude that the wishes of the spouse will always prevail over other interests. It depends on the wider circumstances. Where traditional identity and important cultural values are at stake, preference for the spousal connection may properly yield, as has been recognised in Australia in relation to Aboriginal customary law notions of kinship.

D. Potential for Tikanga and Human Rights to Clash

An interesting aspect of Elias CJ's opinion in *Takamore* is her reference a number of times to human rights, often in support of recognition of Māori culture but also in support of the deceased's individual preference. From the first paragraph of her judgment she references human rights including dignity, privacy and family and specifically s 20 of the Bill of Rights Act 1990, the right to access culture.²² While human rights have been used in many instances globally to advance the rights of Indigenous peoples, and many argue the Indigenous Declaration is a human rights instrument, human rights are also often associated with liberal and individualistic values, which may conflict with Indigenous rights.

In the High Court Fogarty J found that he could not recognize the tikanga in question because it prioritized the collective over the individual, contrary to common law principles. In the Court of Appeal, tikanga could not be recognized because it would mean that tikanga would prevail over right, which is also contrary to common law principles.

Critics question whether human rights are ultimately suited in their ability to wholly support strong Indigenous peoples' collective rights.²³ Jackson writes that:²⁴

²² At [1].

²³ Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34(1) NYUJ Int'l Law & Pol 189.

²⁴ Moana Jackson "The Crown, the Treaty and the Usurpation of Māori Rights" in *Proceedings of Aotearoa/New Zealand and Human Rights in the Pacific and Asia Region: A Policy Conference* (Wellington, 1989) at 17; Annie Mikaere "Collective Rights and Gender Issues: A Māori Woman's Perspective" in Nin Tomas (ed) *Collective Human Rights of the Pacific Peoples* (University of Auckland International Research Unit for Māori and Indigenous Education, Auckland, 1998) at 79.

The rights recognized by the West have been largely individuated...and they have not affected the dominant place of Western or colonising states in relation to other people. There has been little recognition of collective rights such as an Indigenous right to independent sovereignty, since such a right clearly challenges that dominance in a political, social and economic sense.

Mikaere writes, referring to international human rights law that:²⁵

it is illogical for Māori to turn unquestioningly to Western legal concepts for answers to problems which have been brought into our lives by the imposition of Western law. Denying the validity of Māori law by seeking answers in imposed law is a powerful indivation that we have lost faith in our own legal philosophies, that loss of faith itself a sign of the self-negation that Jackson has described as being a necessary part of the process of colonisation.

On the other hand, pragmatists, including Professor Robert A Williams Jr, see human rights as functionally useful to advance the rights of Indigenous peoples.²⁶

E. Will Non- Māori Assessments Prevail?

Critical Indigenous tribal theorists might argue that New Zealand courts are systemically biased towards non- Māori values being based in non-Māori legal traditions and dominated by non-Māori judges, especially at the appellate level. From a realist perspective, it is understandably difficult for non-Māori judges not well versed in tikanga to divorce themselves from their own cultural attachments, possibly including to their own nuclear families, to wholly appreciate the others' perspectives.

²⁵ See, also, this statement: [i]deologically 'rights' talk is part of the larger, greatly obscured reality of American colonialism. ... by entering legalistic discussions wholly internal to the American system, Natives participate in their own mental colonisation. Once Indigenous peoples begin to use terms like language 'rights' and burial 'rights', they are moving away from their cultural universe, from the understanding that language and burial places come out of our ancestral association with our lands of origin. [...] When Hawaiians begin to think otherwise, that is, to think in terms of 'rights', the identification as 'Americans' is not far off." Haunani-Kay Trask *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (2nd ed, Hawaii University Press, Hawaii, 1999) and cited in Kerensa Johnston "International Law, Indigenous Peoples and the Struggle for Human Rights: An Analysis of the Utility of United Nations Bodies and International Human Rights Law in the Protection of Indigenous Peoples' Rights" in *International Governance and Institutions: What Significance of International Law?* (Conference Papers Australia and New Zealand Society of International Law, 2003 at 184.

²⁶ Robert A Williams Jr "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) 4 Duke LJ 660.

Elias CJ seems to address the potential problems in the courts resolving matters such as this, stating, “[a] court-imposed result in such circumstances may not convince the disappointed party or indeed be universally convincing in its own terms.”²⁷

The majority’s decision in *Takamore* illustrates an appreciation of the importance of the collective and tikanga. In assessing the appropriate role for custom, the majority state that subject to not being in conflict with statute, “our common law has always been amenable to development to take account of custom.”²⁸ Apparently striking a middle ground between tikanga and the preferences of the individual and his spouse and children, the majority state that:²⁹

the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased’s heritage, and, if the dispute is brought before the Court because someone is aggrieved with the personal representative’s decision, Māori burial practice must be taken into account.

However, there are a number of passages in the judgment from which it is possible to suggest that the individual and nuclear family’s views might be more likely to prevail than a tikanga perspective dictated by values and ideologies behind, for example, mana, mana whenua, whakapapa, ahi kaa, whānaungatanga and tapu. First, consider the majority’s statement that:³⁰

a personal representative, particularly one who is a member of the deceased’s family, who has a personal view of what is appropriate is not precluded from acting in accordance with that view, provided consideration has been given to all relevant factors and viewpoints.

Focusing on the effects of the law, where the personal representative is not versed in tikanga and/or his or her personal views are inconsistent with the outcome required under tikanga, it would be difficult for that person to objectively and independently balance them with tikanga.

²⁷ *Takamore v Clarke*, above n 2, at [11].

²⁸ At [150].

²⁹ At [164].

³⁰ At [158].

Second, if there is a dispute and the matter is to be decided by the courts, the Court is to examine:³¹

the nature and closeness of the relationship of the deceased with each family and each location at the time of death. The sensitivities of family and others close are relevant along with cultural, religious and other circumstances that underlie them.

In assessing “closeness” within a family, it might be difficult for judges who are not familiar with whānau relationships and values, and who themselves prioritise their own nuclear families, to appreciate that the broader whānau might, culturally, be at least as close to the deceased. Moreover, it is the closeness of relationship to a specific individual, the deceased, that is relevant rather than the tikanga principles that favour the collective, whānaungatanga and mana whenua.

Third, in deciding on the merits of the specific case, the first factor considered important was “the fact that Mr Takamore made his life in Christchurch with his partner and their children, living there with them for over 20 years until his death in 2007”, referring to the lack of relationship between Mr Takamore’s children and Kutarere. That “Kutarere is the place of central importance to Mr Takamore’s Māori family and their custom” was only the second factor considered, followed by the individual views of Mr Takamore and then his spouse and children. The individual choices of Mr Takamore and his family appeared, in this analysis, to dominate the majority’s approach to deciding the case. Moreover, taking into account the urbanization of Māori over the last century, arguably a colonial product leading to the loosening of tribal ties, it might be less likely for tikanga to prevail under such tests.

As mentioned above, Elias CJ is very clear about the dangers of measuring one culture against the cultural standards of a different legal system. She writes:³²

the values behind the different positions may be very difficult for the Court to balance in reaching a fair and just result if they are taken from registers which are not commensurable. That will often be the case if the differences of view arise out of distinct religious or cultural value systems.

³¹ At [169].

³² At [11].

Elias CJ's approach is arguably more accommodating of the influence of tikanga on the common law overall and more specifically in cases such as this, suggesting the potential for fairer balancing between liberal Western values and Māori tikanga values. She writes:³³

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the ... colony". [...] Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

Elias CJ's decision, like that of the majority's, is ultimately one of judgment, which can be problematic from a critical perspective as there is room for personal and other bias to prevail, even invisibly. She explains the factors that do not determine her view and carefully describes the importance of tikanga in the process and relevant human rights and the Declaration on the Rights of Indigenous Peoples.³⁴ She then states that, "weighing up the different and valid claims of the parties as best I can, I have concluded that Mrs Clarke and her children should in the circumstances of the case be left to decide where Mr Takamore is to be buried."³⁵

Reflecting the overall view that tikanga is not the applicable law in situations where the relevant whānau is bound by tikanga, tikanga is not the dominant consideration in Elias CJ's decision. She also notes the individual choices of Mr Takamore, including that he left Kutarere to make a life elsewhere and that his children want him in Christchurch,³⁶ commenting that burying him away "is not consistent with the choices he made in life."³⁷ Thus, while Elias CJ appears to give more weight to tikanga than the majority, individual liberty is also considered relevant, which can conflict with tikanga values such as whānaungatanga and mana whenua.

Elias CJ's view that it is for the High Court to resolve disputes about the place of burial arguably injects greater independence and objectivity into the assessment when

³³ At [94].

³⁴ At [12].

³⁵ At [12].

³⁶ At [103].

³⁷ At [105].

compared to the situation where the personal representative with the primary decision making authority is also one of the party's to the dispute, as the majority requires. However, as noted above, the criticism remains that tikanga is to be balanced by a non-tikanga institution.

V. Conclusion

I have attempted to outline from a critical perspective some of the issues that arise in *Takamore* with respect to the NZSC's approach to tikanga Māori. In conclusion, taking these critical perspectives seriously, there remains a need for New Zealand courts to develop a uniquely New Zealand jurisprudence that, taking into account te Tiriti o Waitangi, the principle of equality and the impact of colonization on Māori, better accommodates tikanga Māori. In the interests of the rule of law, transparency, clarity and even honesty, the courts might simultaneously explicitly confront questions about the legal authority of the British common law that result from the legal uncertainty around the transfer of legal sovereignty from Māori to the British Crown.