NGĀ TIKANGA MĀORI AND THE POLITICS OF SELF-DETERMINATION IN AOTEAROA/NEW ZEALAND

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I. Introduction

In this chapter I identify the problem of the role of *cultural difference* in the law relating to Indigenous rights in Aotearoa with a specific focus on the judicial interpretation of ngā tikanga Māori, or Māori customary law, specifically in the *Takamore* court decisions of the High Court,[2] Court of Appeal[3] and Supreme Court concerning Tūhoe customary burial rights.[4]

By Māori customary law, I mean those laws, rules and processes created by whānau, hapū and iwi governing how members relate to one another and engage with others. Cultural difference relates to those aspects of Indigenous identity that are said to make Indigenous peoples distinct and commonly include customary law but also language, dress or more broadly a "way of life" that has its origins in pre-contact Indigenous society. Māori culture, in this sense, has always had a prominent role in Indigenous claims making in Aotearoa as it has in Indigenous movements in other countries. But in this chapter I make the point that cultural claims have the potential to detract from more significant remedies and especially those that would give effect to Māori political institutions. And while I focus on judicial treatment of custom law, I suggest that a broader study is merited on the extent to which cultural difference underpins New Zealand legislation and Treaty of Waitangi settlements.

II. The Politics of Recognition versus the Politics of Distribution

Whereas in the past cultural difference and negative stereotypes were used by the state as means to suppress and marginalise peoples, they have often been re-appropriated and used by these same peoples to justify the recognition of distinctive rights. This has given rise to the "politics of recognition" whereby social movements, including the Black Power, Second Wave Feminism, Gay and Lesbian and Indigenous

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[2] *Clarke v Takamore* [2010] 2 NZLR 525 (HC).

[3] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.

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

and Native American movements, sought to address "culture injustices" including "cultural domination", "non-recognition" and "disrespect".[5] As Charles Taylor noted:[6]

> Nonrecognition or misrecognition ... can be a form of oppression, imprisoning someone in a false distorted reduced mode of being. Beyond simple lack of respect, it can inflict a grievous wound, saddling people with crippling self-hatred. Due recognition is not just a courtesy but a vital human need.

However, the "politics of recognition" has been criticised by many scholars. Basically, the argument goes, marginalised groups invest too much emphasis on their cultural difference as a basis for rights recognition. One of the strongest critics, Nancy Fraser, called this the "problem of reification" i.e., in her view, "today's recognition struggles often serve not to promote respectful interaction within increasingly multicultural contexts, but to drastically simplify and reify group identities ... ."[7] This conception of culture is also out of step with contemporary anthropology and political theory which has generally discarded it, preferring a "constructivist" understanding of culture as hybrid, contested and constructed through historical processes, thus ever-changing.[8] The politics of recognition also leads to remedies of cultural and symbolic change that fail to address structural injustices. Thus Fraser's most significant contribution was her argument that the emphasis on culture or the politics of recognition leads to the "problem of displacement" whereby the economic dimension of an injustice is downplayed.[9] It is one thing to recognize and respects one's gay, lesbian or Indigenous identity and another to recognize that their social status in society is also due to economic injustice, or what Fraser called, the "politics of redistribution."[10]

Fraser emphasized that matters of recognition and distribution are intertwined and both need to be addressed to enable these marginalised groups to participate in social and political life on par with others.[11] Indeed, to obtain full equality or participatory parity in society, Fraser argued that the identities themselves would need to be dis-

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[5] Nancy Fraser *Adding Insult to Injury* (Verso, London, 2008) at 14.

[6] Charles Taylor *Multiculturalism and "The Politics of Recognition"* (Princeton University Press, Princeton, 1992) at 25.

[7] Fraser and others, above n 5, at 130, 133–134.

[8] James Tully *Strange Multiplicity* (Cambridge University Press, Cambridge, 1995) at 10.

[9] At 130.

[10] Fraser, above n 5.

[11] At 16.

assembled.[12] Fraser's analytical framework is a useful tool for assessing the reforms to give effect to say, gay or native American rights.[13] However, in the context of Indigenous rights, Fraser's work does not adequately address the strong political demands made by many Indigenous movements.[14] Fraser's criticisms are based on the notion that the members of marginalised groups seek membership on par with other members in the liberal democracy that they live in. Most Indigenous movements seek this recognition but they also seek separate political status or power-sharing with the modern state. Instead of equality or participatory parity these claims are typically grounded in prior sovereignty or anti-colonialism.[15] I call this the politics of self-determination. This puts in question the right of states to govern Indigenous peoples and their territories. It indicates the need for a new social contract whereby Māori and the Crown negotiate their possible terms of co-existence.

It is interesting to consider these issues in the context of New Zealand and legal reforms made since the 1970s to recognize Māori rights. Particularly in the early years, Māori advocates placed great emphasis on distinctive Māoritanga and iwi-tanga.[16] The moral base of the movement was the tribe – the logic was that as the tribe had suffered the loss, the modern tribe had the legitimate claim to redress. As a result, despite a history of discrimination and marginalization, iwi had to establish they were still a culturally distinctive and coherent collective connected to their lands and culture. Therefore cultural difference, or the politics of recognition as Fraser puts it, was inextricably connected to the so-called "Māori renaissance" and the historical rectification of injustices.

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[12] Fraser, above n 5, at 129–141.

[13] Karen Engle *The Elusive Promise of Indigenous Development* (Duke University Press, Durham, 2010) (arguing that the international Indigenous movement places too much emphasis on the human right to culture at the expense of original stronger claims to self-determination).

[14] But see Fraser, above n 5, at 274-291 (identifying a gap in her analysis ie, the significance of political misrepresentation, as she called it, as a separate species of injustice). According to Fraser, misrepresentation occurs when "political boundaries and/or decision rules function to deny some people, wrongly, the possibility of participating on a par with others", at 279. Yet this still falls short of the politics of self-determination described in this chapter.

[15] Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 Univ Tor Law J 101. (for a description of the "historical sovereignty" argument). See also, James Anaya "Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend" (2005) 16 Colo Jnl International law and Policy 237, at 241 (referring to a "continuity with historical sovereignty" model).

[16] Andrew Sharp J*ustice and the Māori* (Oxford University Press Australia & New Zealand, 1990) and Richard S Hill *Māori and the State* (Victoria University Press, Wellington, 2009) at ch 7.

However Māori claims did not rest solely on the politics of recognition. At the heart of the Māori renaissance was the politics of self-determination or, in the language of the Treaty, tino rangatiratanga.[17] The movement pointed to the commitments made in the Treaty to uphold tino rangatiratanga and the subsequent suppression of Māori political institutions and loss of territory, although often urban-based Māori were at the vanguard of the movement. This struggle encompassed both the economic and recognition dimensions identified by Frazer above. But of course it went much further by challenging the authority of the liberal state all together.

But despite this original emphasis on the politics of self-determination, I would argue that a great deal of New Zealand's domestic reforms have been directed at giving effect to cultural difference/the "politics of recognition". That is not to say that there is no objective cultural difference in Māori life and that it shouldn't be used in claims-making. New Zealand's Indigenous rights architecture is not *only* about "cultural claims and redress". In particular, significant economic redistribution has occurred through Treaty settlements. The problem is reified Māori culture and its prevalence in the reforms both as a rationale for Indigenous rights but also in terms of redress, resulting in the problem of displacement and denial of the politics of self-determination.

For example, since the early 1990s, Parliament sought to accommodate "Māori interests" in legislation that would likely impact on them. A well-known example is the Resource Management Act 1991 (RMA). This includes a Treaty clause – the requirement that decision makers "take into account the principles of the Treaty of Waitangi."[18] It also includes specific directions to decision makers to consider customary law i.e., to have "particular regard" to "kaitiakitanga"[19] [guardianship by the tangata whenua] and "recognise and provide for ... the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], and other taonga [treasures]."[20] As a result of these provisions, when a local council draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua's customary law. Only these communities can provide evidence of the meaning of the customary concept. However, there are often contested views as

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[17] See, Hill, above n 16, at 175-176 (noting how an emphasis on Indigenous autonomy, self-determination and sovereignty as tino raNgātiratanga arose in the 1980s with increased attention directed at the Māori version of the treaty.).

[18] Resource Management Act 1991, s 8.

[19] S 7(a).

[20] S 6(e).

to the meaning of customary law and concepts, especially if a consent application is resisted by local Māori and the issue ends up in litigation. Councils or resource consent applicants may provide their own expert testimony, which may conflict with tangata whenua's, drawing on Māori with specialist knowledge of Māori custom. In this context there is ample scope for the problem of reification and manipulation of custom.

For example, in *Beadle & Wihongi v Minister of Corrections* members of local hapū objected to an application for resource consents under the RMA to build a prison in their rohe.[21] One objection was that the prison would interfere with the tangata whenua's relationship with a taniwha named Takauere, the spiritual guardian of the area who moved through underground geothermal springs and waterways that would be blocked by the construction.[22] There was conflicting expert evidence about whether the proposal might have any effect on the taniwha. One Māori witness said he had never heard of the taniwha and that "the concept was being used by people for their own purposes,"[23] while another suggested that Takauere "was being misused to fight a prison" in a way that he found offensive.[24] The Court accepted there were those who sincerely believed in the existence of the taniwha.[25] However, the Court felt constrained by the RMA itself:[26]

> ... the Act and the Court are creations of the Parliament of a secular State. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings. . . . Although sections 6(e), 7(a) and 8 are sometimes referred to as protecting Māori spiritual and cultural values, those sections have been carefully worded. Their meaning is to be ascertained from their text and in the light of the purpose of the Act. Neither the statutory purpose, nor the texts of those provisions, indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.

[21] *Beadle v Minister of Corrections* EC Auckland A74-02, 8 April 2002.
[22] At 82-83.
[23] At 84.
[24] At 85.
[25] At 86.
[26] At 87.

Of course, the point of the reference to Māori customary concepts in the RMA is to include these concepts in resource management decision making. But the Court admitted to the practical difficulties in evaluating questions about metaphysical matters, especially when there was conflicting evidence given by tangata whenua.[27] In the end the Court ruled it was not persuaded by the evidence that the taniwha, "to whatever extent [it] may exist", would be affected by the construction of the prison.[28]

Another example relates to rights to water, which has received a lot of attention in New Zealand/Aotearoa recently. Water is regulated by the RMA but at present the government's position is that neither the state nor any private party "owns" water.[29] This is despite Māori consistently arguing that they possess proprietary rights in rivers, lakes and streams within their rohe.[30] The reference to customary law in the RMA has done little to assist Māori. Writing in 2013, Jacinta Ruru notes:[31]

> Since the enactment of the RMA in 1991, there have been twenty instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge waste water into water, or dam water. In all of these cases, Māori speak of the importance of the water to them culturally, including the belief that water has its own mauri (life force) and the importance of these places for food gathering, namely, fishing. In most cases Māori have lost – sometimes outright, sometimes partially ...

In *Wakatu Inc v Tasman District Council*, for example, local iwi opposed a resource consent application to take 16,000 cubic metres of groundwater per day from an aquifer connected to the Motueka river to provide for a community water scheme.[32] Tangata whenua witnesses argued that the transport of water away from its original catchment would affect the mauri (life force) of the river, "with consequent derogation from the ability of tangata whenua to exercise kaitiakitanga over their traditional lands and waters and to practice rangatiratanga over their resources."[33] As the Court noted,

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[27] At 87.

[28] At 88.

[29] Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 2.

[30] At 1.

[31] Jacinta Ruru "Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand" (2013) 22 Pac Rim Law Policy J 311 at 325.

[32] *Wakatu Inc v Tasman District Council* [2012] NZRMA 363. (ENC).

[33] At [59].

“what is essentially at issue is whether in the absence of any physical effect on the river that is more than neglible, there can be a spiritual effect on the mauri of the river, or on the relationship of the tangata whenua with it.”[34] Ultimately, the court said that any spiritual or metaphysical effects could be addressed by imposing conditions, in particular, requiring the council to establish a “tangata whenua liaison committee” to consider the appropriate kawa for implementing the project.[35]

Significantly, I think the Court referred to two “contextual matters” to understand tangata whenua opposition – the local Māori land incorporation, a party to the litigation, had been refused consent by the council to abstract water from under its own lands and there had been inadequate efforts by the council to consult with iwi. As a result, the court noted “there was justification by Māori submitters that their resources were again being alienated to meet the needs of those outside their rohe. It appeared to them to derogate from their role as kaitiaki and affront their mana.”[36]

Since the enactment of the RMA in 1991, there has been a proliferation of statutes referring to Māori customary law. A content search of the word “tapu” for example on the New Zealand legislation website results in 109 results.[37] Each of the close to 60 Treaty settlements enacted to date contain many references custom law.[38] And there has been a great deal of litigation about the meaning of these customary concepts as Māori use them to assert their interests. But despite the incorporation of customary law in legislation, what is clear, at least in relation to the RMA, is that these reforms are not empowering iwi. As the Waitangi Tribunal has said many times, iwi and hapū feel sidelined by the RMA consent process.[39] Part of the problem no doubt lies in the statutory direction to “have particular regard” to kaitiakitanga which means the decision-maker can give priority to other matters. However the references in the

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[34] At [58].

[35] At [116].

[36] At [73].

[37] <http://www.legislation.govt.nz>.

[38] Office of Treaty settlements Quarterly Report (1 January 2016 – 31 March 2016) < https://www.govt.nz/assets/Documents/OTS/Quarterly-report-to-31-March-2016.pdf>.

[39] See, Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 94 (noting “how time consuming - and protracted - the processes can be. Indeed, they show that for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast of petroleum activities so that taonga can be protected is relentless”). See also, Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 280-283 (Critiquing the RMA and noting the “lynchpin” of a Treaty-compliant RMA system would be enhanced iwi management plans, called iwi resource management plans, at 281).

RMA to customary law, I would argue, are directed more at accommodating cultural difference, or the politics of recognition, and not about the politics of distribution or, more significantly, the politics of self-determination. Customary concepts like kaitiakitanga can have great political potency.[40] And the politics of recognition/cultural difference has potential to lead to reforms of substance. So too do the politics of redistribution. But the politics of self-determination is about fundamental reforms based on prior sovereignty that recognise the political status of Māori as Indigenous peoples. And what is absent from the RMA are effective mechanisms for recognition of iwi and hapū self-determination through for example the devolution of power from local governments to iwi which is possible under the RMA but has only been used on a few occasions.[41]

I would argue too that this same issue of political control is at the heart of the Takamore litigation – notably Ngai Tūhoe self-determination – and that this was undermined by an emphasis throughout the litigation on cultural difference or, more specifically, a focus on the content of Ngai Tūhoe tikanga on burial rights.

The Takamore litigation arose because Jim Takamore died without leaving a will noting where he wanted to be buried. His whānau wanted to bury him in Tūhoe country and so he was taken – without the consent of his immediate family who wanted to bury him in their home town of Christchurch – and buried in his Tūhoe urupa. Takamore's wife, in her capacity as executrix of his will, sought a court order that the common law indicated that she should decide where he should be buried. The Tūhoe whānau argued that they should have final say according to Tūhoe tikanga, which provided that the decision was for the broader collective (whānau pani) but with a strong preference for the deceased to return to Tūhoe, even forcibly if required.[42] This tikanga, it was argued, could be recognised by the courts as part of its inherent jurisdiction, in the way they have always had capacity to apply local customs to resolve disputes provided the custom was long-standing, reasonable, and not supplanted by statute.[43]

Thus, a central feature of the litigation and indeed the very heart of the Tūhoe whānau's legal case was Tūhoe customary law. In the High Court, Fogarty J rejected

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[40] See Waitangi Tribunal *Ko Aotearoa Tēnei*, above n 39, at 272 (placing kaitiakitanga on a spectrum, from full kaitiaki control, to joint control and influence in decision making).

[41] See Waitangi Tribunal *Ko Aotearoa Tēnei*, above n 39 at 285-286 (recommending that the RMA's existing mechanisms for delegation, transfer of powers, and joint management, be amended to remove unnecessary barriers to their use).

[42] *Clarke v Takamore*, above n 2 at [57].

[43] At [62] and [81].

the application of Tūhoe customary law on the basis that it was incompatible with the common law's general presumption of individual freedom and autonomy.[44] According to Fogarty J, Takamore had rejected his familial ties and identity as a Tūhoe member and "chose to live outside tribal life and the customs of his tribe."[45] Thus the imposition of the collective will of Tūhoe custom on Takamore without his permission was contrary to the law.[46] Ms Clarke, as executrix, was entitled to possession of the body.[47]

The Court of Appeal also found for Ms Clarke but disagreed with Fogarty J's emphasis on Takamore's individual autonomy. According to the Court, "[g]iven that most Māori custom is based on the collective and duty to the collective, rather than on individual rights", such an approach "would have the effect of negating Māori custom in most cases".[48] The Court was also more sensitive to the issue of urbanization of Māori and the notion of tribal members like Takamore retaining their identity and connection despite not living in their homeland.[49] Yet in the Court's view there were serious shortcomings with Tūhoe's customary law. In particular, the ability of the Tūhoe whānau to forcibly remove Takamore failed the common law reasonableness test.[50] But according to the Court there were also difficulties with the lack of certainty and finality as "the custom does not allow for a clear allocation of legal rights to the body. Rather it provides a *process* for debate and negotiation."[51] If compromise and negotiation failed it was not clear who would ultimately resolve the dispute.[52] The Court also raised the appropriateness of extending Ngāi Tūhoe custom to Clarke, who was not a member of Ngāi Tūhoe and had no wish to be subject to their custom.[53]

Therefore, the Court of Appeal endorsed what it described as a "more modern approach to customary law" to "integrate the Tūhoe custom into the common law relating to burial."[54] The Court of Appeal proposed that Tūhoe custom be "a relevant cultural consideration for an executor or executrix to take into account in determining

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[44] At [82]-[88].
[45] At [88].
[46] At [88].
[47] At [90].
[48] *Takamore v Clarke*, above n 3 at [151].
[49] At [156]–[158].
[50] At [163] and [165]–[166].
[51] At [167].
[52] At [167].
[53] At [188].
[54] At [254].

the method and place of burial."[55] However, the Court considered that this approach was not feasible because Mr Takamore's sister and whānau members were not open to negotiation and did not fully explain their cultural values to Ms Clarke. As a result, the Court concluded that there was no legal authority for the Tūhoe whānau to take the body.

The Supreme Court majority took a different approach altogether. It did not see the issue as a conflict between Ngāi Tūhoe custom and a common law rule. Instead, it ignored custom law altogether and determined that there was a common law rule that the executor has the exclusive right to determine burial.[56] In considering how to exercise those rights, the majority saw Māori burial customs as being a "relevant consideration" to be weighed among other factors.[57] As a result, Denise Clarke had the right to disinter Takamore and have his body re-buried in Christchurch.

All three Takamore decisions demonstrate a fundamental problem that arises in the judicial interpretation of customary law. Where possible, Māori seek recognition of their tribal customary law in the courts to advance some claim of right. In such cases, custom law is often the only basis on which Māori can intervene. However, raising custom law results in a search for reified, ancient traditions and values – which are often deemed by the courts to be incapable of receiving legal recognition due to their normative divergence from the dominant legal system. Tūhoe burial rules are too backward, contrary to human rights, vague and capricious. Litigation over custom under the RMA seems to be a proxy battle for the exercise of greater political control over use of the resources as seems to be the case in *Wakatu Inc v Tasman District Council*.[58] Arguably the Takamore litigation was connected to the broader assertion of political power asserted by Ngāi Tūhoe in the context of its Treaty settlement.[59]

But the fundamental problem is the absence of state recognition of political institutions. The modern state, even in the era of rights recognition, has been opposed

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[55] At [255].

[56] *Takamore v Clarke*, above n 4, at [152].

[57] At [156]. (But see the decision of Elias CJ, who did not see this as a conflict of laws case. In her view, there was no common law rule that dictated the executor had the final say and nor was there a definitive rule in Tuhoe custom. Rather, in cases of dispute the courts were required to weigh up competing considerations and make a decision.).

[58] *See also* the claim to customary title to the foreshore for example was motivated by Ngāti Apa's struggle to enter the aquaculture industry in the Marlborough Sounds.

[59] See for example the emphasis on Ngāi Tuhoe mana motuhake in the Tūhoe Claims Settlement Act 2014.

to Māori exercising political power. Tino rangatiratanga is officially equated with self-management. This notion was first advanced by the fourth Labour government in 1989 in "Principles for Crown Action on the Treaty of Waitangi."[60] But it has remained Treaty policy ever since. Treaty settlements may provide means of procedural control and co-management of resources but do not provide for recognition of political institutions. The emphasis in Treaty settlements is on the politics of recognition and redistribution. The suppression of Māori political institutions and the ability to make laws – whether in the form of regulations or statutes – means that when Māori customary law does arise, Māori must invoke tradition. This legal lacunae leads to an emphasis on cultural difference and the politics of recognition.

III. Conclusion

So far, with the reforms instituted to address Māori claims making, there has been a heavy emphasis on cultural difference or the politics of recognition and redistribution. But the absence of the politics of self-determination is abundantly clear to Māori who continue to call for more political autonomy over the things that matter most to them.

[60] Geoffrey Palmer "The Treaty of Waitangi - Principles for Crown action (New Zealand)" (1989) 19 Vic Univ Wellington Law Rev 335.

CONTEMPORARY MĀORI LEGAL ISSUES